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Professional Liability

Evan A. Kirkham

Carrington Coleman, EKirkham@CCSB.com

Hayden M. Baker

Carrington Coleman, hbaker@ccsb.com

Tyler C. Wright

Carrington Coleman, TWright@CCSB.com

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PROFESSIONAL LIABILITY

*Evan A. Kirkham**
*Hayden M. Baker***
*Tyler C. Wright****

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I. DIRECTOR AND OFFICER LIABILITY

During the Survey period, Texas courts issued an array of interesting, yet significant, opinions for purposes of individual liability. Two of the discussed opinions, each issued by the Eighth El Paso Court of Appeals,

* B.A., University of Mississippi, 2013; J.D. Southern Methodist University Dedman School of Law, 2017. Associate, Carrington Coleman.

** B.A., Washington State University, 2014; J.D. Southern Methodist University Dedman School of Law, 2018. Associate, Carrington Coleman.

*** B.A., University of Virginia, 2003; J.D., Southern Methodist University Dedman School of Law, 2019. Associate, Carrington Coleman.

address whether the business judgment rule should be classified as an affirmative defense under the Texas Rules of Civil Procedure, and whether members of a limited liability company (LLC) may owe intra-member fiduciary duties by reason of a pre-existing implied partnership. Additionally, during the Survey period, the Second Fort Worth Court of Appeals demonstrated the significance of broadly-drafted corporate advancement provisions and the distinct nature of an entity's indemnification and advancement obligations.

A. THE EL PASO COURT OF APPEALS REJECTS ARGUMENT THAT THE BUSINESS JUDGMENT RULE SHOULD BE CLASSIFIED AS AN AFFIRMATIVE DEFENSE

Rule 94 of the Texas Rules of Civil Procedure provides a non-exhaustive enumerated list of affirmative defenses.¹ Therefore, Texas courts are left with discretion to classify non-enumerated defenses as affirmative defenses under Rule 94. A defense's classification as an "affirmative defense" is significant in that such classification places "the burden of proof . . . on the defendant to present sufficient evidence to establish the defense and obtain the requisite jury findings."² In *In re Estate of Poe*,³ the Eighth El Paso Court of Appeals was tasked with determining, among other things, whether the corporate business judgment rule should be classified as an affirmative defense under Rule 94. Answering this question in the negative, the court of appeals found that, when the defendant properly raises the application of the business judgment rule, the plaintiff ultimately carries the burden of demonstrating which of the defendant's acts fall outside the confines of the rule's safe harbor.⁴

Turning to the relevant facts, Richard C. Poe (Dick) operated three large car dealerships in El Paso, Texas: (1) Dick Poe Toyota; (2) Dick Poe Chrysler; and (3) Dick Poe Dodge.⁵ Dick's three dealerships were held in three distinct limited partnerships.⁶ Poe Management, Inc. (PMI) was acting as general partner, and therefore, was the controlling entity of all three limited partnerships. While Dick maintained 95% ownership of the Chrysler and Dodge dealerships, PMI was owned entirely by Dick's son Richard.⁷ Nevertheless, pursuant to an arrangement between Dick and Richard, Dick was appointed by Richard as the President and sole director of PMI. Richard later testified that the intent of this arrangement was that "Dick would run the 'family businesses' so long as he wanted to, and upon Dick's death or retirement, control would pass to Richard."⁸

1. TEX. R. CIV. P. 94.

2. *Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156–57 (Tex. 2015).

3. 591 S.W.3d 607, 640 (Tex. App.—El Paso 2019, no pet.).

4. *See id.* at 640–41.

5. *Id.* at 618.

6. *Id.* Those limited partnerships were (1) Dick Poe Imports, LP (Toyota); (2) Dick Poe Motors I, LP (Chrysler); and (3) Dick Poe Dodge I, LP (Dodge). *Id.*

7. *Id.* at 618–19.

8. *Id.* at 620.

Subsequent to the creation of the PMI arrangement between Dick and Richard, their relationship quickly began to erode. As a consequence, Dick amended his will to remove Richard as co-trustee and executor of his estate.⁹ Following this revision, and the addition of other trustees and executors, Dick's comptroller for the three dealerships, Karen Castro, and his accountant, Anthony Bock, were designated to serve as co-executors of Dick's estate. In addition, Castro, Bock, and Dick's attorney, Paul Sergent, were each designated as co-trustees.¹⁰ Further, Dick inquired with Sergent as to whether there was anything that he could do to regain control of the three dealer-operating partnerships.¹¹ Sergent informed Dick that "the quickest and most efficient way was to buy stock in PMI."¹² Almost a year later,¹³ Sergent prepared a "unanimous consent of the board of directors in lieu of a special meeting" whereby Dick purchased 1,100 shares of PMI stock for \$3,209,205, based on a book value calculation performed by Bock.¹⁴ Following the stock issuance, Dick owned 52% of PMI's voting shares.¹⁵ Richard was never informed of the stock issuance.¹⁶

Just fifteen days following the stock issuance, Dick passed away.¹⁷ Three days later, Bock and Castro, as the named co-executors, filed an application to probate Dick's will.¹⁸ Under the will, Castro and Bock, as co-executors, were provided with the ability to vote for Dick's stock in PMI.¹⁹ Pursuant to such power, Castro and Bock, acting by written consent, elected Bock as President, Castro as Vice President, and Sergent as Secretary of PMI.²⁰ Richard was not invited to the meeting and was removed from his position as Vice President.²¹

While Richard had, on the same day the will was probated, initiated litigation against Bock and Castro, Richard later amended his petition to allege, among numerous other claims,²² breach of fiduciary duty against each of Sergent, Castro, and Bock in their respective capacities as officers

9. *Id.* at 620–21.

10. *Id.* at 620.

11. *Id.* at 620–21.

12. *Id.* at 621.

13. In the meantime, Dick and Richard engaged in negotiations for Richard's purchase from Dick of substantially all of the assets of the partnerships operating the Dodge and Chrysler dealerships. However, those negotiations were ultimately terminated by Dick. *See id.* at 621–22.

14. *Id.* at 622–23.

15. *Id.* at 622.

16. *Id.* at 623.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 625.

21. *Id.*

22. *Id.* at 626. In addition, Richard asserted the following claims: (1) "[d]eclaratory relief to set aside the stock issuance as a self-dealing transaction"; (2) "[t]hat Dick breached his fiduciary duties to PMI"; (3) "[t]hat Sergent, Bock, and Castro conspired along with Dick to breach Dick's fiduciary duties [to] Richard"; and (4) "[d]eclaratory relief seeking to establish that Dick lacked mental capacity to agree to the share issuance." *Id.*

of PMI.²³ The claim was subsequently tried by jury where, after the close of Richard's case, each of Sergeant, Castro, and Bock moved for a directed verdict under the theory that "Richard failed to overcome the business judgment [rule] for any of the actions they took as officers or directors of PMI."²⁴ The probate court granted Sergeant, Castro, and Bock's motion and discharged the jury.²⁵

Pursuant to Texas case law, corporate officers and directors owe three separate duties to the corporation: obedience, due care, and loyalty.²⁶ Important in *In re Estate of Poe* is the duty of due care. Such duty "requires a director [or officer] to be diligent and prudent in managing the corporation's affairs."²⁷ However, the duty of care, and the breach of such duty, is subject to what has been referred to in this article as the "business judgment rule."²⁸ Specifically, as interpreted by the courts of Texas, the business judgment rule "protects corporate officers and directors . . . from liability for acts that are within the honest exercise of their business judgment and discretion,"²⁹ regardless of whether such acts were otherwise "negligent, unwise, inexpedient, or imprudent."³⁰

On appeal, Richard argued that the business judgment rule is an affirmative defense which should therefore require Sergeant, Castro, and Bock to carry the burden of proving such defense.³¹ Therefore, Richard's interpretation would place the burden squarely on the corporate actor of proving a corporate act falls within the safe harbor of the business judgment rule.³²

At the start of the court's analysis, it noted that the "business judgment rule has been referred to as a 'defense,' but [it found] no case holding that it is an 'affirmative defense' under [Rule 94]."³³ Additionally, surveying Delaware authority and Texas federal cases, the court noted that such authority "concluded that overcoming the business judgment rule was an

23. *Id.*

24. *Id.* at 639.

25. *Id.*

26. *See, e.g., Ritchie v. Rupe*, 443 S.W.3d 856, 868 (Tex. 2014) (citing *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 723–24 (5th Cir. 1984) (interpreting Texas law) (noting that a corporate director's fiduciary duties include duties of obedience, care, and loyalty)); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) (noting that an agency relationship is a special relationship imposing a fiduciary duty on the agent to act solely in the best interest of the principal); *Lowry v. Tarbox*, 537 S.W.3d 599, 615 (Tex. App.—San Antonio 2017, pet. denied) ("As a fiduciary, a corporate officer owes the corporation a strict duty of good faith and candor, as well as the general duty of *full disclosure* respecting matters affecting the principal's interests.") (internal quotations and citations omitted).

27. *In re Estate of Poe*, 591 S.W.3d at 639 (citing *Gearhart Indus., Inc.*, 741 F.2d at 719).

