In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00077-CV

VICTOR HO, JEFF THOMPSON, AND SHERRY WILLIAMS, Appellants

V.

JENNIFER LEE JOHNSON, INDIVIDUALLY AND AS NEXT FRIEND OF JARELL LEE, A MINOR, Appellees

On Appeal from the 136th District Court
Jefferson County, Texas
Trial Cause No. D-187,529

MEMORANDUM OPINION

This is a permissive appeal of a denial of a Motion for Summary Judgment in a healthcare liability suit. *See* Tex. R. App. P. 28.3. Defendants Victor Ho, M.D. (Dr. Ho or Ho), Jeff Thompson, M.D. (Dr. Thompson or Thompson), and Sherry Williams, FNP[1] (FNP Williams or Williams) (collectively "Appellants" or

[1] "FNP" is an abbreviation used for a Family Nurse Practitioner.

"Defendants"[2]) are healthcare providers who were named as defendants in a medical malpractice claim and a product liability claim filed by Plaintiff Jennifer Lee Johnson (Johnson) individually and on behalf of her son, Jarell Lee (Jarell). Johnson filed the underlying lawsuit against the Defendants, other healthcare providers, and a drug manufacturer. The Defendants filed a traditional and no-evidence Motion for Summary Judgment that was denied by the trial court. The trial court then granted a joint motion for a permissive interlocutory appeal of the denial of the summary judgment on the basis that (1) the order involves controlling questions of law as to which there are substantial grounds for differences of opinion and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Appellate courts do not have jurisdiction over interlocutory appeals in the absence of a statutory provision permitting such an appeal. *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011). As a general rule, the denial of a motion for summary judgment is not appealable. *See Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994). Section 51.014 of the Texas Civil Practice and Remedies Code designates civil orders that may be appealed on an interlocutory basis, and it is strictly construed. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014 (West Supp.

[2] The Appellants were not the only defendants named in the Plaintiff's live pleading on file in the underlying suit.

2015); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). Section 51.014(d) permits an interlocutory appeal of an otherwise unappealable order, including the denial of a summary judgment motion, upon the trial court's certification of the statutory requirements, i.e., the order involves a controlling question of law on which there is substantial ground for disagreement and an immediate appeal may materially advance the ultimate resolution of the case. *Id.* The court of appeals has discretion to accept or refuse to hear a permissive appeal. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(f). This Court previously entered an order accepting the permissive appeal, and this Court has jurisdiction over this matter pursuant to Texas Civil Practice and Remedies Code sections 51.014(d) and 51.014(f).

UNDERLYING CLAIM

According to the medical report from J. Carlos Maggi, M.D. (Dr. Maggi) which was attached to Plaintiff's Second Amended Petition, in July of 2008, Jarell was thirteen years old, and he was receiving treatment for "Bipolar [D]isorder with Depakote, Clonidine, Invega, and Lithium[]" under the supervision of a treating physician and a psychiatrist. On August 18, 2008, Jarell was transported by EMS to the emergency room at Memorial Hermann Baptist Hospital (Baptist Hospital) in Beaumont, Texas. While at Baptist Hospital on August 18th, Jarell received

treatment from FNP Williams and Dr. Thompson. According to a summary of the medical records contained in Dr. Maggi's report, at the time of Jarell's admission to the emergency room on August 18, 2008,

> . . . EMS reported [Jarell] had complaints of headache, nausea, dizziness, and his mother stated that he had slowed and slurred speech, an indication of possible neurological problems. His initial vital signs were recorded as: blood pressure 131/80, a rapid pulse rate of 122, respirations of 18, temperature elevation of 100.4, oxygen saturation of 99% (on room air), and pain was rated at 5/5. He had an elevated Neutrophil count (88%) and elevated Liver Function Tests . . . and had "moderate blood" in the urine (with 0 (zero) RBC's). The combination of these latter two findings, associated with muscle pain and difficult[y] in ambulation, is consistent with Rhabdomyolysis and myoglobinuria, diagnoses which were missed and therefore not appropriately treated.
>
> Sherry Williams FNP, performed a physical exam and the case was reviewed by Jeff Thompson, MD. Ms. Williams documented her impression: Abd pain- etiology undetermined, elevated liver enzymes, hematuria. At 23:15, Norco 7.5mg now was ordered for pain. Upon discharge, [Jarell] was given prescriptions for Bactrim and Bentyl. The patient was finally given the Norco at 01:35 on August 19, 2008 and discharged at 01:36. Nursing notes stated: "Pt generally sore, moves very slow, delivered medication has not had time to take effect". He left the emergency room via wheel chair, apparently unable to ambulate.

On August 20, 2008, Jarell received treatment from his family physician, Dr. Dundas, who admitted Jarell to Baptist Hospital. Jarell was then transferred from Baptist Hospital to Memorial Hermann Children's Hospital in Houston and discharged on August 26, 2008. On or about August 30, 2008, Jarell returned to the

emergency room at Baptist Hospital in Beaumont, and received care from Dr. Ho. However, at that time Baptist Hospital did not admit Jarell due to an evacuation order for Hurricane Gustav, but the hospital made attempts to arrange for Jarell to be admitted to a hospital in Houston. Johnson decided to take Jarell to Dallas for further treatment. On August 31, 2008, Jarell was taken to the emergency room at Baylor University Medical Center in Dallas and then transferred to the Children's Medical Center in Dallas, Texas. From September 1, 2008 to September 19, 2008, Jarell received treatment and care at the Children's Medical Center in Dallas, and on September 19th, his right leg was amputated below the knee. In his deposition, Dr. Maggi testified that he reviewed the Children's Medical Center of Dallas records for Jarell dated from September 1, 2008 through November 18, 2008.

In her deposition, Johnson also testified that she did not recall anyone at Baptist Hospital telling her to stop giving Jarell any medications. She did recall being told in Houston that she should stop giving Invega to Jarell, but she did not recall getting instructions about any other medications. Milton Anderson, M.D. (Dr. Anderson), another one of Johnson's experts, testified in his deposition that Johnson had resumed giving Jarell antipsychotic medications despite having been given instructions to stop giving the medications to Jarell at some point.

