

TAPA files brief contending conclusory and unexplained statements are not evidence of a material fact

On December 22, 2022, TAPA filed an amicus brief in the Texas Supreme Court in a case regarding treating a snake bite in a hospital emergency department.

The lawsuit, brought by Robin and Dana Dunnick, alleged that Dr. Kristy Marsillo delayed treatment of their daughter's snakebite injury, causing further complications, including permanent injury, disfigurement, and ongoing pain and suffering.

Dr. Marsillo originally obtained a dismissal of the case (*Marsillo v. Dunnick*) from the trial court after filing a no-evidence summary judgment motion. The trial court ruled that the plaintiff failed to show a "scintilla of evidence" of willful and wanton negligence, which is the required threshold in an emergency care case. Unfortunately, the Austin Court of Appeals reversed that summary judgment and ordered the case to trial. Dr. Marsillo appealed that reversal to the Texas Supreme Court, and TAPA joined her in asking that the trial court's summary judgment ruling be reinstated.

Dr. Benjamin Abo provided expert witness testimony for the plaintiffs. He opined that anything other than the immediate administration of antivenom is negligent and falls below the standard of care. Additionally, he stated that the treating physician was subjectively aware of putting the snakebite victim at extreme risk by delaying treatment and did so with conscious indifference to the welfare and safety of the patient.



Credit: Werner Rudhart/VISUM/eyevine

Dr. Marsillo countered with evidence that medical literature puts the timeframe for administering antivenom between one and four hours after a venomous snake bite. Dr. Marsillo did administer antivenom in that timeframe, but only after monitoring vitals, running blood tests, and marking the progression of swelling to confirm the patient had not received a dry, nonvenomous bite.

Dr. Marsillo's course of treatment also included an EKG, two large-bore IVs, lab work, urinalysis, blood type matching, blood coagulation studies every two hours, monitoring and measuring visible symptom progression every 30-minutes, and preparing antihistamines in the event of an allergic reaction to the antivenom.

Attorney Brent Cooper, a long-time TAPA resource and advocate, drafted the TAPA brief and argued that there was no evidence that the doctor treated the snakebite with conscious indifference. Instead, all evidence confirmed that Dr. Marsillo's treatment met the standard of care.

The course of treatment and observation used by Dr. Marsillo, in this case, is consistent with the accepted guidelines of the American Academy of Family Physicians. Cooper also argues that there is

no evidence that Dr. Marsillo set aside her education, training, and medical opinions to exclusively use the hospital's snakebite protocol in deciding on her patient's care.

Particularly troublesome was the Third Court of Appeals' holding that reversal of the trial court's summary judgment ruling was warranted because "a possibility" existed that the physician was guilty of consciously putting her patient at extreme risk of harm. Possibilities are not evidence, and allowing this reversal to stand has worrisome implications, including a watering down of the evidence required for a plaintiff to sue in an emergency department case.

TAPA's brief cautions the Supreme Court that "If allowed to stand, the lesser standard frustrates legislative intent and promises to promote the very circumstances the legislature sought to correct in enacting the heightened willful and wanton emergency care statute."

Joining TAPA on the amicus brief in support of Dr. Marsillo's Petition for Review are the Texas Hospital Association, Texas Medical Association, and the Texas Osteopathic Medical Association.

The Texas Supreme Court has ordered the Dunnicks to respond to Dr. Marsillo's petition to overturn the Austin Court of Appeals by January 30, 2023.