28. *Id.*

29. *Id.* (citing *Sneed v. Webre*, 465 S.W.3d 169, 173 (Tex. 2015)).

30. *Id.*

31. *Id.* at 639–40.

32. *Id.* at 640 (noting the "allocation of that burden is critical to the standard of review as it dictates whether Richard had to disprove the defense, or the individual defendants had to prove it as a matter of law").

33. *Id.*

element of the plaintiff's case."³⁴ Nevertheless, the court conceded that neither the Delaware state nor Texas federal authority was controlling.³⁵ Accordingly, the court proceeded to address Richard's principal arguments.

In support of his characterization of the business judgment rule, Richard highlighted language contained in the 2015 Texas Supreme Court case, *Sneed v. Webre*.³⁶ Specifically, Richard pointed to the supreme court's statement that, in the context of close corporations, "the Legislature did not require shareholders of a closely held corporation to establish derivative standing by pleading or proving that the directors failed to exercise their honest business judgment. . . ."³⁷ However, the court responded that the supreme court in *Sneed* recognized that the business judgment rule may arise twice in the context of close corporations, "once with the corporation's decision not to pursue a claim in its own name, and again when the *merits* of the underlying claim are decided."³⁸ To this end, the court posited that *Sneed's* holding only "precludes consideration of the business judgment rule at the first stage."³⁹ Conversely, at the merits stage (i.e., second stage), the court cited *Sneed* as holding the business judgment rule is "what a shareholder plaintiff must plead and prove to establish a derivative right to relief. . . ."⁴⁰ Therefore, the court concluded that, because the case had reached the merits stage, "Richard carried the burden of showing the corporate actions of which he complain[ed] were not protected by the rule."⁴¹

In re Estate of Poe is significant as it rejects the argument that a corporate officer or director carries the ultimate burden of demonstrating that his or her actions fall within the protections of the business judgment rule. Instead, and in concurrence with the characterization of the rule under Delaware case law, *Poe* places that burden on the plaintiff. As such, at least one Texas court of appeals has affirmatively rejected the notion that the rule should be classified as an affirmative defense for purposes of Rule 94.

B. THE FORT WORTH COURT OF APPEALS RECOGNIZES THE CONSEQUENCES OF BROADLY DRAFTED ADVANCEMENT PROVISIONS

Provisions governing an entity's obligation to indemnify and advance legal expenses to corporate officials are oftentimes housed within the same section of the entity's governing documents. However, it is impor-

34. *Id.* (first citing *Gantler v. Stephens*, 965 A.2d 695, 706 (Del. 2009); then citing *Fed. Deposit Ins. Corp. v. Benson*, 867 F. Supp. 512 (S.D. Tex. 1994)).

35. *Id.* at 641 (stating that "[t]hese authorities are persuasive but not controlling.>").

36. 465 S.W.3d 169 (Tex. 2015).

37. *In re Estate of Poe*, 591 S.W.3d at 641.

38. *Id.* (citing *Sneed*, 465 S.W.3d at 178) (emphasis added).

39. *Id.*

40. *Id.* (citing *Sneed*, 465 S.W.3d at 187).

41. *Id.*

tant to note that the two obligations are separate and distinct. For example, depending on the language of the governing documents, a corporate actor's right to advancement may be entirely independent of the actor's ultimate indemnification right. Additionally, because advancement obligations are permissible and not mandatory under the Texas Business Organizations Code (TBOC),⁴² entities are left with broad discretion to craft their own advancement provisions. As such, careful consideration must be made as to the intended scope of such provisions. In *L Series, L.L.C. v. Holt*,⁴³ the Second Fort Worth Court of Appeals demonstrated one such instance where a broadly drafted advancement provision may fail to satisfy the expectations of the entity's management.⁴⁴

The facts of *Holt* are relatively straightforward. Conrad Holt was a member of four Texas LLCs (collectively, the Companies).⁴⁵ Three of those companies served as the general partner of three Texas limited partnerships (collectively, the Dealerships) operating various Saturn vehicle dealerships across the Dallas-Fort Worth area.⁴⁶ In addition to his role as president of the Companies, Holt served as the general manager of each dealership.⁴⁷

In December of 2016, the Companies and Dealerships brought suit against Holt, alleging that Holt had "engaged in numerous types of fraudulent activity and 'financial abuse' toward the Companies and Dealerships . . ." ⁴⁸ Holt subsequently filed a breach of contract counterclaim against the Companies and Dealerships under the theory that he was entitled to the advancement of his legal fees and expenses pursuant to the company agreements of the Companies.⁴⁹ After moving for summary judgment on his counterclaim, the trial court granted Holt's motion and directed the Companies to pay Holt his then-incurred attorney's fees and "future reasonable attorney fees and expenses' on a monthly basis."⁵⁰ Thereafter, the Companies sought a writ of mandamus from the appellate court seeking a directive that the trial court "vacate its advancement order."⁵¹

42. See TEX. BUS. ORGS. CODE ANN. § 8.104(a) ("[a]n enterprise *may* pay or reimburse reasonable expenses incurred by a present governing person or delegate. . .") (emphasis added); TEX. BUS. ORGS. CODE ANN. § 101.402(a)(1)-(2) (noting that a limited liability company "*may*: (1) indemnify a person; [or] (2) pay in advance or reimburse expenses incurred by a person") (emphasis added).

43. 571 S.W.3d 864 (Tex. App.—Fort Worth 2019, pet. denied).

44. See *id.* at 876.

45. *Id.* at 867.

46. *Id.*

47. *Id.*

48. *Id.* The alleged conduct included "fraudulently recording sales to receive bonuses from car manufacturers, fraudulently booking sales, making unlicensed insurance sales, and engaging in various kinds of financing fraud." *Id.*

49. *Id.* at 868.

50. *Id.*

51. *Id.* In addition, the Companies sought an interlocutory appeal and the court ultimately found it lacked jurisdiction over that interlocutory appeal. *Id.* at 872 (holding that no statutory provision "authorizes an interlocutory appeal of an order requiring advancement.").

At the court of appeals, the Companies argued that the trial court had abused its discretion because “their suit against Holt d[id] not fall within the scope of the advancement provisions in the Companies’ [company agreements] because they sued him for ‘his various bad acts’ rather than his member status.”⁵² Accordingly, the court was called to analyze the specific language contained in the advancement provisions.

Turning to the relevant language, the advancement provision contained in the company agreements provided that:

[t]he right to indemnification . . . shall include the right to be paid or reimbursed by the Company the reasonable expenses incurred *by a Person of the type entitled to be indemnified under Section 8.01* who was, is or is threatened to be made a named defendant or respondent in a Proceeding [1] *in advance of the final disposition of the Proceeding* and [2] *without any determination as to the Person’s ultimate entitlement to indemnification*⁵³

Therefore, the principal inquiry left to the court was to determine whether Holt was “of the type entitled” to indemnity under Section 8.01 of the company agreements.⁵⁴ Turning to Section 8.01, that section stated that:

each Person who was or is made a party [to a] pending or completed action, suit[,] or proceeding . . . , *by reason of the fact* he or she . . . was serving at the request of the Company and an officer, trustee, employee, agent, or similar functionary of the Company shall be indemnified by the Company to the fullest extent permitted by the Act and the TBCA.⁵⁵

Based on the italicized language, the Companies contended that Holt was not entitled to advancement as the suit was not “by reason of the fact” he was serving as a functionary of the Companies. Instead, the Companies contended that their suit against Holt was “solely for ultra vires acts outside of his capacity as a member”⁵⁶

Rejecting the Companies’ argument, the *Holt* court noted that such argument “would violate [the advancement provision’s] clear directive that the right to advancement is *not dependent on a determination of the right to indemnity*.”⁵⁷ Therefore, whether Holt was ultimately afforded advancement rights did not teeter on an inquiry of whether his acts were, *in fact*, outside of the scope of his authority as a member and manager of the Companies. Instead, citing Delaware case law, the court determined that Holt was only required to demonstrate that the suit and corresponding allegations were “based on—and . . . *causally connected to*—Holt’s ser-

52. *Id.* at 872.

53. *Id.* at 873.

54. *Id.* The court noted that the advancement provisions of three of the Companies’ company agreements were identical and that the fourth was substantially similar to the point of not necessitating an independent analysis of the provision and language. *Id.*

55. *Id.* (emphasis added).

56. *Id.*

57. *Id.* at 874 (emphasis added).

vice as a member and a manager.”⁵⁸ To this end, the court concluded that it did not amount to an abuse of direction to find that Holt was entitled to the advancement right as “at least one of the claims against him is dependent on his member and manager status”—that he breached his fiduciary duties to the Companies “due to his position as an official manager.”⁵⁹

As demonstrated in the *Holt* case, where the entity’s governing documents provide that an advancement right is not dependent on an indemnity right, a corporate official’s rights to advancement may exceed such official’s indemnity rights. In fact, the *Holt* court quotes Delaware case law acknowledging “the tsunami of regret that swept over corporate America regarding mandatory advancement contracts”⁶⁰ As the case seems to always be, hindsight is 20/20. Therefore, in adopting governing documents, management and/or shareholders must be mindful of the practical consequences of the adopted language.

