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Up to Interpretation—Highlighting the Texas Supreme Court's "Ambiguous" Approach to Statutory Construction

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A. The Decision

In *Texas Health Presbyterian Hospital of Denton v. D.A.*,[1] the Texas Supreme Court engaged in flawed logical reasoning and employed inconsistent legal standards to find that a statute was unambiguous. Moreover, the Texas Supreme Court's decision in *Texas Health* demonstrates the court's willingness to invoke conflicting analytical approaches and precedent to achieve a desired outcome. This malleable approach to statutory interpretation questions in *Texas Health* and in prior cases has created a minefield of uncertainty as to how future statutory interpretation issues in Texas will be analyzed and resolved.

In *Texas Health*, the plaintiff-family alleged that the defendant-doctor negligently delivered their baby.[2] The family sought to recover under an ordinary negligence theory, but the doctor claimed that the Texas Medical Liability Act (the Statute) required the family to prove willful and wanton negligence to recover.[3] To resolve this issue, the Texas Supreme Court was charged with interpreting the Statute to determine which neg-

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1. 569 S.W.3d 126 (Tex. 2018).
2. *Id.* at 128–29.
3. *Id.* at 129.

ligence theory applied.[4] The relevant portion of the Statute required the family to prove that the doctor acted with willful and wanton negligence if the claim arose out of 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."[5] The sole issue in the case was whether the phrase "immediately following the evaluation or treatment of a patient in a hospital emergency department" (the Phrase) only applied to care "in a surgical suite" or whether it also referenced care in a "hospital emergency department" and an "obstetrical unit."[6]

The family argued that the Phrase modified all three locations, and thus the Statute did not apply.[7] Because the doctor did not provide the care at issue in an obstetrical unit "immediately following the evaluation or treatment of [the] patient in a hospital emergency department," the family argued that they could recover under an ordinary negligence theory.[8]

The doctor argued that the Phrase only referenced care performed "in a surgical suite," and thus the Statute did apply.[9] Under his interpretation, the willful and wanton negligence standard applied to all emergency care that occurred in obstetrical units, regardless of any "evaluation or treatment" beforehand.[10] Thus, the doctor argued that the family could not recover on the basis of ordinary negligence.[11]

The court ultimately concluded that the Phrase applied only to care "in a surgical suite," and thus the family was required to prove willful and wanton negligence.[12] First, the court reasoned that if the Phrase applied to all three locations, then the insertion of "in a" before "surgical suite" but not "obstetrical unit" would be surplusage, and its deletion would not alter the Statute's meaning.[13] Moreover, the court found that if the Phrase applied to care "in a hospital emergency department," the construction would create a redundancy that would render the Statute "ineffective when it is needed most."[14] Finally, the court refused to consider extrinsic aids because, according to the court, the Statute's language was unambiguous.[15]

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4. *Id.*

5. *Id.* The Texas legislature amended the statute in 2019, including various revisions and exceptions to the statute's applicability. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.153(a) (West 2011). This note intends to analyze the Texas Supreme Court's statutory interpretation methodology rather than the current version of § 74.153.

6. *Tex. Health*, 569 S.W.3d at 130.

7. *Id.*

8. *Id.*

9. *Id.* at 129–30.

10. *See id.*

11. *Id.* at 129.

12. *Id.* at 137.

13. *Id.* at 133.

14. *Id.* at 135.

15. *Id.* at 135–36.

B. Logical Flaws and Legal Inconsistencies

The Texas Supreme Court's decision in *Texas Health* "created more questions than it answered."[16] Not only did the court shamelessly contradict itself, but it also used blatantly distinguishable analogies and misapplied well-established canons of statutory construction to conclude that the Statute was unambiguous. As a result, the court's analysis has been characterized as "puzzling," "a case of poor statutory interpretation," and perhaps even a "bad-faith, results-oriented exercise in raw judicial activism."[17]