On August 11, 2010, Johnson, individually and as the next friend of Jarell, filed an Original Petition against Baptist Hospitals of Southeast Texas a/k/a Memorial Hermann Baptist Beaumont Hospital, Memorial Hermann Hospital System, Memorial Hermann Children's Hospital, Dr. Ho, Michelle Barratt, M.D., Dr. Thompson, Unnati Doshi, M.D., Bridget Dingle, M.D., FNP Williams, Julie Hayes, M.D., Judy Lee, M.D., David Podeszwa, M.D., Diana Zepeda-Orozco, M.D., Alisa Gotte, M.D., Ortho-McNeil-Janssen Pharmaceuticals, Inc. (Ortho-McNeil), and an Unknown Defendant. Johnson alleged that Jarell was given the prescription medication Invega which "caused Jarell [] to suffer body aches, headaches, nausea, and dizziness, the symptoms for which he was ultimately diagnosed with rhabdomyolysis[[3]]." Johnson further alleged that the

[3] Rhabdomyolysis is "[a]n acute, fulminating, potentially fatal disease of skeletal muscle that entails destruction of muscle as evidenced by myoglobinemia and myoglobinuria." Stedman's Medical Dictionary for the Health Professions and Nursing 1464 (7th ed. 2012). Dr. Maggi explained rhabdomyolysis as follows in his deposition testimony:

> . . . Rhabdomyolysis means that skeletal muscle gets ruptured. Rhabdomyo means that muscle that is skeletal gets ruptured, gets destroyed, whether it's because of a drug, whether it's because of an inflammation, which is myositis, whether it is because of an autoimmune disease, whether it's because of trauma, electrocution, crush injury, et cetera, et cetera, muscle destruction related to rhabdomyolysis and myoglobin. Myoglobin can get in the urine.
>
> Myoglobinuria, whether there is some degree of rupture of the muscle that leads to the protein, which is the myoglobin, to get into the blood.

rhabdomyolysis (rhabdo) caused Jarell to develop "compartment syndrome" which then led to the amputation of his right leg. According to Johnson, the healthcare providers missed the diagnosis and failed to properly treat Jarell's condition, and the "medical negligence" of the healthcare providers "directly and proximately" caused Jarell's injuries. On October 12, 2010, Johnson filed her First Amended Petition, and then on November 5, 2010, Johnson filed her Second Amended Petition. Johnson attached reports from medical doctors, Dr. Maggi and Dr. Anderson, to each of her petitions, which she alleged complied with section 74.351 of the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (West Supp. 2015) Johnson also included an expert report from an acute care nurse practitioner, Vagn Petersen (NP Petersen or Petersen), to her second amended petition (hereinafter Petition).

According to Johnson, Dr. Thompson and FNP Williams initially examined and treated Jarell on August 18, 2008, and "failed to recognize rhabdo despite a tell-tale combination of test results (myoglobin in the urine, but without the presence of red blood cells), and failed to instruct Ms. Johnson to discontinue the lithium." Johnson alleged in her Petition that the misdiagnosis in Beaumont, along with the treatment in Houston, and then finally in Dallas, all contributed to the ultimate amputation of Jarell's leg. Johnson's expert, Dr. Maggi, testified in his

deposition that Jarell had strong evidence of rhabdomyolysis on August 18th, even though his urine was otherwise clear in color, because the urinalysis showed moderate blood in the urine without any white blood cells or red blood cells or casts in the urine:

> Q. This child did not have strong evidence of acute rhabdomyolysis on August 18 either?
>
> A. Of course he did.
>
> Q. Okay. What color was the urine?
>
> A. The urine was dark.
>
> Q. On the 18th?
>
> A. I have to look it up. I have to review that.
>
> Q. Here. I'll pull it for you.
>
> A. Thank you.
>
> Q. Looks like it was clear and yellow on the 18th?
>
> A. It says here "color: Yellow; clarity: Clear." Okay. Yes, still, he was -- still he had -- this is what I'm talking about.
>
> He had evidence of myoglobin, based on the fact that he had moderate blood in the urine with zero WBC and zero RBC and zero casts.
>
> Q. What else?
>
> A. None bacteria.
>
> Q. What else?

A. That's it.

Q. Well, with acute active rhabdomyolysis, you typically have, as you've put in your report, dark brown or amber-colored urine --

A. Depends on the severity of the myoglobinuria. I mean, if you have myoglobin levels of 5,000 to 6,000, yes, you're going to have dark, amber urine. And by that, you're already having decreased urine output. And that makes the urine very concentrated. This kid did not have --

Can I borrow that, again?

Q. Sure.

A. This child did not have evidence of concentration of urine. At this point, you cannot tell he was in -- in renal failure. The reason for that is his -- he had no cast, he had no red cells, he . . .

Q. Okay. So, when I read the literature on acute rhabdomyolysis, one of the telltale signs is dark, amber urine.

On the 18th, this child did not have that; correct?

A. Correct.

But he had -- he had -- okay. I'm not going to argue with you. My opinion is that he did have myoglobinuria, acid in urine. The -- what I criticize about that particular examination is that when you see -- and this is taught in medical schools, first-year residency -- one of the things that you have to look for when you have blood in the urine and no RBCs, you have to look for another protein that is giving you that false positive blood in the urine. And that's myoglobin. And I'm sure, since you're well informed, that you have read that same thing, too.

If you have moderate blood in the urine and you don't have red cells, there's only one explanation, and that's myoglobin. So, there's only one thing that can give you that.

Dr. Maggi also opined that "the emergency room management was neglectful and was ignorant or lack of knowledge or lack of attention [sic] to the facts[.]" And, "when the management is based on lack of knowledge or lack of recognition or neglectful observations, then I think that's where the malpractice occurs. Not in an intentional way, but out of ignorance or lack of knowledge." Dr. Maggi testified in his deposition that it was "a chain or a cascade of errors" and that a "chain of errors and a chain of mistakes that occurred[]" on the part of healthcare providers in Beaumont, Houston, and Dallas that resulted in the below-the-knee amputation of Jarell's leg. Nevertheless, Dr. Maggi also agreed that Dr. Thompson and FNP Williams could not reasonably foresee that the subsequent medical providers in Dallas would "fluid overload" Jarell or that the fluid overload in Dallas "would cause compartment syndrome that then went unrecognized, not timely treated, and led to amputation[.]"

> Q. It's even more remote and attenuated when you back it up to August 18. Dr. Thompson and Nurse [Williams] could not reasonably foresee that if this child had to be readmitted, that subsequent treaters in Dallas would fluid overload the child.
>
> Am I correct?
>
> Plaintiff's Attorney: Objection. Form.
>
> A. Yes.
>
> Q. Nor could the doctors in Beaumont, that is, Dr. Thompson and Nurse [Williams], reasonably foresee that the fluid overload in Dallas

would cause compartment syndrome that then went unrecognized, not timely treated, and led to amputation?