To effectively do so, adequate consideration must be given to the duality of competing interests. On one hand, a broad advancement provision allows a corporate official the resources to defend what may be a baseless allegation. Conversely, the entity will be required to advance expenses to a corporate official who the current management and/or shareholders believe engaged in serious conduct that is detrimental to the entity. Therefore, those adopting the governing documents must be mindful of these competing interests and the specific objectives sought to be obtained by the advancement provision. For example, if the Companies’ management had conducted a review with the competing objectives in mind, the advancement provision may have limited advancement to only claims alleged against the corporate official by third parties. Therefore, by effectively weighing these interests, management may be better equipped to stomach the consequences of their entity’s advancement obligations.

C. THE EL PASO COURT OF APPEALS FINDS LIMITED LIABILITY
COMPANY MEMBER OWED INTRA-MEMBER FIDUCIARY
DUTIES DUE TO PRE-EXISTING IMPLIED
PARTNERSHIP

The TBOC is silent on the issue of whether a member of a Texas LLC owes fiduciary duties to his, her, or its fellow members.⁶¹ Similarly, Texas courts addressing the issue have been hesitant to find that LLC members owe each other fiduciary duties *as a matter of law*.⁶² Instead, Texas courts

58. *Id.* at 876 (citing *Paolino v. Mace Sec. Int’l, Inc.*, 985 A.2d 392, 406 (Del. Ch. 2009) (finding that “if the corporate powers were used or necessary for the commission of the alleged misconduct” the corporate actor is entitled to advancement)) (emphasis added).

59. *Id.* at 874.

60. *Id.* at 875 (quoting *Barrett v. Am. Country Holdings, Inc.*, 951 A.2d 735, 747 (Del. Ch. 2008)).

61. See TEX. BUS. ORGS. CODE ANN. §§ 101.001–.114.

62. See, e.g., *Entm’t Merch. Tech., L.L.C. v. Houchin*, 720 F. Supp. 2d 792, 797 (N.D. Tex. 2010) (“No Texas court has held that fiduciary duties exist between members of a limited liability company as a matter of law.”) (first citing *Gadin v. Societe Captrade*, No. 08-CV-3773, 2009 WL 1704049 (S.D. Tex. June 17, 2009); then citing *Suntech Processing*

have espoused the view that whether an intra-member fiduciary relationship exists is typically a question of fact.⁶³ However, when faced with this very factual inquiry, the Eighth El Paso Court of Appeals, in *Houle v. Casillas*,⁶⁴ turned to the tenets of partnership law. Avoiding the requisite factual analysis under LLC law, the *Houle* court instead found evidence of a pre-existing implied partnership between disputing LLC members.⁶⁵ As such, the *Houle* court determined that LLC members can owe each other fiduciary duties as partners in an implied partnership that predates the formation of the LLC.

Houle's factual underpinning began with a business plan between Robert Houle and Jose Casillas.⁶⁶ In the summer of 2009, Houle and Casillas agreed to acquire, through an LLC, an older residential home that had been subdivided into apartments (the Property).⁶⁷ Additionally, the two men agreed that Casillas would provide the required capital for the acquisition and renovation of the Property while Houle would oversee and manage the renovations.⁶⁸ Thereafter, Houle and Casillas formed Pershing 3901 LLC (Pershing), with Houle individually owning his membership interest and Casillas holding his membership interest through Casco Investments, Inc. (Casco).⁶⁹ Through Pershing, the two men purchased the Property using funds from a promissory note made by Casillas to Pershing.⁷⁰ Importantly, the promissory note was secured by a deed of trust on the Property.⁷¹

Subsequent to Pershing's acquisition of the Property, renovations began with Houle having complete oversight of the project.⁷² While Houle and Casillas contemplated that renovations would last no longer than three months, the project had still not reached completion after the one-year mark. Additionally, the cost of the renovations had already totaled \$45,030.25, an amount over Houle and Casillas's estimation of \$40,000. Consequentially, on July 6, 2010, Casillas "sent a detailed email to Houle outlining the parties' original agreement" and identifying the time and cost overruns.⁷³

Following the July 6 email, Casillas contacted a local law firm in El

Sys., L.L.C. v. Sun Commc'ns, Inc., No. 05-99-00213-CV, 2000 WL 1780236, at *6 (Tex. App.—Dallas Dec. 5, 2000, pet. denied) (not designated for publication) (noting "[t]here is no Texas case addressing fiduciary duties between members in a limited liability company" and holding the TBOC does not "give authority to the trial court to find a fiduciary [relationship] between . . . members as a matter of law").

63. *Kaspar v. Thorne*, 755 S.W.2d 151, 155 (Tex. App.—Dallas 1988, no writ.).

64. 594 S.W.3d 524 (Tex. App.—El Paso 2019, no pet.).

65. *Id.* at 551.

66. *Id.* at 532. Houle and Casillas had known each other for approximately twenty-five years and Houle was Casillas's ex-brother-in-law. *Id.*

67. *Id.* at 533.

68. *Id.*

69. *Id.* The author assumes Casillas, as a resident of Mexico, structured his ownership to be indirect through Casco partially to avoid being an individual U.S. taxpayer.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 534.

Paso.⁷⁴ That firm advised Casillas that the surest way to protect his investment was to “memorialize” the \$45,030.25 he contributed to Pershing for the renovations.⁷⁵ To do so, the firm prepared a promissory note in the amount of \$45,030.25 and a second deed of trust securing the note and identifying Casillas as the lender and Pershing as the borrower.⁷⁶ The deed of trust was dated November 15, 2010, and the maturity date of the note was set for the same day—allowing Casillas to foreclose on the deed of trust at any time.⁷⁷ Houle contended he had no knowledge of the two documents.⁷⁸

Ultimately, in May 2011, Casillas foreclosed on the Property pursuant to a substitute trustee’s sale.⁷⁹ At the sale, JLC Ventures, Inc., an entity owned by Casillas, purchased the Property for \$50,000.⁸⁰ Interestingly, Casillas, on behalf of Casco, was the first to initiate litigation following the sale, alleging claims against Houle for breach of fiduciary duties he owed to Casco and Pershing. In response, Houle filed a general denial along with, among other things, counter and third-party claims against Casco and Casillas for breach of fiduciary duty.⁸¹ Specifically, Houle alleged that he and Casillas were *partners*, and Casillas, “both in his individual capacity and as president of Casco—owed him a fiduciary duty and duty of good faith and fair dealing.”⁸² On this issue, Casillas filed a partial motion for summary judgment, arguing that neither Casillas nor Casco owed “fiduciary duties to Houle as a matter of law.”⁸³ In response, Houle attached the July 6, 2010 email he received from Casillas asserting that the email evidenced the creation of a partnership between himself and Casillas.⁸⁴ Nevertheless, the trial court granted Casillas’s motion.⁸⁵

On appeal, the Eighth El Paso Court of Appeals noted that at least one Texas court of appeals had held that the TBOC “does not itself impose a fiduciary duty upon members of an LLC.”⁸⁶ However, the *Houle* court further noted that Houle did “not appear to be arguing that Casillas owed him a duty as a fellow member of [Pershing], [but] instead, appear[ed] to find the fiduciary relationship in a pre-existing . . . oral and informal partnership.”⁸⁷ To this extent, Casillas argued such informal partnership was “formed when he and Casillas entered into their agreement to purchase and renovate the . . . Property, and that they formed [Pershing] simply as

74. *Id.* at 535.

75. *Id.*

76. *Id.* Casillas executed the deed of trust on behalf of Pershing in his capacity as President of Casco, its manager. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 536.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 537.

84. *Id.*

85. *Id.* at 538.

86. *Id.* at 546.

87. *Id.*

a means of effectuating their pre-existing partnership.”⁸⁸ Because the TBOC recognizes intra-partner fiduciary duties,⁸⁹ Houle’s seemingly unique argument became paramount to the court’s analysis.

Addressing Houle’s argument, the court first found that the “fact that the parties agreed to form an LLC to effectuate their agreement does not preclude the possibility that the parties already had a *pre-existing—and continuing—partnership*.”⁹⁰ Therefore, the court determined that the next stage of its analysis would be whether the relationship between Houle and Casillas could be considered a partnership under Texas law.⁹¹ To make this inquiry, the *Houle* court turned to Section 152.052 of the TBOC which enumerates five factors of analysis for whether an implied partnership exists:

- (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing: (A) losses of the business; or (B) liability for claims to third parties against the business; and (5) agreement to contribute or contributing money or property to the business.⁹²

In making an analysis of the five factors, the court emphasized that the “party seeking to establish the existence of a partnership is not required to provide evidence of all five factors.”⁹³ Turning to the five factors, the court first found the profit sharing factor conclusively satisfied.⁹⁴ Looking to the July 6, 2010 email, the court opined that the email demonstrated “the parties had an agreement to share equally in profits after renovations were completed and after Casillas was reimbursed for his investment.”⁹⁵ Next, looking to the factor of intent, the court noted that an expression of intent may be found even where there is no direct evidence of an intent to form a partnership.⁹⁶ However, in the evidence before it, the court found that a single instance of Casillas referring to himself as a

88. *Id.* at 546–47.