First, the court utilized questionable analogies and logic when it concluded that the Phrase applied only to care "in a surgical suite."[18] The court began its discussion by conceding that the Statute was "an unpunctuated phrase containing a modifier that—in light of its location within the phrase—*could modify the entire series or only the last item in the series*."[19] The court even equated the Statute to one that the Court of Criminal Appeals found "ambiguous because 'it [was] not punctuated at all.'"[20] Yet, in the same breath, the court attempted to justify its assertion that the Statute at issue was actually *unambiguous* by analogizing the Statute to others that *were* punctuated.[21] In one analogy, the court acknowledged that the inclusion of commas was a factor (in fact, a leading factor) that led the Supreme Court of the United States to conclude that a statute was unambiguous.[22] In short, the Texas Supreme Court first equated the Statute to a similar, unpunctuated statute that was ambiguous; yet, the court concluded that the Statute was unambiguous by comparing it to dissimilar, punctuated statutes. This analogical reasoning is suspect to say the least, especially given the court's explicit recognition that "the lack of punctuation provide[d] no clear indication either way."[23] A modifying phrase that "could modify the entire series"[24] and lacks any clarifying punctuation is certainly ambiguous. In fact, just two years before *Texas Health*, the Texas Supreme Court relied on the fact that "punctuation 'will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part.'"[25] In *Texas Health*, however, the court seemed to be merely speculating how the Texas legislature

16. Robert Painter, *Texas Supreme Court Opinion Changes Birth Injury Standard of Proof*, Hous. Law., May/June 2019, at 44, 44.

17. Patrick Luff et al., *Emergency Medical Care in Chapter 74: Substantive Definitions and Interpretive Quandaries*, 51 Tex. Tech L. Rev. 785, 801 (2019).

18. *See Tex. Health*, 569 S.W.3d at 137.

19. *Id.* at 132 (emphasis added).

20. *Id.* at 131–32 (quoting Ludwig v. State, 931 S.W.2d 239, 242 (Tex. Crim. App. 1996)).

21. *See id.* at 133–34.

22. *See id.* at 134 (discussing United States v. Ron Pair Enters., 489 U.S. 235, 235 (1989) (holding that a phrase was unambiguous because it was "set aside by commas, and separated from the reference to [other terms] by the conjunctive words 'and any' . . . .")).

23. *Id.* at 132.

24. *Id.*

25. Sullivan v. Abraham, 488 S.W.3d 294, 297 (Tex. 2016) (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 161 (2012)).

would have wanted that Statute to be read—a task that is both impracticable and inappropriate for the court to undertake.[26]

Furthermore, the court misapplied Texas precedent when it concluded that the omission of "in a" before "obstetrical unit" permitted only one possible interpretation.[27] Specifically, the court asserted that the inclusion of "in a" before "surgical suite" but not "obstetrical unit" *required* the conclusion that the Phrase applied only to surgical suites.[28] While the court's interpretation is reasonable, such a conclusion is not required. The Texas Supreme Court has explicitly stated that "redundancy is not determinative."[29] While the court "should avoid, *when possible*, treating statutory language as surplusage, *there are times when redundancies are precisely what the Legislature intended*."[30] The Texas legislature's inclusion of "in a" before "surgical suite" does not require any particular interpretation. Rather, the legislature could have simply included the phrase "out of an abundance of caution, for emphasis, or both."[31] Bizarrely, the court even recognized that the legislature may "mistakenly enact language that . . . does not accurately reflect its collective intent."[32] Yet somehow, the legislature's inclusion of the seemingly insignificant phrase "in a" before "surgical suite" unambiguously reflected its collective intent. The issue in *Texas Health* is not whether the court's interpretation is reasonable; the issue is the Statute (especially given its lack of punctuation) did not "yield a single inescapable" result to limit inquiry to the text alone,[33] and the court's logical and legal justifications for finding no ambiguity whatsoever were sparse, flawed, and unconvincing.

Perhaps the most glaring legal flaw in the court's analysis was interpreting the Statute in isolation rather than considering the entire statutory scheme. When interpreting a statute, the court "*must always* consider the statute as a whole rather than its isolated provisions."[34] In 2019, the Texas

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26. *See* SCALIA & GARNER, *supra* note 25, at 95 ("The search for what the legislature 'would have wanted' is invariably either a deception or a delusion.").