Plaintiff's Attorney: Objection. Form.

Q. They couldn't reasonably foresee that or predict that either, could they?

Plaintiff's Attorney: Objection. Form.

A. No, they couldn't.

Q. They could not?

A. They could not foresee that, no.

As to the healthcare providers in Houston who treated Jarell from August 20, 2008 to August 26, 2008, Dr. Maggi testified in his deposition that he believes that the doctors in Houston inadequately treated Jarell for rhabdo:

Q. And from August 20 to 26, you believe that the doctors in Houston at Memorial Hermann Children's Center inadequately treated Jarell for rhabdo?

A. Correct.

Q. And you believe that because of that inadequate treatment, his rhabdo returned?

A. That's correct. That -- like I said at the beginning, I feel it was a -- how do you say? – a chain of errors and a chain of mistakes that occurred. One of them was that the treatment was incomplete and that the patient was discharged too early.

As to the healthcare providers in Dallas, Dr. Maggi agreed in his deposition that had the Dallas providers managed fluids appropriately, Jarell would likely not have developed compartment syndrome, and had the Dallas providers timely diagnosed and treated the compartment syndrome, Jarell "would have probably not suffered a leg amputation."

Dr. Anderson, another of Plaintiff's experts, testified in his deposition that Jarell's compartment syndrome on September 4, 2008, was a medical emergency and that if compartment syndrome is not timely diagnosed, the risk of amputation increases each hour it is not addressed. In his expert report, Dr. Anderson wrote that "Jarell [] lost his leg from a combination of misdiagnosis, delays in treatment, and overzealous hydration done to maintain urine flow." Dr. Anderson also agreed in his deposition that "overzealous hydration" by healthcare providers in Dallas caused edema in Jarell's leg and stated that was "related only in part to the presence of rhabdo for which he was hydrated, but it was a new aspect to the case[]" and independent of the care provided in Beaumont.

According to the clerk's docket, on January 7, 2011, the trial court signed an order granting Plaintiff's non-suit without prejudice as to Baptist Hospital, Memorial Hermann Hospital System, and Memorial Hermann Children's Hospital. The appellate record does not include a copy of the signed order. The clerk's

docket also reflects that, on June 3, 2013, Johnson filed a notice of non-suit without prejudice as to Ortho-McNeil. Appellants' brief asserts that "all Defendants other than Appellants were previously dismissed," and Appellee's brief states that "[t]he other physicians . . . were protected by governmental immunity . . . and were all dismissed[.]"

On August 15, 2014, Defendants Ho, Thompson, and Williams filed a motion to designate Johnson and the Children's Medical Center of Dallas as responsible third parties, which the trial court granted on September 2, 2014. On October 1, 2014, Defendants Ho, Thompson, and Williams filed a Motion for Summary Judgment, arguing that they were entitled to a summary judgment because:

> 1. There is a lack of legal causation from the undisputed sequence of facts; that is, Defendants' conduct has to do more than furnish a condition that makes a Plaintiff's injury possible. In this case, the compartment syndrome that made the injury possible did not even exist until many days after Defendants' care and treatment; the evidence unequivocally shows that subsequent treating physicians created the condition by administering excessive fluids and then failing to timely diagnose and treat the condition;
>
> 2. Defendants met the standard of care in all respects and were not negligent;
>
> 3. None of the Plaintiffs' experts have established wilful and wanton negligence for the emergency care provided by Defendants, which is a requirement of Chapter 74.153 of the Texas Civil Practice and Remedies Code;

> 4. All of Plaintiff's qualified experts who can testify to causation have conceded that the outcome (amputation) was unforeseeable, unpredictable and remote at the time of Defendants' care, thereby negating proximate cause as a matter of law;
>
> 5. But for Jennifer Lee Johnson's actions in restarting the medications that she had been told to discontinue, the amputation would never have happened;
>
> 6. The negligence of the subsequent healthcare providers (designated as responsible third parties) solely caused the compartment syndrome, which was a new, intervening, and/or superseding cause of any injuries and damages, and;
>
> 7. The negligence of the subsequent healthcare providers in failing to diagnose and treat a condition they solely caused directly led to amputation of Jarell's right leg.

Ho, Thompson, and Williams sought a traditional motion for summary judgment and a no-evidence motion for summary judgment on the issue of proximate cause. And, they sought a no-evidence summary judgment on the issue of willful and wanton negligence.

Johnson filed a Response to the Motion for Summary Judgment arguing that "There Is Sufficient Evidence For a Jury to Find that the Actions and Omissions [of Thompson and Williams] Were A Proximate Cause (along with other proximate causes) of [Jarell's] Amputation." Alternatively, Johnson argued that even if the amputation was not caused by the acts or omissions of Thompson and Williams, Jarell endured additional pain and suffering "as a result of the missed

diagnosis and worsening of the condition in the hours or days after his discharge from Baptist [Hospital] on August 18." Johnson states in her Response that "Plaintiffs do not contest the motion with respect to Dr. Ho."

Ho, Thompson, and Williams filed a Reply, and Johnson filed a Sur-Reply. The trial court conducted a hearing on October 27, 2014, and, according to the docket sheet, took the matter under advisement. The appellate record does not include a reporter's record from the hearing.

On November 25, 2014, the trial court issued a letter ruling denying the Defendants' Motion for Summary Judgment. The Defendants filed a "Motion for Reconsideration of Defendants' Motion for Summary Judgment, or, In the Alternative, Motion for Permission for Interlocutory Appeal of Denial of Summary Judgment" and Johnson filed a Response thereto. The parties also filed an "Agreed Motion for Permission for Interlocutory Appeal of Denial of Summary Judgment[.]" The trial court entered an "Order Denying Defendants' Motion for Summary Judgment and Granting Permission for Interlocutory Appeal[.]" Therein, the Court states as follows:

> . . . [A]fter reviewing the Motion [for Summary Judgment] and any response, and having heard the arguments of counsel . . .
>
> The Court hereby denies the Defendants' Motion for Summary Judgment.