89. TEX. BUS. ORGS. CODE ANN. § 152.204 (“[a] partner owes to the . . . other partners . . . a (1) duty of loyalty; and (2) a duty of care. . . .”). See *Houle*, 594 S.W.3d at 546 (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 264 (Tex. 1951) (“[t]he relationship between . . . partners . . . is fiduciary in character, and imposes upon all the participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other. . . .”).

90. *Houle*, 594 S.W.3d at 547 (emphasis added). Interestingly, on this point, the El Paso Court of Appeals cited to another of its opinions finding that a prior agreement between two businessmen created a fiduciary relationship, regardless of the subsequent formation of a business entity. See *id.* (citing *Cielo Vista Bank v. McCutcheon*, 719 S.W.2d 658, 660–61 (Tex. App.—El Paso 1986, writ ref’d n.r.e.)).

91. *Id.* at 547–48.

92. *Id.* (quoting TEX. BUS. ORGS. CODE ANN. § 152.052(a)).

93. *Id.* at 548 (citing TEX. BUS. ORGS. CODE ANN. § 152.052(c)). The *Houle* court further explained that “evidence of all five factors establishes a partnership as a matter of law, and therefore, the five-factor test is considered on a continuum. . . .” *Id.* (internal quotations omitted).

94. *Id.*

95. *Id.*

96. *Id.* (citing TEX. BUS. ORGS. CODE ANN. § 152.051). The court further noted that “[e]vidence of expressions of intent could include . . . the parties’ statements that they are

“Silent Partner” was insufficient to find a “direct expression of . . . intent to form a partnership.”⁹⁷

While the court was brief in addressing the first two factors, it conducted a fairly substantial analysis on the issue of whether Houle and Casillas participated in, or had the right to participate in control of, the partnership. Importantly, the court highlighted that the control factor “is one of the most important factors in determining whether a partnership exists.”⁹⁸ Here, holding the factor weighed in favor of a partnership finding, the court primarily emphasized that “Houle and Casillas jointly made the decision to purchase the . . . Property, decided how to finance the property, and agreed to form an LLC for the purpose of protecting their personal interests.”⁹⁹

Turning to the final two factors, the court first found that no evidence was present in the record “to suggest that [Houle and Casillas] agreed to share equally in the losses or liabilities of the partnership.”¹⁰⁰ Conversely, the court found that the record contained sufficient evidence to find each of Casillas and Houle agreed to contribute money and/or property to the partnership.¹⁰¹ Important to such finding was Houle’s contribution of his skills and services in overseeing the Property’s renovations,¹⁰² and Casillas’s contribution of the capital necessary to acquire and renovate the Property.¹⁰³

When balancing the five factors collectively, the court was left with three of the five weighing in favor of a partnership finding: “(1) an agreement to share profits, (2) control over the enterprise, and (3) a contribution of money and property to the enterprise by both [Houle and Casillas].”¹⁰⁴ Emphasizing that “these [three] factors are . . . the most dispositive and important factors,” the court concluded “there [was] sufficient evidence to raise a factual question regarding the existence of a partnership . . . ,” and therefore, the existence of fiduciary duties between Houle and Casillas.¹⁰⁵

The *Houle* case is interesting and significant for multiple reasons. First, the court seemingly abandons what would seem to be the primary analysis—the existence of intra-member fiduciary duties in an LLC. As the court notes, whether LLC members owe each other fiduciary duties likely

partners, one party holding the other party out as a partner on the business’s letterhead or name plate, or in a signed partnership agreement.” *Id.* (internal citation omitted).

97. *Id.* at 549.

98. *Id.*

99. *Id.* at 549–50. Also important to the court was evidence of the division of responsibility, namely, “Casillas providing the financing for the project, and Houle providing his expertise and management skills in overseeing the renovations.” *Id.*

100. *Id.* at 550.

101. *Id.* at 550–51.

102. *Id.* Here, the court emphasized that “Houle’s agreement to lend his labor and time to oversee or supervise the renovations of the . . . Property, was the equivalent of contributing money or property to the partnership.” *Id.*

103. *Id.* at 551.

104. *Id.*

105. *Id.*

lies in the question of whether the members are in an unequal position of power.¹⁰⁶ However, such analysis was never performed by the *Houle* court. While the omission of the LLC analysis may be explained by Houle alleging breach of fiduciary duty against Casillas rather than Casco (Houle's co-member in Pershing), the omission nevertheless demonstrates that claims for breach of fiduciary duty may be maintained under theories outside traditional LLC law.

Second, the *Houle* opinion is significant for purposes of individual liability. Often, for personal protection, individuals will form entities to hold their LLC membership interests. Here, Casillas did just that in his formation of Casco. By accepting Houle's implied partnership argument, the *Houle* court is effectively disregarding that protection—demonstrating that an LLC member may individually sue the principal of his or her co-member entity on the basis of an implied partnership. As parties will seemingly always negotiate and document their prospective business plan before the formation of the LLC, it is difficult to envision a circumstance where the five referenced factors would weigh against an implied partnership finding. As such, the *Houle* opinion opens the door for expanded individual fiduciary duties and liability for the principals of entities holding LLC interests.

II. MALPRACTICE LIABILITY

In 2019, rulings out of Texas's Supreme Court and appellate courts made it less likely for attorneys to be found liable under traditional conflict-of-interest claims, but more likely to be haled into court long after having concluded the representation and to have to rebut the live testimony of the judge that presided over the proceeding giving rise to the malpractice claim.

A. THE SUPREME COURT CLARIFIES AN EXCEPTION TO THE CONFLICT-OF-INTEREST RULE

In May 2019, the Texas Supreme Court issued a well-reasoned opinion denying mandamus relief to an aggrieved party and former client in a guardianship proceeding who sought to disqualify former counsel for an alleged violation of the Texas Disciplinary Rules of Professional Conduct. In doing so, the supreme court wrestled with simultaneous application of seemingly unreconcilable rules—1.02, 1.06, and 1.09. In the end, the supreme court, speaking through Chief Justice Hecht, opined that the attorney's representation of the party applying for temporary guardianship of a former client was not a conflict of interest and did not require disqualification.¹⁰⁷

In *In re Thetford*,¹⁰⁸ the Appellee, Jamie Rogers, represented by her

106. *Id.* at 546 (citing *Suntech Processing Sys., L.L.C. v. Sun Commc'ns, Inc.*, No. 05-99-00213-CV, 2000 WL 1780236, at *6-7 (Tex. App.—Dallas Dec. 5, 2000, pet. denied)).

107. *In re Thetford*, 574 S.W.3d 362, 374-81 (Tex. 2019) (orig. proceeding).

108. *See id.*

attorney, Alfred Allen, filed an application for temporary guardianship of Rogers's aunt, Verna Thetford, including guardianship of Thetford's person and establishment of a management trust for her estate. Thetford moved to disqualify Allen, arguing to the lower court that Allen had violated fiduciary duties he owed to Thetford as her former attorney. The trial court denied Thetford's motion to disqualify and appointed Allen's new client, Rogers, as temporary guardian for Thetford.¹⁰⁹ Before the supreme court, Thetford recast her argument, maintaining that the Texas Disciplinary Rules of Professional Conduct—specifically Rules 1.06(b) and 1.09(a)(3)—required that Allen be disqualified due to an inherent and overt conflict of interest. The supreme court held that the Rules permit otherwise conflicting representations in limited circumstances, like here, where the attorney has demonstrably advanced the interests of his former client by finding her a guardian.¹¹⁰ The supreme court further held that Thetford's argument was not convincing enough to overcome the deference owed to the trial court's discretion.¹¹¹

Three Disciplinary Rules were examined:

A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.¹¹²

A lawyer shall not represent opposing parties to the same litigation.

[A] lawyer shall not represent a person if the representation of that person: . . . (1) involves a substantially related matter in which the person's interest are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appear to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.¹¹³

Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . if it is the same or a substantially related matter.¹¹⁴

From the outset, the supreme court recognized that “[g]uardianship proceedings present difficult ethical issues for lawyers.”¹¹⁵ But, despite such complicated ethical issues, the parties' arguments were exceedingly simple. Allen argued that Rule 1.02(g) required him, as Thetford's law-

109. *Id.* at 369.

110. *Id.* at 365.

111. *Id.*

112. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.02(g), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9).

113. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06(a)–(b).

114. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09(a)(3).

