No. 22-0969

In the Supreme Court of Texas

Barbara Lindsey,
Petitioner,
v.

MAX F. ADLER, M.D.P.A , f/k/a PARKCITIES DERMATOLOGY CENTER, a/k/a COPPELL DERMATOLOGY; MAX F. ADLER; LINDA L. WHITE; AND JOHN DOES
Respondents.

From the Fifth District Court of Appeals, Cause No. 05-20-01081-CV; and, The 160th District Court for Dallas County, Cause No. DC-19-07358, Honorable Aiesha Redmond, Presiding

PETITIONER'S MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Motion for Rehearing

1. This Court Should Instruct Texas Courts to Not Require Litigation Before Claimants Could know of their Claim

In Texas, a misguided Court's requiring foreign object claimant's suit before reasonable opportunity to discover the object – that has been before this Court before. The fact pattern is such a Constitutional aberration that is garnered the following adjectives from this Court :

-"shocking,"

Gaddis v. Smith, 417 S.W. 2d 577, at 581(Tex: Supreme Court 1967);

-"absurd," and **"unjust,"**

Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972); and,

-not **"possible,"**

Nelson v. Krusen, 678 S.W. 2d 918, 923 (Tex: Supreme Court 1984).

The instant ruling below requires a report on a second foreign object, before this Plaintiff could have discovered a second foreign object. The ruling thus requires a Plaintiff to litigate the unknown – to write a blank report on an unknown second foreign body. The irregularity of the ruling is further seen by the nature of the applicable discovery rule, which determines basic *accrual* of the Cause of Action:

"[T]he discovery rule ... is the test to be applied in determining when a plaintiff's cause of action **accrued**."

See, Weaver v. Witt; 561 .W. 2d 792, at 793-794 (Tex: Supreme Court 1977)[emphasis added].

While the Plaintiff herein properly pled non-discovery of the second object, the decision below ruled it proper to require litigation of unknown claims before they accrue – an impossible task. Their penalty upon the predictable failure is dismissal, as happened here.

The Dallas Courts' Requiring this Plaintiff to sue before reasonable discovery *and* before accrual clearly violated due process and requires review by this Court.

2. This Court Should Instruct Texas Courts to Not Apply Medical Malpractice Protections for Intentional Battery Cases

The unexpected, non-consented insertion of nontherapeutic items - at a simple laser scar removal procedure – that is not malpractice, that is a battery.

There is simply no medical standard for inserting non-therapeutic, unsolicited, unexpected objects, into unwitting patients.

In this case the insertion lacked any figment of consent – the only thing authorized was the non-contact application of laser radiation to the skin.

An overly insistent nurse did provide an unsolicited injection (for stinging that had not been complained of) – and that injection proved to be the vehicle for something completely unrelated, unexpected,

and absolutely not authorized by the Plaintiff: experimental nanotechnology.

The fact that implanted nanotechnology and humans are intersecting, that is well established – if not yet copiously litigated. Please see,

https://www.rand.org/pubs/research_reports/RR3226.html

and

https://www.washingtontimes.com/news/2022/dec/5/neuralink-elon-musk-company-under-federal-investig/

How medical device designers sometimes cut corners, however, and how they sometimes resort to non-consensual experimentation, that *has* been well litigated: See, *Anderson V. George H. Lanier Memorial Hospital*, 982 F.2d 1513 (1993) (non-consensual implantation resulting from the frenzied initial development stages of Intra Ocular Lenses)

Intentionally wrongful and non-therapeutic touching such as non-consensual experimentation is correctly held an intentional battery – even when it happens during medical treatment. *ibid.*

Likewise, assaults and batteries do occur in medical settings, during treatment, and are properly ruled as not medical malpractice. See, *Wasserman v. Gugel*, No. 14-09-00450-CV (Tex. App. May. 20, 2010), *Drewery v. Adventist Health Systems*, 344 SW 3d 498 (Tex: Court of Appeals, 3rd Dist. 2011), *Appell v. Muguerza*, 329 SW 3d 104 (Tex: Court of Appeals 2010).

If a patient had been intentionally shot with a bullet, by a doctor, and during a procedure, there would be no hesitation in ruling a battery. The object was not remotely therapeutic, was completely unconsented, and completely unexpected. The use of a syringe to insert an object should not be treated differently.

This Court should instruct lower Courts that insertion of non-therapeutic, unsolicited, unexpected objects, into unwitting patients – that is not medical malpractice by the perpetrator, that is a battery.

3. Absent this Court's Review, Texas Would Henceforth Allow *Res Judicata* Dismissals with Insufficient Due Process Protections

Res judicata Dismissals originating from TCPRC 74.351(b) improperly bypass due process protections requisite prior to summary adjudication. Those essential, basic presumptions favoring non-movants are the essence of due process when a motion is proffered and carries the chance of removing a right to jury trial.

Here we are dealing with a *res judicata* motion – this was carefully noted by a prior appeals decision, in *this* case:

"…**they did not seek relief under section 74.351(b).** Rather… [it was on] **res judicata**, collateral estoppel, and the statute of limitations."

See, Adler v. Lindsey, No. 05-20-00148-CV (Tex. App. Aug. 20, 2020).

The Motion at issue was therefore a summary adjudication based on *res judicata* – within a TCPRC

74.351(b) Motion – and lacked any of the protective presumptions carefully wrought into our summary adjudication statues.

Upholding this dismissal contravenes our whole-body of due process law:

"…[E]xtreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character. "

Richards v. Jefferson Cnty., Ala., 517 U.S. 793, 797, 116 S.Ct. 1761, 1765, 135 L.Ed.2d 76 (1996).

This Court should instruct the Appellate Court on the required due process prior to summary adjudication based on *res judicata*.

Prayer

Lindsey prays this Court grant this motion for rehearing, to reverse or otherwise vacate the Fifth Court's ruling, Order the trial court to vacate its November 9th, 2020 dismissal; and to further remand the case to the trial court for further proceedings consistent with this Honorable Court's Opinion herein.

Lindsey further prays for such other and further relief to which she is justly entitled.

Signed February 13th, 2023

/s/ Barbara Lindsey

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Signed February 13th, 2023

/s/ Barbara Lindsey

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Signed February 13th, 2023

/s/ Barbara Lindsey

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