The Court, having denied Defendants' Motion for Summary Judgment, hereby GRANTS the Agreed Motion for Permission to File Interlocutory Appeal pursuant to Chapter 51.014(d) of the Civil Practice and Remedies Code and Rule 168 of the Texas Rules of Civil Procedure, thereby permitting Defendants to proceed with an interlocutory appeal of this Order. In so doing, the Court finds that the following controlling questions of law exist on which there is a substantial ground for difference of opinion, to wit:

1. Does the longstanding principle acknowledged by the Supreme Court in Cannon v. Pearson, 3[83] S.W.2d 565, 567 (Tex. 1964) [footnote omitted] and recognized as applicable to a medical malpractice defendant [footnote to *Penick v. Christensen*, 912 S.W.2d 276, 289 (Tex. Civ. App.— Houston [14th Dist.] 1995, writ denied); *Merckling v. Curtis*, 911 S.W.2d 759, 768 (Tex. App.— Houston [1st Dist.] 1995, writ denied); *Galvan v. Fedder*, 678 S.W.2d 596, 598 (Tex. App.— Houston [14th Dist.] 1984, no writ)] eliminate the "substantial factor" component of proximate cause for the defendant to be liable?

2. Under the facts of this case, was the alleged negligence of the defendants sufficiently remote in time and circumstances from the subsequent treaters' alleged negligence to preclude it from being a "substantial factor" as a matter of law?

3. Is there some evidence to satisfy the requirements for a finding of willful and wanton negligence against the Defendant Emergency Room Physicians and Nurse Practitioner who were providing emergency care in an emergency room, as required by Chapter 74.153 of the Texas Civil Practice and Remedies Code, given existing precedent in the Ninth Court of Appeals?

In denying Defendants' Motion for Summary Judgment, the Court makes the following substantive rulings on the above-stated legal questions presented in Defendants' Motion, the parties' replies and responses, and the arguments of counsel:

> 1.&2. Legal causation is not precluded as a matter of law because there is evidence in the record that would support any jury finding that the defendants' alleged negligence (failure to diagnose and treat the plaintiff's condition) worsened that condition and necessitated the subsequent treatment which resulted in the plaintiff's injury. Therefore, under the principle set forth in Cannon, Penick, Merckling and Galvan, the defendants (if found to be negligent) would be liable despite any intervening events or passage of time.
>
> 3. Based on the summary judgment record, there is some evidence that could support any finding by the jury of willful and wanton negligence against the Defendant Emergency Room Physicians and Nurse Practitioner as required by Chapter 74.153 of the Texas Civil Practice and Remedies Code. In addition, given the fact that willful and wanton negligence involves both an objective analysis and a subjective analysis (as to the defendants' state of mind) and can be based on circumstantial evidence the court concludes that it would be "inappropriate" to determine the issue by summary judgment [footnote omitted].
>
> The Court further finds that an immediate appeal pursuant to Chapter 51.014(d) may materially advance the ultimate termination of the litigation since a successful appeal will result in a summary judgment that ends the litigation.

Defendants Ho, Thompson, and Williams filed a petition for permissive appeal in the Court of Appeals on February 20, 2015, and we entered a *per curiam* Order granting the petition for permissive appeal.

STANDARD OF REVIEW

We review a summary judgment de novo. *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). When we review a traditional summary

judgment, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex. App.—Dallas 2009, no pet.); *see also* Tex. R. Civ. P. 166a(c). We take evidence favorable to the nonmovant in a motion for summary judgment as true, and we indulge every reasonable inference and resolve every doubt in favor of the nonmovant. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 800 (Tex. 1994).

The purpose of a no-evidence motion for summary judgment is to pierce the pleadings and evaluate the evidence to see if a trial is necessary. *Benitz v. Gould Group*, 27 S.W.3d 109, 112 (Tex. App.—San Antonio 2000, no pet.). The nonmovant has the burden of proof once the movant files a no-evidence motion for summary judgment. *See* Tex. R. Civ. P. 166(a)(i). To defeat a no-evidence motion for summary judgment, the nonmovant must produce more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *Id.*; *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). A nonmovant succeeds in producing more than a scintilla when the evidence "'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004)

(quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). In evaluating the evidence, the trial court must resolve all reasonable doubts about the facts in favor of the nonmovant. *Lehrer v. Zwernemann*, 14 S.W.3d 775, 777 (Tex. App.—Houston [1st Dist.] 2000, pet. denied).

CONCESSION REGARDING SUMMARY JUDGMENT AS TO DR. HO

In her response to Defendants' motion for summary judgment, Plaintiff stated she did "not contest the Motion with respect to Dr. Ho." On appeal, Johnson concedes in her brief that summary judgment would be appropriate for Dr. Ho. According to Johnson:

> Plaintiff[] had conceded in the Response to the Motion for Summary Judgment that Summary Judgment was appropriate with respect to Dr. Ho. [citation omitted] Apparently, in the course of preparing the interlocutory appeal, this was never properly memorialized; nonetheless, Johnson still concedes that Summary Judgment is appropriate as to Dr. Ho.

Appellants' reply brief on appeal also argues that the claims against Dr. Ho should be dismissed because Appellee conceded no evidence supports those claims. Accordingly, we need not address the issues presented in the permissive appeal with respect to Dr. Ho. We conclude that Dr. Ho was entitled to a Summary Judgment on Johnson's claims. We reverse and remand to the trial court for further proceedings consistent herewith.

SUBSTANTIAL FACTOR COMPONENT OF PROXIMATE CAUSE

With respect to the claims against Thompson and Williams, the first issue as stated by the trial court is whether "the longstanding principle acknowledged by the Supreme Court in Cannon v. Pearson, 3[83] S.W.2d 565, 567 (Tex. 1964) . . . eliminate[s] the 'substantial factor' component of proximate cause for the defendant to be liable[.]" The second issue as stated by the trial court is "[u]nder the facts of this case, was the alleged negligence of the defendants sufficiently remote in time and circumstances from the subsequent treaters' alleged negligence to preclude it from being a 'substantial factor' as a matter of law[.]" We consider both issues together.

In *Cannon v. Pearson*, the Supreme Court stated:

> It has long been an accepted and established rule in this State that one who wrongfully injures another is liable in damages for the consequences of negligent treatment by a doctor or surgeon selected by the injured person in good faith and with ordinary care.

383 S.W.2d 565, 567 (Tex. 1964). In *Cannon*, the Cannons' daughter was injured by a taxicab, and the parents settled their claim against the taxicab owner and operator and executed a release. *Id*. at 566. The parents then pursued a medical negligence claim against the doctor and hospital that rendered treatment to their daughter after the accident. *Id.* The healthcare providers responded to the claim and argued that the claims were barred by the general nature of the release of the

original tortfeasor. *Id.* The Supreme Court discussed cases from other jurisdictions that had adopted a more "modern rule" but ultimately concluded that "the cause of action against a tort-feasor includes the right to full satisfaction of damages proximately caused by a doctor's negligence, [so that] settlement with the tort-feasor should, at least presumptively, include satisfaction of the claim for damages for malpractice." *Id*. at 567.