115. *In re Thetford*, 574 S.W.3d at 365.

yer, to institute guardianship proceedings for her by representing Rogers.¹¹⁶ Thetford argued that she was Allen's client in 2017 when the guardianship application was filed, and therefore, Allen's representation of Rogers was a conflict of interest under Rule 1.09(a)(3).¹¹⁷ In the alternative, Thetford argued that, even if she was Allen's client in 2017, the representation violated Rule 1.06(a).¹¹⁸

The supreme court determined that Rule 1.02(g)'s requirement that attorneys take "reasonable action[s]" "expressly *allows*, but does not also *require*, the attorney to institute a guardianship proceeding."¹¹⁹ And though "Rule 1.02(g) does not trump the conflict-of-interest rules," the supreme court noted the severity of disqualification as a remedy, the requirement that the trial court evaluate disqualification motions by "strictly adher[ing] to an exacting standard," and that the supreme court give deference to the trial court's decision unless the trial court has acted "without any reference to guiding rules or principles."¹²⁰

Thetford was required to prove that: (1) Allen represented her and Rogers in "substantially related" matters; and (2) the guardianship proceeding was "adverse" to her interests.¹²¹ The supreme court found Thetford could prove neither.¹²²

To prove that the matters were "substantially related," Thetford was challenged with showing that the overlapping facts created "a genuine threat of disclosure."¹²³ She could not. Thetford argued that confidential information shared with Allen concerning the disposition of her estate could be used against her in the guardianship proceeding.¹²⁴ The supreme court reasoned that the overlap was only facial—Thetford was unable to prove how confidences shared during the preparation of her will could be used against her in the guardianship proceeding, which was purposed to determine whether Thetford was "incapacitated."¹²⁵ Any confidences disclosed to Allen were irrelevant.¹²⁶

But even if Thetford had been able to prove a substantial relationship between the two proceedings, the supreme court rejected Thetford's argument that Allen's representation of Rogers in the guardianship proceeding was adverse.¹²⁷ The supreme court's interpretation of Rule 1.06 and 1.09's "direct adversity" requirement was informed by the comments to Rule 1.06(b) which characterize "direct adversity" as existing when "the lawyer's independent judgment on behalf of a client or the lawyer's

116. *Id.* at 371.

117. *Id.* at 372.

118. *Id.*

119. *Id.*

120. *Id.* at 373–74.

121. *Id.* at 374.

122. *Id.* at 375, 380.

123. *Id.* at 374.

124. *See id.* at 375.

125. *Id.*

126. *Id.*

127. *See id.* at 375–80.

ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client."¹²⁸ According to the comments, requisite adversity can also be found when the "lawyer reasonably appears to be called upon to espouse adverse positions in the same matter."¹²⁹ As for Rule 1.06(a)'s prohibition against the representation of "opposing parties to the same litigation," the comments state that such "opposition" is established when "a judgment favorable to one of the parties will directly impact unfavorably upon the other party."¹³⁰

The supreme court reasoned that guardianship proceedings are generally "not adversarial in character" because they are "designed to promote and protect the well-being of the incapacitated person."¹³¹ The American Bar Association's (ABA) commentary on Model Rule 1.14(b) was considered. The ABA's Commission on Ethics and Professional Responsibility reasoned that filing a petition for guardianship on behalf of an incapacitated client is a "narrow exception" to the conflict-of-interest rules, but that dual-representation, such as in the present case, would be regarded as adverse unless and until the court makes the necessary determination of incompetence.¹³² The supreme court rejected the ABA's analysis, finding that it provided "scant justification for [its] sweeping declaration" and "prioritizes the conflict-of-interest rules over the lawyer's judgment about what's in the best interests of the client."¹³³

Instead, the supreme court concluded that 1.02(g) and the conflict-of-interest rules should be read together as provided for in the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*, Section 24A—acknowledging that lawyers are sometimes forced to choose between "imperfect alternatives."¹³⁴ As such, the supreme court held that in order for a guardianship proceeding to be adverse:

[1] the applicant's interests must be adverse to the proposed ward's . . . as the proposed ward would have defined them when she had capacity; [and]

[2] [i]n the absence of evidence of how the proposed ward would have defined her interests, . . . adversity exists when the applicant's interests would not promote and protect the proposed ward's well-being.¹³⁵

Thetford's insistence that she did not need a guardian was insufficient

128. *Id.* at 376 (citing *Nat'l Med. Enters., Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex. 1996)).

129. *Id.* (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 6, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9)).

130. *Id.* at 376 (citing TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.06 cmt. 2).

131. *Id.* (internal citations omitted).

132. *Id.* at 377.

133. *Id.*

134. *Id.* at 378–79.

135. *Id.* at 379.

to demonstrate adversity.¹³⁶ The evidence showed that, before her dementia worsened, Thetford had wanted Rogers to serve as her guardian and that Rogers was not indebted to, or otherwise unaligned with, Thetford's interests.¹³⁷

The supreme court concluded its analysis by acknowledging that the "heavy responsibility for determining the best resolution of fundamental and emotional issues lies necessarily within the trial court's sound discretion" and "[t]he stakes are high."¹³⁸ Nevertheless, the supreme court found that the present record reflected the trial court's awareness and thoughtful consideration of the issues.¹³⁹ And, even if the trial court's ruling was improper, it was "not final" and could be "revisit[ed] . . . at a later stage if other information [came] to light."¹⁴⁰ The supreme court denied Thetford's petition for mandamus.

B. TEXAS JUDGES ARE PERMITTED TO TESTIFY IN ATTORNEY DISCIPLINARY CASES

In October 2019, the Texas Supreme Court ruled that not only was it appropriate for a federal bankruptcy judge to testify in an attorney disciplinary case, but that it may have been required.¹⁴¹ The supreme court, opining per curiam, arrived at their decision by distinguishing close-to-analogous case law, interpreting the Texas Code of Judicial Conduct, and mixing in a healthy dose of practical procedural considerations.

The appeal arose from the trial court's decision to disbar attorney Mark Cantu for his violations of the Texas Disciplinary Rules of Professional Conduct in connection with his representation of the debtor in a bankruptcy proceeding.¹⁴² At trial, a jury found Cantu had violated multiple Disciplinary Rules including

Rule 3.02 (prohibiting lawyer from "taking a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter"), Rule 3.03(a)(1) (prohibiting lawyers from "knowingly making false statements of material fact or law to a tribunal"), Rule 3.03(a)(5) (prohibiting lawyers from knowingly offering false evidence), and Rule 8.04(a)(3) (prohibiting lawyers from "engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation").¹⁴³

Plaintiffs, the Commission for Lawyer Discipline, relied heavily on testimony from their expert witness, Judge Marvin Isgur.¹⁴⁴ Judge Isgur had

136. *Id.*

137. *Id.* at 379–80.

138. *Id.* at 380.

139. *Id.*

140. *Id.*

141. *Comm'n for Lawyer Discipline v. Cantu*, 587 S.W.3d 779, 780 (Tex. 2019) (per curiam).

142. *Id.*

143. *Id.* at 781.

144. *Id.*

presided over the action in which Cantu demonstrated questionable behavior.¹⁴⁵ Judge Isgur testified, among other things, that Cantu had “displayed a pattern of omission, obfuscation and noncompliance,” had “given false oaths in the bankruptcy court,” and had “refused to comply with lawful Court orders.”¹⁴⁶

The court of appeals reversed and remanded on appeal, holding that the admission of Judge Isgur’s testimony was improper.¹⁴⁷ The appellate court based its opinion on a critical analysis of the supreme court’s decision in *Joachim v. Chambers*.¹⁴⁸ In front of the supreme court, Cantu argued that the logic from *Joachim* should control—that the judge is not supposed to tell the jury how to vote.¹⁴⁹ The supreme court interpreted *Joachim* differently. It reasoned that the holding in *Joachim* was limited to the case specific facts.¹⁵⁰ According to the supreme court, *Joachim* did not announce a general rule against judicial testimony and actually acknowledged that judges are generally competent to testify.¹⁵¹

The supreme court went on to reason that disallowing judges to testify in lawyer disciplinary cases “would place judge-initiated grievances at an artificial disadvantage relative to other grievances in which the complainant may freely testify.”¹⁵² Therefore, “whereas *Joachim* sought to protect the integrity of the judiciary by limiting judicial expert testimony, in Cantu’s case, excluding judicial testimony could have had the opposite effect by suggesting to the jury, at Cantu’s urging, that judges do not stand behind their accusations.”¹⁵³ Still, *Joachim* was found to be fundamentally different because, unlike the present case, the judge in *Joachim* had not participated in the prior proceedings, let alone conducted the prior proceedings.¹⁵⁴ Judge Isgur was a fact witness with expert knowledge of standard conduct.¹⁵⁵ The judge in *Joachim* was a hired expert whose role was to impress the judicial seal of approval on the plaintiff’s case.

But beyond distinguishing *Joachim*, the supreme court supported its opinion by citing to the Code of Conduct for United States Judges, specifically Canon 3(B)(6) and the corresponding commentary, which reads: “A judge should take appropriate action upon receipt of reliable information . . . that a lawyer violated applicable rules of professional conduct . . . reporting the conduct to the appropriate authorities . . . or otherwise cooperating with or participating in judicial or lawyer disciplinary proceed-

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (citing *Joachim v. Chambers*, 815 S.W.2d 234 (Tex. 1991)).

149. *Id.* at 782.

150. *Id.* at 783.

151. *Id.*

152. *Id.*

153. *Id.* at 784.

154. *Id.* at 785.