Subsequently, in *Penick v. Christensen*, 912 S.W.2d 276 (Tex. App.—Houston [14th Dist.] 1995, writ denied), the Houston court of appeals examined the applicability of the *Cannon* original tortfeasor rule in a medical malpractice case. 912 S.W.2d at 288-89. The court indicated that where the jury failed to find the original healthcare provider negligent, the rule in *Cannon* did not apply. *Id.* at 289. Furthermore, the Houston court noted that the evidence in *Penick* did not support a jury instruction on "new and independent cause," that is, whether a later healthcare provider's negligence was an unforeseeable separate and independent act that destroyed the causal connection between the first actor's negligence and the plaintiff's injury. *Id.* at 288-89. Subsequently, the Houston court of appeals again briefly discussed the *Cannon* original tortfeasor rule in *Gill v. Watters*, No. 14-96-00205-CV, 1997 Tex. App. LEXIS 3705 (Tex. App.—Houston [14th Dist.] July 17, 1997, pet. denied) (mem. op.), where the court of appeals explained that

the *Cannon* original tortfeasor instruction "is applicable only when the first actor has been found negligent[.]" *Id.* at **13-14. The trial court did not err in refusing a *Cannon* "third-party tortfeasor" instruction because the jury found no evidence of negligence by the original tortfeasor. *Id.*

Johnson argues that "the treatment of [Jarell] was a 'chain of errors and a chain of mistakes that occurred' which was book-ended by Appellants and the Dallas doctors." Johnson maintains that the "original tortfeasor rule" articulated in *Cannon* also applies in the context of this medical malpractice action, as demonstrated by *Penick* and *Gill*. According to the trial court's Order, the trial court agreed with Johnson. The trial court cited with authority to *Cannon*, *Penick*, and *Gill*, and denied the motion for summary judgment reasoning that "[l]egal causation is not precluded as a matter of law because there is evidence in the record that would support any jury finding that the defendants' alleged negligence (failure to diagnose and treat [Jarell's] condition) worsened that condition and necessitated the subsequent treatment which resulted in [Jarell's] injury."

Appellants contend on appeal that the trial court misapplied *Cannon* and the other cases and it failed to properly analyze the issue of proximate cause. Appellants argue that as a matter of law "Appellants' alleged negligence was superseded by new and independent superseding proximate causes, namely (1) the

actions of Plaintiff Jennifer Lee Johnson in continuing to give or restarting medications against physicians' orders and (2) the admitted negligence [] at Children's Dallas beginning September 1, 2008." Furthermore, Appellants contend that the trial court erred in denying their motion for summary judgment because there is no evidence of "wilful and wanton negligence" by Appellants.

WILLFUL[4] AND WANTON NEGLIGENCE

The Appellants filed a no-evidence motion for summary judgment on the basis that there is no evidence of "wilful and wanton negligence." Thompson and Williams contend that the care they provided was "emergency medical care" and therefore under the applicable statutory provision they are not liable unless the claimant can establish that they were willfully and wantonly negligent. The trial court concluded that there is some evidence upon which a jury could find that the Defendants' conduct was "willful and wanton[,]" and further that it would be inappropriate to determine this issue by summary judgment.

[4] Section 74.153 uses the spelling "wilful," but "willful" is the preferred American spelling. *See Gardner v. Children's Med. Ctr. of Dallas*, 402 S.W.3d 888, 891 n.1 (Tex. App.—Dallas 2013, no pet.). Except when quoting the statute, or the trial court order, pleadings, or motions, we will use the preferred spelling "willful."

EMERGENCY MEDICAL CARE

Under Texas statutory law,

> [a] person who in good faith administers emergency care is not liable in civil damages for an act performed during the emergency unless the act is wilfully or wantonly negligent . . . .

Tex. Civ. Prac. & Rem. Code Ann. § 74.151(a) (West Supp. 2015). Originally known as the "Good Samaritan statute," the statute was enacted to provide an affirmative defense against ordinary negligence for persons who administer emergency care, under specified circumstances. *McIntyre v. Ramirez*, 109 S.W.3d 741, 742 (Tex. 2003). "Under certain circumstances, the Good Samaritan statute exempts a person who responds to a medical emergency from liability for ordinary negligence." *Id*. at 744.

Section 74.153, titled "Standard of Proof in Cases Involving Emergency Medical Care[,]" provides that:

> In a suit involving a health care liability claim against a physician or health care provider for injury to or death of a patient arising out of the provision of emergency medical care in a hospital emergency department . . . , the claimant bringing the suit may prove that the treatment or lack of treatment by the physician or health care provider departed from accepted standards of medical care or health care *only if the claimant shows by a preponderance of the evidence that the physician or health care provider, with wilful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or similar circumstances*.

Tex. Civ. Prac. & Rem. Code Ann. § 74.153 (West 2011) (emphasis added). Section 74.153 provides that a physician or healthcare provider is not liable in civil damages for an injury to or death of a patient arising out of the act performed during the emergency unless the claimant can establish by a preponderance of the evidence that the provider was willfully and wantonly negligent. *Id.* The statutory provisions do not change the standard of care for an emergency room healthcare provider, but they heighten the burden of proof required by the claimant. *ExxonMobil Corp. v. Pagayon*, 467 S.W.3d 36, 50 (Tex. App.—Houston [14th Dist.] 2015, pet. filed) (citing to *Benish v. Grottie,* 281 S.W.3d 184, 191 (Tex. App.—Fort Worth 2009, pet. denied), *Baylor Med. Ctr. at Waxahachie v. Wallace*, 278 S.W.3d 552, 556 (Tex. App.—Dallas 2009, no pet.), and *Bosch v. Wilbarger Gen. Hosp.*, 223 S.W.3d 460, 464 (Tex. App.—Amarillo 2006, pet. denied)).

"Emergency care" is not defined in the statute but "emergency medical care" is defined in Chapter 74 of the Civil Practice and Remedies Code as follows:

> "Emergency medical care" means bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.

Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(7) (West Supp. 2015). The use of the phrase "could reasonably be expected" makes clear that whether the circumstances constitute "emergency medical care" must be viewed prospectively and objectively, not retrospectively or subjectively. *Turner v. Franklin*, 325 S.W.3d 771, 777 (Tex. App.—Dallas 2010, pet. denied). "Bona fide emergency services" means any actions or efforts undertaken to diagnose or treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions; if those efforts or actions are provided during the time period and under the circumstances specified in section 74.001(a)(7), they constitute "emergency medical care" within the meaning of section 74.153. *Id.* at 778. Whether Thompson's and Williams's care constituted emergency care under the statute is a mixed question of law and fact. We review a trial court's factual determinations for abuse of discretion, and we review questions of law de novo. *See Titan Transp., LP v. Combs*, 433 S.W.3d 625, 636 (Tex. App.—Austin 2014, pet. denied)

Johnson argues on appeal that

> . . . [t]here has been no testimony or suggestion that Defendants ever provided emergency treatment to [Jarell][], or that they ever even considered that his condition was one that "[in] the absence of immediate medical attention could reasonably be expected to result in

> placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part."

Johnson further maintains that even though the Defendants provided their treatment and care in an "emergency room" setting, that Jarell was treated for "a non-emergent condition," and therefore section 74.153 does not apply. We disagree. Thompson's and Williams's failure to diagnose Jarell with rhabdo or their ultimate discharge of Jarell from the emergency room for what they may have concluded was a "non-emergent condition" would not necessarily mean that the care and treatment that they provided in the emergency room was not the type of "emergency medical care" covered by section 74.153.

Johnson testified in her deposition that Jarell had been having difficulty walking for three days prior to going to Baptist Hospital in August of 2008. Johnson stated that a family member called an ambulance to take Jarell to the hospital after Jarell collapsed after standing up. According to Dr. Maggi's report, when Jarell arrived at Baptist Hospital, Jarell had "significantly abnormal lab values and abnormal vital signs, including fever and neurologic complaints" and Jarell was unable to "walk appropriately[.]" According to the report from FNP Petersen, upon arrival at Baptist Hospital, Jarell and Johnson reported that Jarell had "on/off again headaches, dizziness & slurred speech that prompted activation of EMS (Emergency Medical Services)." Jarell was transported to the emergency

room at Baptist Hospital by EMS, and then treated in the emergency room by Thompson and Williams. The treatment Jarell received for his complaints would be consistent with the definition of "emergency medical care" as defined by section 74.001(a)(7). Jarell was presented to the emergency room for symptoms that demonstrated serious impairment to bodily functions and for the type of complaints generally treated in an emergency room. Accordingly, we conclude that the care and treatment provided by Thompson and Williams would fall within the type of emergency care outlined in section 74.153.

EVIDENCE OF WILLFUL AND WANTON NEGLIGENCE

Next, we must determine whether or not there was more than a scintilla of evidence of willful and wanton negligence by Thompson and Williams. The trial court concluded that there is "some evidence that could support any finding by the jury of willful and wanton negligence" by the Defendants, and further that it would be "'inappropriate' to determine the issue by summary judgment[.]"

We conduct a de novo review of the grant or denial of a summary judgment. *Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 71 (Tex. 2011); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). To prevail on a no evidence motion for summary judgment, the movant must first allege that there is no-evidence of one or more specified elements of a

claim or defense on which the nonmovant would have the burden of proof at trial. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006) (per curiam); *see* Tex. R. Civ. P. 166a(i). A nonmovant will defeat a no-evidence summary judgment motion if the nonmovant presents more than a scintilla of probative evidence on each element of her claim. *Galindo v. Snoddy*, 415 S.W.3d 905, 911 (Tex. App.—Texarkana 2013, no pet.); *Price v. Divita*, 224 S.W.3d 331, 335 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *Merrell Dow Pharms.*, 953 S.W.2d at 711. Less than a scintilla of evidence exists when the evidence is "'so weak as to do no more than create a mere surmise or suspicion' of a fact." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983)). Section 74.153 does not define "wilful and wanton negligence." However, the legislature has expressly provided that it requires that the claimant show by a preponderance of the evidence that the physician or health care provider "with wilful and wanton negligence, deviated from the degree of care and skill" reasonably expected from an ordinarily prudent physician or health care provider in the same or similar circumstances. Tex. Civ. Prac. & Rem. Code Ann. § 74.153.

To establish "willful and wanton negligence[,]" the claimant must prove an "extreme degree of negligence." *Christus Health Se. Tex. v. Licatino*, 352 S.W.3d 556, 562 (Tex. App.—Beaumont 2011, no pet.). In *Licatino*, the healthcare provider appealed after a jury found the provider was negligent. *Id.* at 557. We reversed and rendered judgment for the healthcare provider because there was legally insufficient evidence to support the jury's finding that the willful and wanton negligence of the hospital was a proximate cause of the death of a patient who died of a heart attack hours after being discharged from the emergency room. *Id.* at 557, 560, 563. We concluded that "[n]one of the evidence supports an inference that the nurses consciously disregarded their patient's welfare[]" and that "Licatino failed to establish the degree of deviation from the standard of care that is required to impose malpractice liability on a provider of emergency health care services." *Id.* at 563.

Although section 74.153 does not define the phrase "wilful and wanton negligence," the phrase has been interpreted by Texas courts as being equated with gross negligence. *See Turner*, 325 S.W.3d at 780-81 (citing to the senate hearings the court noted that when discussing "the conference committee report on House Bill 4, one senator, in response to a question about the language in section 74.153, stated 'No, the standard is the same. Both wilful and wanton negligence are

covered, but this is basically a gross negligence standard. You don't have to prove intent.' S.J. of Tex., 78th Leg., R.S. 5004 (2003).''). The former Good Samaritan statute also had similar language that courts construed to require a degree of conduct that would be equivalent with gross negligence or conscious indifference. *See Dunlap v. Young*, 187 S.W.3d 828, 835-36 (Tex. App.—Texarkana 2006, no pet.); *Hernandez v. Lukefahr*, 879 S.W.2d 137, 141-42 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Wheeler v. Yettie Kersting Mem'l Hosp.*, 866 S.W.2d 32, 50 n.25 (Tex. App.—Houston [1st Dist.] 1993, no writ).[5]

Thompson and Williams argue on appeal, as they did in the trial court, that there is no evidence of willful and wanton negligence. Johnson did not include any discussion about willful and wanton negligence in her Response to the motion for summary judgment in the trial court. However, Johnson argued in her Sur-Reply that Thompson and Williams failed to provide evidence conclusively establishing that section 74.153 applies, the Defendants did not supply emergency medical care

[5] The Texas Pattern Jury Charge includes a definition for willful and wanton negligence in reference to a malpractice claim to include an act or omission which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others. *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises, Products* PJC 51.18 A-C (2014).

to Jarell, and section 74.153 presents a standard that is not properly disposed of by summary judgment because it is determined in large part by the subjective intent of the actor. The trial court stated in its Order that it would be "'inappropriate' to determine the issue by summary judgment[.]"

While we generally agree that determining whether an emergency care provider was "willfully and wantonly negligent" requires an analysis of the facts, we conclude that it is an issue that may be decided by summary judgment if summary judgment is otherwise proper based upon the summary judgment record. *See, e.g.*, *Dill v. Fowler*, 255 S.W.3d 681, 682-84 (Tex. App.—Eastland 2008, no pet.) (affirming no-evidence motion for summary judgment for emergency room physician, where the claimant conceded at trial and on appeal that she had no evidence of willful and wanton negligence but contended that section 74.153 was unconstitutional); *Turner*, 325 S.W.3d at 783-85.

Under the subjective component, the actor must have actual, subjective awareness of the risk involved and choose to proceed in conscious indifference to the rights, safety, or welfare of others. *Sage v. Howard*, 465 S.W.3d 398, 407 (Tex. App.—El Paso 2015, no pet.); *Turner*, 325 S.W.3d at 781 (citing *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 248 (Tex. 2008)) It is the

plaintiff's burden to prove that Dr. Thompson and FNP Williams deviated from the standard of care with "willful and wanton negligence."

As stated by the Texas Supreme Court regarding the components of a "gross negligence claim,"

> . . . First, viewed objectively from the actor's standpoint, the act or omission complained of must depart from the ordinary standard of care to such an extent that it creates an extreme degree of risk of harming others. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784-86 (Tex. 2001); *Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 21-22 (Tex. 1994); *see also Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993) (holding that gross negligence must involve an "objectively higher risk than ordinary negligence"). "Extreme risk" is not "a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff." *Moriel*, 879 S.W.2d at 22 (quoting *Alexander*, 868 S.W.2d at 327); *see also Harrison*, 70 S.W.3d at 785. And the risk must be examined prospectively from the perspective of the actor, not in hindsight. *Moriel*, 879 S.W.2d at 23. Second, the actor must have actual, subjective awareness of the risk involved and choose to proceed in conscious indifference to the rights, safety, or welfare of others. *Harrison*, 70 S.W.3d at 785; *Ung*, 904 S.W.2d at 641; *Moriel*, 879 S.W.2d at 23.

Hogue, 271 S.W.3d at 248.

The subjective element requires evidence that the actor had actual, subjective awareness of the risk involved and that he chose to proceed in conscious indifference to the rights, safety, or welfare of others. *Id*.; *Sage*, 465 S.W.3d at 407; *Turner*, 325 S.W.3d at 781. The plaintiff bears the burden to show that the

defendant knew about the peril but his acts or omissions demonstrate that he did not care. *Sage*, 465 S.W.3d at 407 (citing *La.-Pac. Corp. v. Andrade*, 19 S.W.3d 245, 246-47 (Tex. 1999), and *Telesis/Parkwood Retirement I, Ltd.*, 462 S.W.3d 212, 244 (Tex. App.—El Paso 2015, no pet.)). To raise a fact issue regarding willful and wanton negligence, there must be legally sufficient evidence that a defendant had actual, subjective awareness that conditions constituted an extreme degree of harm but the defendant nevertheless was consciously indifferent to the rights, safety, or welfare of others. *See Sage*, 465 S.W.3d at 407; *cf. Suarez v. City of Tex. City*, 465 S.W.3d 623, 633-34 (Tex. 2015) (discussing the requirements for proving gross negligence and citing *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 660 (Tex. 2007)). "[I]n other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care." *La.-Pac. Corp.*, 19 S.W.3d at 246-47. A plaintiff may establish the defendant's mental state by circumstantial evidence. *Id.* at 247 (citing *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998)); *Turner*, 325 S.W.3d at 782 n.17 ("Because direct evidence of a party's state of mind is rarely available, this [subjective] element may be proved by circumstantial evidence.") (citing *Moriel*, 879 S.W.2d at 23).

In *Turner*, the court of appeals reversed a traditional summary judgment for one physician because he failed to conclusively disprove the subjective element that he did not have "'actual, subjective awareness of the risk involved and [chose] to proceed in conscious indifference to the rights, safety, or welfare'" of the patient; but, the court of appeals also affirmed a no-evidence motion for summary judgment for the radiologist who reviewed the ultrasound images from the emergency room visit because the plaintiff failed to establish more than mere negligence as to the radiologist. 325 S.W.3d at 782-83, 785-86 (quoting *Hogue*, 271 S.W.3d at 248). The Turners argued that their expert's report created a fact issue. Therein, the expert opined that Cohn, the defendant radiologist, was negligent in interpreting the ultrasound, but the expert did not "address whether Cohn was subjectively aware of an extreme risk or acted with conscious indifference to the rights, safety, or welfare of others." *Id*. at 785-86. And, the Turners failed to cite to any other direct or circumstantial evidence in the record that raised a genuine issue of material fact on the subjective element of willful and wanton negligence. *Id*. at 786.

In *Sage v. Howard*, Gregory Sage had surgery to replace his left hip in March of 2006. 465 S.W.3d at 401. After his hip replacement surgery, he experienced dislocations of the hip on several occasions and his orthopedic

surgeon concluded that the prosthesis used by Sage's previous surgeon was too small and the prosthesis was then replaced in March of 2007. *Id.* After his March 2007 surgery, Sage developed an infection and the prosthesis was replaced again in August of 2007. *Id.* In October of 2007, Sage again developed pain in his left hip and Sage and his father went to the Del Sol Medical Center's emergency room where he was evaluated and treated by Dr. Howard. *Id.*

Dr. Howard diagnosed Sage with a dislocation of the left hip and manipulated the left leg, and Sage and Sage's father testified that during the manipulation by Dr. Howard they heard something crack. *Id.* at 401, 403-04. Dr. Howard then performed a hip reduction procedure. *Id.* at 402. Dr. Howard testified that he had never before performed a hip reduction without first obtaining x-rays, he did not consult the orthopedic specialist on call, and he did not call Sage's treating physician. *Id.* at 401. Dr. Howard claimed that the x-rays were taken before he performed the procedure and that the x-rays showed that Sage had a fractured femur. *Id.*

Sage filed a healthcare liability suit against Dr. Howard. Sage alleged that Dr. Howard fractured Sage's left femur while attempting to manipulate and treat a "presumed dislocation." *Id.* at 402. Dr. Howard filed a no-evidence and traditional motion for summary judgment. *Id.* The no-evidence motion asserted that Sage

could present no evidence that (1) Dr. Howard committed any act or omission that was a proximate cause of the fractured femur or that (2) Dr. Howard deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician in the same or similar circumstances with willful and wanton negligence. *Id.* The plaintiff submitted a response along with evidence that included interrogatory answers and medical records, as well as an affidavit from Dr. Heller, an expert. *Id.* at 403.