155. *Id.* at 785–86.

ings.”¹⁵⁶ The supreme court found the Texas Code of Judicial Conduct Canon 3(D)(2) and the Texas Disciplinary Rules of Professional Conduct 8.03(a) both comparable and supportive, considering the language of the Texas Code closely mirroring the federal code, and Judge Isgur’s obligation as a lawyer to “inform the appropriate disciplinary authority” if he became aware of any “professional conduct that raises a substantial question as to [a] lawyer’s honesty, trustworthiness or fitness as a lawyer.”¹⁵⁷ The Texas Code of Judicial Conduct comports: “A judge who receive[d] information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct should take appropriate action.”¹⁵⁸

Note however, while the supreme court found it proper, and perhaps necessary, for Judge Isgur’s testimony to be admitted, it also determined that any testimony about Cantu’s character would be improper.¹⁵⁹ Judge Isgur has not testified as to Cantu’s character when he “confirmed that he based his decisions as a judge in part on the credibility of witnesses” nor when he testified that he found certain of Cantu’s actions “frivolous things.”¹⁶⁰

III. HEALTHCARE LIABILITY

A. INTRODUCTION

During the Survey period, the Texas Supreme Court delivered law-clarifying and law-changing decisions relating to healthcare liability. A common theme found throughout the court’s decisions was that the court considered cases that turned on an issue of statutory interpretation. One such case even triggered the Texas legislature to amend statutory language after the supreme court interpreted the statutory text.

B. TEXAS SUPREME COURT CONCLUDES FALSIFYING MEDICAL RECORDS IS A HEALTHCARE LIABILITY CLAIM, RESOLVING COURTS OF APPEALS’ SPLIT

Those familiar with the Texas Medical Liability Act (TMLA) probably know that the TMLA places additional hurdles in front of claimants who want to bring a healthcare liability claim against a physician or healthcare provider. The TMLA, codified at Texas Civil Practice & Remedies Code Chapter 74, requires a claimant to provide an expert report within 120 days after the defendant files its original answer.¹⁶¹ The purpose of the expert-report provision is to “ensure frivolous claims are eliminated

156. *Id.* at 784.

157. *Id.*

158. *Id.* (citing TEX. CODE JUD. COND. CANON 3(D)(2), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. B).

159. *Id.* at 786.

160. *Id.*

161. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a).

quickly.”¹⁶² The expert-report requirement serves to dissuade claimants who bring frivolous claims for the purpose of extorting an undeserved settlement from the defendant that wants to avoid the very costly discovery process.

The events that gave rise to *Baylor Scott & White, Hillcrest Medical Center v. Weems* began with a plaintiff, Ruthen Weems (Plaintiff), who had previously been indicted on criminal charges of aggravated assault with a firearm.¹⁶³ Plaintiff then brought this action against Baylor, Scott & White, Hillcrest Medical Center (Baylor/Defendant) for intentional infliction of emotional distress, asserting that the only evidence leading to his indictment in his criminal case was a fraudulent medical report that a Baylor nurse prepared.¹⁶⁴ The issue the Texas Supreme Court addressed was whether a falsified-medical-records claim is a healthcare liability claim, and therefore subject to the TMLA’s expert-report requirements.¹⁶⁵

The nurse’s medical report pertained to the victim of the aggravated assault and described the victim’s injuries as a point-blank gunshot wound to the head.¹⁶⁶ In his pleadings, Plaintiff alleged that the nurse fabricated the report as a result of police coercion to cover up an unlawful entry into Plaintiff’s motel room and an illegal search.¹⁶⁷ To support his intentional infliction of emotional distress claim that the nurse knowingly, intentionally, and willingly falsified the report, Plaintiff further asserted that a forensics expert in his criminal case later contradicted the report and determined it was not possible the victim was shot.¹⁶⁸ Baylor invoked the TMLA’s civil-liability limitations as a defense in its answer and prematurely filed a TMLA dismissal motion, which effectively put Plaintiff on notice that his claims may be subject to the TMLA’s expert-report requirements.¹⁶⁹ While Plaintiff’s claims largely hinged on the truthfulness of his allegations that the forensic expert contradicted the nurse’s medical report, Plaintiff did not serve a report from that forensic expert, or any expert report, on the defendant as the TMLA requires.¹⁷⁰ Instead, Plaintiff asserted his intentional infliction of emotional distress claims were not medical malpractice claims subject to the TMLA’s additional expert-report requirements.¹⁷¹

This case highlighted the court of appeals’ split by way of its procedural posture. The case arose in the Tenth Waco Court of Appeals, but the Waco court transferred the appeal to the Sixth Texarkana Court of Ap-

162. *Baylor Scott & White, Hillcrest Med. Ctr. v. Weems*, 575 S.W.3d 357, 363 (Tex. 2019).

163. *Id.* at 361.

164. *Id.*

165. *Id.* at 360–61.

166. *Id.* at 361.

167. *Id.*

168. *Id.* at 362.

169. *Id.*

170. *Id.*

171. *Id.*

peals due to a docket-equalization order.¹⁷² In its curt two-paragraph opinion, the Texarkana court restated its previously-established disagreement with the Waco court on this issue.¹⁷³ The Texarkana court had to apply Waco precedent pursuant to Texas Rule of Appellate Procedure 41.3, however, because it had received the case pursuant to the docket-equalization order.¹⁷⁴ The supreme court acknowledged the split and took the opportunity to resolve the divide.¹⁷⁵

As noted by the supreme court, the TMLA defines a healthcare liability claim as:

a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.¹⁷⁶

The supreme court had to determine whether Plaintiff's intentional infliction of emotional distress claim based on falsified medical records fell within this statutory definition as a matter of law.¹⁷⁷ A rebuttable presumption arises that a claim is a healthcare liability claim under the TMLA when the claim is "based on facts implicating the defendant's conduct during the course of a patient's care, treatment, or confinement."¹⁷⁸ It may not be immediately obvious that an intentional infliction of emotional distress claim¹⁷⁹ such as this one—where the claimant has no relation to the patient who was the subject of the medical care—is properly characterized as a healthcare liability claim. The court noted, however, that how plaintiffs title their claims is not dispositive of whether the TMLA applies.¹⁸⁰ Because the facts Plaintiff alleged in his pleadings implicated Defendant's conduct during the course of a patient's care, treatment, or confinement, Plaintiff had the burden to first rebut the presumption the TMLA applied.¹⁸¹ What is notable is that while the defendant must be a healthcare provider or physician for the claim to be subject to the TMLA, there are no similar restrictions on the claimant's

172. *Id.*

173. *Weems v. Baylor, Scott & White, Hillcrest Med. Ctr.*, 566 S.W.3d 293, 294 (Tex. App.—Texarkana 2017), *rev'd*, 575 S.W.3d 357 (Tex. 2019) (citing *Benson v. Vernon*, 303 S.W.3d 755, 759 (Tex. App.—Waco 2009, no pet.); see *TTHR, L.P. v. Coffman*, 338 S.W.3d 103, 111 n.2 (Tex. App.—Fort Worth 2011, no pet.) ("The [Waco] court offered no analysis to support its distinction of [the falsifying-medical-records] claim from the other [healthcare liability] allegations made We therefore do not find *Benson* persuasive on this issue.")).

174. *Weems*, 575 S.W.3d at 362 n.6.

175. *Id.*

176. *Id.* at 363 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13)).

177. *Id.*

178. *Id.*

179. Plaintiff also pled fraud in his appellate brief, which the court included in its analysis. *Id.*

180. *Id.* ("As our precedent makes clear, a party cannot avoid Chapter 74's requirements and limitations through artful pleading.").

181. *Id.*

characterization; the claimant does not need to be the patient, the patient's guardian, or a "friend of the patient" to bring a claim on behalf of the patient.¹⁸²

Once the court determined Plaintiff did not overcome the rebuttable presumption that the TMLA applied, it made quick work in determining Plaintiff's claim fell well within the TMLA's definition of a healthcare liability claim because the claim (1) "alleged [a] departure from accepted standards of 'professional or administrative services directly related to health care'"; and (2) caused plaintiff's injuries.¹⁸³ With respect to causation, the supreme court noted the TMLA is not limited to bodily injury as the statutory definition contemplates causes of action that sound in tort or contract.¹⁸⁴ The supreme court then looked to the statutory definitions in the Texas Administrative Code to conclude that accurately recording diagnoses in a medical record is a professional or administrative service the Department of State Health Service and the Texas Medical Board require.¹⁸⁵

The final step in deconstructing the statutory definition of what is considered a healthcare liability claim in this case was whether falsifying medical records "directly related" to healthcare.¹⁸⁶ This inquiry was a somewhat closer call for the supreme court—and was where the Texarkana and Waco courts of appeals disagreed—yet the supreme court had little difficulty in determining that falsifying medical records is directly related to health care.¹⁸⁷ After reciting the definitions of "[d]irectly related"¹⁸⁸ and "[h]ealth care,"¹⁸⁹ and reciting the statutory requirements requiring accuracy and accessibility of medical records,¹⁹⁰ the supreme court agreed with the Texarkana court of appeals when it concluded that creating and maintaining accurate medical records is a professional or administrative service directly related to healthcare.¹⁹¹ The reasoning the supreme court offered in making this determination was that physicians base their treatment on previous or current diagnoses and therefore accurate medical records are imperative to keep physicians properly informed.¹⁹² However, the supreme court did not overturn the previous conflicting Waco court of appeals decision in its entirety on this issue. The court in *Benson* did not elaborate on the circumstances surrounding the falsified medical records in that case or whether the physician fabricated

182. *See id.* at 363–64, 364 n.19.