Dr. Howard stated in his interrogatory responses that he ordered and read the x-rays and relied upon the radiologist for a formal interpretation. *Id.* at 401. The notation made by Dr. Howard in the written emergency room record did not mention the fracture but did say: "X-rays show a prosthesis. I may be able to convince myself that the ball could be overlying the socket. I do not see an overt dislocation." *Id.* His diagnosis stated: "Left hip dislocation by history." *Id.* The radiologist, who electronically signed the x-ray reports two days later on October 4, 2007, diagnosed a fracture of the upper medial aspect of the femur including the upper portion of the shaft adjacent to the lesser trochanter. *Id.* The radiologist did not mention a hip dislocation. *Id.*

Dr. Heller opined that Dr. Howard's care fell below the applicable standard of care. *Id.* at 408. According to Dr. Heller, the standard of care under the same or

similar circumstances for an individual who had multiple prior dislocations which could not be reduced in the emergency department and had to be treated in the operating room, includes: ordering left hip and lower extremity radiology studies, properly reading the x-rays, and immediately consulting with an orthopedic surgeon; and that even assuming that reduction of a dislocation is appropriate in the emergency room, only one attempt should have been made and if it is unsuccessful, the patient should be taken to the operating room for a second attempt under general anesthesia. *Id.* at 407-08. He concluded that Dr. Howard deviated from the standard of care in performing the reduction without an orthopedic consultation, in failing to order the proper radiology studies before the attempted reduction, and in using excessive force during the second attempt which fractured the femur. *Id*. at 408. Dr. Heller also addressed that Dr. Howard knew there was an extreme degree of risk and harm. *Id*. The trial court granted the defendant's summary judgment. *Id.* at 402.

On appeal, the El Paso Court of Appeals affirmed the summary judgment on the first theory of liability, i.e., failure to order an orthopedic consultation, but reversed it in part, finding that there was more than a scintilla of evidence that the x-rays were taken after the reduction, and more than a scintilla of evidence that Howard chose to proceed without the x-rays in conscious indifference of Sage's

rights, safety, or welfare. *Id.* at 408-09. According to Dr. Heller, a prudent emergency physician should take an x-ray before attempting a hip reduction and applying the wrong force during the reduction can cause a fracture. *Id.* The court concluded that "[d]espite his knowledge of the risk of fracture, there is more than a scintilla of evidence Dr. Howard performed the hip reduction without an x-ray and used excessive force during the second attempted reduction[]" and there was more than a scintilla of evidence that Dr. Howard acted with conscious indifference to Sage's rights, safety, or welfare, which was sufficient to defeat a no-evidence summary judgment motion. *Id*. at 409.

In the case at bar, Johnson argued in her Sur-Reply in the trial court that there "is sufficient evidence in this case to warrant a finding that the treatment of [Jarell][] in Baptist Hospital on August 18 was a product of willful and wanton negligence." She referenced testimony by her experts that there is only one explanation for blood in the urine without actual blood cells appearing on microscopic examination and that explanation was rhabdomyolysis. According to Johnson, the jury would be entitled to consider the inactions of the Defendants and conclude that the Defendants deliberately ignored or were indifferent to what was otherwise an "inescapable conclusion." According to the testimony of Dr. Maggi, one of Johnson's experts, "the emergency room management was neglectful and

was ignorant or lack of knowledge or lack of attention [sic] to the facts[.]" Dr. Maggi also testified that "when the management is based on lack of knowledge or lack of recognition or neglectful observations, then I think that's where the malpractice occurs. Not in an intentional way, but out of ignorance or lack of knowledge." In his deposition, Dr. Maggi also agreed that the liver enzymes that were elevated on Jarell's August 18th lab report are not specific for rhabdo. And, Dr. Anderson's report states that "[a]lthough there is a link between rhabdomyolysis and developing compartment syndrome, the link is neither absolute nor inevitable."

Johnson argues that Thompson and Williams "failed to recognize rhabdo despite a tell-tale combination of test results (myoglobin in the urine, but without the presence of red blood cells)," which is something that is taught to first-year residents, and Thompson and Williams failed to instruct Ms. Johnson to discontinue the lithium. Dr. Maggi testified that medical schools teach first-year residents that

> . . . one of the things that you have to look for when you have blood in the urine and no RBCs, you have to look for another protein that is giving you that false positive blood in the urine. And that's myoglobin. And I'm sure, since you're well informed, that you have read that same thing, too.
>
> If you have moderate blood in the urine and you don't have red cells, there's only one explanation, and that's myoglobin. So, there's only one thing that can give you that.

Nevertheless, we conclude that this testimony does not raise a genuine issue of material fact on the subjective element of willful and wanton negligence. *See Turner*, 325 S.W.3d at 786. We find no evidence in the record to support Johnson's claim that the actions or omissions of Thompson and Williams departed from the ordinary standard of care to such an extent that they created an extreme degree of risk of harming others (the objective element). Additionally, there is no evidence in the record to establish that Thompson and Williams were subjectively aware of an extreme degree of risk and proceeded anyway, or that their actions and decisions demonstrated a conscious indifference to the rights, safety, or welfare of Jarell (the subjective element). Accordingly, even when we view the record in a light most favorable to Johnson, we conclude that she has failed to provide more than a scintilla of probative evidence of willful and wanton negligence on the part of Thompson and Williams. Johnson has failed to provide more than a scintilla of evidence that Thompson and Williams knew about the peril of Jarell's medical condition, or that their acts or omissions demonstrated that they proceeded with a conscious indifference to the rights, safety, or welfare of Jarell or Johnson. The trial court erred in denying the no-evidence motion for summary judgment. We sustain appellants' second issue.

Because we have sustained Appellants' second issue, we need not determine whether or not the trial court erred in applying the original tortfeasor rule as stated in *Cannon* to the "proximate cause" determination in this case because the determination of such issues would not result in any greater relief to the Appellants. *See Licatino*, 352 S.W.3d at 563. Accordingly, we reverse and remand to the trial court for further proceedings consistent herewith.

REVERSED AND REMANDED.

LEANNE JOHNSON
Justice

Submitted on June 3, 2015
Opinion Delivered February 18, 2016

Before McKeithen, C.J., Horton and Johnson, JJ.