183. *Id.* at 364.

184. *Id.* at 364 n.22 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13)).

185. *Id.* at 364–65 (first citing 25 TEX. ADMIN. CODE §§ 133.121(1), (1)(B), 133.41(j)(1), (j)(4); then citing 22 TEX. ADMIN. CODE §§ 160.20(5), 165.1(a), (a)(1)(B), (a)(10)).

186. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.153; *Weems*, 575 S.W.3d at 365.

187. *See Weems*, 575 S.W.3d at 365.

188. *Id.* (citing CHRISTUS Health Gulf Coast v. Carswell, 505 S.W.3d 528, 536 (Tex. 2016)).

189. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10)).

190. *Id.* (citing 22 TEX. ADMIN. CODE §§ 165.1(a), a(2), (a)(10)).

191. *Id.* (citing TTHR, L.P. v. Coffman, 338 S.W.3d 103, 109 (Tex. App.—Fort Worth 2011, no pet.)).

192. *See id.*

medical records in their entirety.¹⁹³ To the extent a falsified medical record has no nexus to a patient's care—or possibly in situations where it is uncertain whether any patient or any care ever even existed, e.g., cases of fraud—the supreme court did not reach the issue.¹⁹⁴ This open question leads one to make a reasonable inference that completely manufactured records may not fall under the TMLA.¹⁹⁵ For now, however, falsified-medical-records claims do fall under the TMLA under ordinary circumstances.

C. “IN A” COMMA, THE SUPREME COURT PROMPTS THE LEGISLATURE TO CHANGE THE LAW ON EMERGENCY CARE

In late 2018, the Texas Supreme Court delivered an opinion radical enough to spur the Texas legislature to quickly amend the TMLA section that the supreme court interpreted. This section is one of several that relate to the negligence standard a claimant must show to hold a physician liable for deviating from the ordinary standard of care when the physician provides emergency medical services. The supreme court's opinion demonstrates the importance of punctuation in statutory construction and provides a reminder to the legislature it will not soon forget.

The facts of this case are fairly straightforward: a mother checked into the obstetrical unit of Texas Health Presbyterian Hospital of Denton the night before giving birth and the decision was made to induce labor the following day at thirty-nine weeks.¹⁹⁶ Complications arose during delivery that resulted in permanent nerve damage to the baby's shoulder.¹⁹⁷ Notably, the complications (the emergency) arose during the ordinary course of labor and delivery.¹⁹⁸ The parents sued the hospital, the delivering doctor, and his practice group, claiming the doctor's and attending nurse's negligence caused their child's injuries.¹⁹⁹ The only issue on this interlocutory appeal was the doctor's claim that Section 74.153 of the TMLA prevented the family from recovering based on only ordinary negligence and instead required the parents to show the doctor acted with willful and wanton negligence.²⁰⁰ The dispute was that the doctor argued the willful and wanton negligence standard applied at all times in the hospital's obstetrical unit while the family argued it applied only immediately after the patient had been examined in the hospital's emergency department.²⁰¹ The trial court granted summary judgment in favor of the doctor

193. See *Benson v. Vernon*, 303 S.W.3d 755, 759–60 (Tex. App.—Waco 2009, no pet.); *id.* at 767 (Gray, C.J., concurring and dissenting).

194. See *Weems*, 575 S.W.3d at 366 n.39.

195. See *id.*

196. *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 128 (Tex. 2018).

197. *Id.*

198. See *id.*

199. *Id.* at 128–29.

200. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.153; *Tex. Health Presbyterian Hosp. of Denton*, 569 S.W.3d at 129.

201. *Tex. Health Presbyterian Hosp. of Denton*, 569 S.W.3d at 129–30.

on this issue, but the Second Fort Worth Court of Appeals reversed and remanded after it first found the statute's language ambiguous.²⁰² By accepting the doctor's petition for review, the supreme court halted a line of precedent that had started to stem from the court of appeals' opinion.²⁰³ Although the supreme court ultimately disagreed with the court of appeals' opinion, the court of appeals' analysis is instructional to understand the legislature's intent when it enacted the TMLA's provisions relating to the negligence standard applicable when providing emergency medical care.

A facial reading of Section 74.153 shows that the statute provides a semi-safe harbor for physicians providing medical care under emergency situations where the physician may be "operating blind" without the benefit of knowing the patient's medical history.²⁰⁴ Under Section 74.153, a claimant must show the physician deviated from accepted medical standards by willful and wanton negligence when the physician is providing emergency medical care rather than mere ordinary negligence, which is applicable in the TMLA's non-emergency care provisions.²⁰⁵ The relevant language of Section 74.153 as the statute existed when the supreme court issued its opinion in this case stated that to impose liability, a plaintiff must show willful and wanton negligence when the physician or healthcare provider performs emergency medical care: "in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department."²⁰⁶ The court of appeals considered why Section 74.153 provides the heightened standard and semi-safe harbor by first applying the "Related Statutes" canon.²⁰⁷ The court of appeals viewed Section 74.153's immediately preceding and succeeding sections, which also relate to providing emergency care services, as instructional to determine what level of negligence the legislature intended when it enacted Section 74.153.²⁰⁸ The court explained:

These four statutes, read together, signal a concern that in circumstances when emergency medical care must occur in the dark—when medical care providers or first responders perform blindfolded as to

202. *D.A. v. Tex. Health Presbyterian Hosp. of Denton*, 514 S.W.3d 431, 432 (Tex. App.—Fort Worth 2017), *rev'd*, 569 S.W.3d 126 (Tex. 2018).

203. *Tex. Health Presbyterian Hosp. of Denton*, 569 S.W.3d at 129–30; *see, e.g.*, *Glenn v. Leal*, 546 S.W.3d 807 (Tex. App.—Houston [1st Dist.] 2018), *review granted, judgm't rev'd*, 596 S.W.3d 769 (Tex. 2020) (*per curiam*).

204. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.153; *see also D.A.*, 514 S.W.3d at 442.

205. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 74.151 (willful and wanton negligence is the applicable standard to situations providing emergency medical care), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 74.101 (ordinary negligence standard is the applicable standard when providing medical care to a patient with informed consent and a knowledge of the patient's medical history).

206. *Tex. Health Presbyterian Hosp. of Denton*, 569 S.W.3d at 129.

207. *D.A.*, 514 S.W.3d at 440–42.

208. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.151, 74.152, 74.154; *D.A.*, 514 S.W.3d at 440–41.

the recipient's relevant past and current medical conditions—those medical care providers should not be held to a standard of ordinary negligence. Instead, before the beneficiary of emergency medical care administered under such inauspicious circumstances may seek damages for negligent care received, he or she must prove that the medical care provider deviated from the standard of care by a willful and wanton degree.²⁰⁹

According to the court of appeals, the “Related Statutes” canon suggested the purpose of the heightened negligence standard that applies in the emergency care situation is to protect those who must provide emergency medical care without first having the opportunity to review the patient's medical history.²¹⁰

The court of appeals next looked to the statute's legislative history and concluded that the legislature contemplated almost this exact scenario when enacting this provision.²¹¹ A discussion between Senators Ratliff and Hinojosa explained that the heightened negligence standard of Section 74.153 applies only when the patient goes immediately to an obstetrical unit from the emergency room but not during emergencies that arise during the normal course of labor and delivery or that arise after the patient has been stabilized.²¹² A similar conversation in the Texas House of Representatives between Representatives Eiland and Nixon confirms what the court suggested when applying the “Related Statutes” canon—the purpose behind the heightened negligence standard is to protect only those providing emergency care without the benefit of the patient's medical history.²¹³

The supreme court disagreed and concluded Section 74.153's language is unambiguous.²¹⁴ When statutory language is unambiguous, courts are prohibited from considering extrinsic aids such as legislative intent.²¹⁵ As the supreme court explained, an unambiguous statute's plain language is the best evidence of the legislature's intent because it is the final voted-upon version of the law; not even the statements of the bill's author or sponsor can provide insight into the “understandings, intentions, or motives of the many other legislators who vote in favor of a bill.”²¹⁶ The court's “responsibility is to construe the language the legislature enacted, not to determine what the legislature or any individual legislators may have meant to enact.”²¹⁷

The supreme court homed in on two key parts of the statute's text. The first was the phrase “in a” that preceded “hospital emergency depart-

209. *D.A.*, 514 S.W.3d at 442.

210. *See id.*

211. *Id.* at 442–43.

212. *Id.* at 443 (citing S.J. of Tex., 78th Leg., R.S. 5003, 5004 (2003)).

213. *See id.* (citing H.J. of Tex., 78th Leg., R.S. 6040 (2003)).

214. *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 135 (Tex. 2018).

215. *See id.* at 135 (citing *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016)).

216. *Id.* at 136–37.

217. *Id.* at 137.

ment” and “surgical suite” but not “obstetrical unit.”²¹⁸ The second textual piece the supreme court focused on was the notable omission of a comma following either “obstetrical unit” or “surgical suite.”²¹⁹ The omitted commas informed the supreme court as to when Section 74.153’s heightened standard applies.²²⁰ Had a comma followed “surgical suite,” the supreme court explained, the phrase beginning “immediately following” would modify all three locations in the series: hospital emergency department, obstetrical unit, and surgical suite.²²¹ But if a comma instead appeared after “obstetrical unit,” the phrase “immediately following” would have only modified the surgical suite location.²²² An absence of both commas, as was the case in this version of the statute, however, rendered the language ambiguous.²²³

The supreme court dissected Section 74.153 and explained the physician’s interpretation would imply the legislature intended the statute be read such that the wanton and willful negligence standard applies when physicians provide emergency medical care:

- [1] in a hospital
 - [a] emergency department or
 - [b] obstetrical unit or
- [2] in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department.²²⁴

Reading the statute this way means that the phrase “immediately following” only modifies “surgical suite” and not “obstetrical unit.” Therefore, under this interpretation the willful and wanton standard applies at *all* times in an obstetrical unit, but in a surgical suite only when the patient just left the emergency room.

On the other hand, the family’s interpretation requires reading the statute such that the willful and wanton negligence standard applies when a physician provides emergency medical care:

- [1] in a
 - [a] hospital emergency department or
 - [b] obstetrical unit or
 - [c] in a surgical suite
- [2] immediately following the evaluation or treatment of a patient in a hospital emergency department.²²⁵

Applying this interpretation, because the statute makes no distinction between the three hospital areas, the willful and wanton negligence standard applies in equal force to all three locations but only right after the patient was evaluated in the emergency room. Looking at the statute’s

218. *Id.* at 133.

219. *Id.* at 131.

220. *See id.*

221. *Id.* at 132.

222. *Id.*

223. *Id.*

224. *Id.* at 130.

225. *Id.*

language as the supreme court dissected it, one notices a glaring inconsistency in the family's interpretation—"in a" appears in [1] and [c], but not in [a] or [b].²²⁶ By deleting the second "in a," according to the family's interpretation, the statute's meaning would not change, but would actually become more clear.²²⁷ Therefore, the supreme court could not ignore the second "in a" and concluded the "surgical suite" phrase must be considered as a phrase distinct from the two preceding phrases in the series.²²⁸ According to the supreme court, the physician's interpretation of the statute was the only reasonable interpretation in light of the fact that "in a" preceded only "hospital emergency department" and "surgical suite" but not "obstetrical unit" as far as where in the hospital the heightened negligence standard applies.²²⁹

While the absence of any commas made the statute ambiguous, the omission of "in an" before "obstetrical unit" was ultimately determinative for the supreme court. This meant the only reasonable interpretation was the physician's interpretation that the willful and wanton standard applied in obstetrical units at all times, regardless of whether the patient was evaluated in the emergency room immediately beforehand.²³⁰ Therefore, the supreme court reversed the court of appeals' holding and reinstated the trial court's decision which granted summary judgment to the physician.²³¹

After the supreme court's interpretation of the statute as written, the legislature quickly responded to amend the statute. The legislature passed House Bill 2362 by a vote of 107–36 in the House and 28–3 in the Senate.²³² The bill's author described the intent behind amending the statute by stating: "The law relating to the standard of proof for medical malpractice cases is overbroad and has led to unnecessary lawsuits. H.B. 2362 attempts to address this issue by specifying certain situations where the standard of proof does not apply."²³³ The statute's amended text, which went into effect September 1, 2019, reads:

[(a) Except as provided by Subsection (b), in] 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 or [, in an] obstetrical unit[,] or in a surgical suite immediately following the

226. *See id.* at 133.

227. *Id.*

228. *Id.* at 132–133 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 141 (2012)). The supreme court seemed unconcerned that this interpretation also seems to illogically suggest that the willful and wanton negligence standard would apply in a hospital emergency department only after the patient had just been seen in a hospital emergency department.

229. *Id.* at 131, 133–35.

230. *Id.* at 135, 137.

231. *Id.* at 137.

232. *See* H.J. of Tex., 86th Leg., R.S. 3170 (2019); S.J. of Tex., 86th Leg., R.S. 2613 (2019).

233. *See* House Comm. on Judiciary & Civil Jurisprudence, Bill Analysis, Tex. H.B. 2362, 86th Leg., R.S. (2019).

evaluation or treatment of a patient in a hospital emergency department, the claimant bringing the suit may prove that . . . the physician or health care provider departed from accepted standards of medical care or health care only if the claimant shows . . . that the physician or health care provider, with willful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider²³⁴

The amended language appears to successfully reflect the legislature's intent that the heightened negligence standard applies only when a physician is effectively "operating blind" without the benefit of the patient's medical history. The legislature further narrowed the safe-harbor provision by adding subsection (b), which reduced the standard to ordinary negligence once the patient was stabilized and had been receiving non-emergency medical treatment.²³⁵ Whether the amendment will have the desired effect still remains to be seen.²³⁶

While the physician and practice group in this case were exonerated, the win for the amici curiae who briefed the issues in support of the physician was short-lived. The amici brief argued (1) the court of appeals' textual reading of the statute was incorrect; and (2) that reading was inconsistent with the realities of childbirth.²³⁷ The amici consisted of the Texas Alliance for Patient Access, the Texas Medical Association, the Texas Osteopathic Medical Association, the Texas Hospital Association, the Texas Association of Obstetricians and Gynecologists, and the American College of Obstetricians and Gynecologists,²³⁸ all of which understandably had a strong interest in the supreme court interpreting the statute to apply the heightened negligence standard at all times in the obstetrical unit. Because the supreme court agreed with the amici's textual interpretation, it did not need to reach the merits of the realities the amici presented that occurred in delivery rooms.

Regardless of how biased they may be, the amici present a compelling argument concerning the reality of the situations that obstetrical units regularly face—an argument that highlights scenarios that cut against

234. TEX. CIV. PRAC. & REM. CODE ANN. § 74.153. Brackets and strikethroughs included to assist in comparing the relevant amended text.

235. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.153(b).

236. In its opinion delivered on February 21, 2020—after the Survey period—the supreme court reversed and remanded *Glenn* without entertaining oral arguments in light of its decision in this case, which had already abrogated *Tex. Health*. See *Glenn v. Leal*, 596 S.W.3d 769 (Tex. 2020); see also *Tex. Health Presbyterian Hosp. of Denton*, 569 S.W.3d at 130 n.4. Without expressly referencing the legislature's 2019 amendment, the court may have considered the legislature's response to its opinion in this case because the court reversed and remanded *Glenn*, rather than reversed and rendered, concluding the trial court committed reversible error by giving an erroneous jury charge. *Glenn*, 596 S.W.3d at 772.

237. See Brief for Texas Alliance for Patient Access et al. as Amici Curiae supporting Petitioners at 10–11, 13, *Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126 (Tex. 2018) (No. 17-0256).

238. *Id.* at 4.

what the legislature may have thought they enacted.²³⁹ In their second issue, the amici argued that obstetrical units regularly receive patients to whom they provide emergency care regardless of whether the patient was first admitted to the emergency room.²⁴⁰ The amici noted that to apply the heightened negligence standard only after the patient has been seen in the emergency room will incentivize hospitals to reroute patients first through the emergency room before reaching the obstetrical unit where the patient would presumably receive more appropriate care.²⁴¹ Moreover, some hospitals have policies in place that require “patients past a certain point in their pregnancy to be seen in the obstetrical unit instead of the emergency department except in cases of trauma,” such as a car wreck.²⁴²

The consequence of the statute’s amended language, if one gives credence to the amici’s assertions, is that hospitals may need to either (1) amend their policies to permit late-term pregnancy patients to be admitted to the emergency room, which could have obvious unintended negative consequences if such a policy causes a delay in, or effectively prohibits, transferring the emergency patient to an obstetrical unit that is better equipped to handle labor and delivery; or (2) enhance their emergency room facilities and physicians to rival better-equipped obstetrical units. Either solution is arguably inefficient and unnecessary given the availability and expertise of obstetrical units. A simple solution would have been to remove the “immediately following” qualifier and instead have amended the statute to state exactly what the legislature appears to have intended, at least with respect to obstetrical units: the willful and wanton negligence standard applies when the patient arrives at the obstetrical unit only under emergency circumstances and while those circumstances persist, and when the attending physician must provide emergency medical care without the ability to evaluate the patient’s medical history.²⁴³

Nevertheless, it is encouraging to see the legislature take action to correct a misunderstanding when it believes the law has been interpreted in a way that it did not intend.

239. See House Comm. on Judiciary & Civil Jurisprudence, Bill analysis, Tex. H.B. 2362, 86th Leg., R.S. (2019).

240. Brief for Texas Alliance for Patient Access et al. as Amici Curiae supporting Petitioners, *supra* note 237, at 13.

241. *Id.* at 14.

242. *Id.* at 13–14.

243. See, e.g., S.J. of Tex., 78th Leg., R.S. 5003–04 (2003); H.J. of Tex., 78th Leg., R.S. 6040 (2003).