27. *See* Luff, *supra* note 17, at 802 (describing the court's explanation as a "bewildering attempt to demonstrate that the statute [was] unambiguous" by suggesting that "the simple absence of 'in a' before 'obstetrical unit' render[ed] [the statute] capable of only one linguistic meaning").

28. *Tex. Health*, 569 S.W.3d at 133 ("By repeating the use of 'in a' before the third item in the series, the language *requires* the conclusion that the third item be treated differently.") (emphasis added)).

29. *See, e.g.*, TIC Energy & Chem., Inc. v. Martin, 498 S.W.3d 68, 77 (Tex. 2016); *see also* United States v. Atl. Research Corp., 551 U.S. 128, 137 (2007) (explaining that "[i]t is appropriate to tolerate a degree of surplusage").

30. *In re* Estate of Nash, 220 S.W.3d 914, 917–18 (Tex. 2007) (emphasis added) (citations omitted).

31. *See In re* City of Georgetown, 53 S.W.3d 328, 336 (Tex. 2001) (noting that redundancies may mean that "the Legislature repeated itself out of an abundance of caution, for emphasis, or both").

32. *Tex. Health*, 569 S.W.3d at 137.

33. *See* Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson, 209 S.W.3d 644, 651–52 (Tex. 2006) (stating that "when a statute's words are unambiguous and yield a single inescapable interpretation, the judge's inquiry is at an end").

34. Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001) (emphasis added); *see also* SCALIA & GARNER, *supra* note 25, at 167 (noting that "the judicial interpreter

Supreme Court reiterated this fundamental tenet of statutory interpretation:

> 'Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes.' As we have so often said, text cannot be divorced from context. We generally 'rely on the plain meaning of a statute's words' to discern legislative intent, but we cannot construe the Legislature's chosen words and phrases in isolation. That is, *we must 'consider the context and framework of the entire statute' and construe it as a whole*.[35]

Even Texas statutory law mandates a consideration of the entire statutory scheme, providing that "[w]ords and phrases *shall be read in context* and construed according to the rules of grammar and common usage."[36]

In this case, however, the court did not construe the phrase at issue within the context and framework of the entire Statute. Unlike the lower court's lengthy evaluation of the entire statutory scheme,[37] the Texas Supreme Court simply avoided such a discussion (thus violating its own precedent).[38] Had the court done so, it may have concluded that the legislature was focused "more on *when* rather than *where* the care was administered."[39] In any event, the court's inconsistent interpretation of statutes, either within context or in isolation, leads to a dangerously flexible approach to future statutory construction issues. In effect, the Texas Supreme Court has given itself leeway to employ contradictory analyses and precedent to achieve a desired result[40]—a practice that is impossible for attorneys and litigants to anticipate.

C. The Proper Role of § 311.023

Arguably more troublesome than the Texas Supreme Court's shaky logical reasoning and legal analysis in *Texas Health* is the role of Code Construction Act § 311.023 in future statutory interpretation cases. Section 311.023 allows a court to consider extrinsic aids, such as legislative history and the statute's objective, to construe a statute "whether or not the statute is considered ambiguous on its face."[41]

In *Texas Health*, the court declined to utilize § 311.023 after finding the

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[must] consider the entire text, in view of its structure and of the physical and logical relation of its many parts").

35. Worsdale v. City of Killeen, 578 S.W.3d 57, 69 (Tex. 2019) (emphasis added) (citations omitted).

36. Tex. Gov't Code Ann. § 311.011(a) (West 2013) (emphasis added).

37. *See* D.A. v. Tex. Health Presbyterian Hosp. of Denton, 514 S.W.3d 431, 440–42 (Tex. App.—Fort Worth 2017), *rev'd*, 569 S.W.3d 126 (Tex. 2018).

38. *See In re* Office of the Att'y Gen. of Tex., 456 S.W.3d 153, 155 (Tex. 2015) (acknowledging that § 311.011 mandates statutory construction "in the context of the statute's surrounding provisions").

39. *Tex. Health*, 514 S.W.3d at 442.

40. A court should not adjust its statutory interpretation methodology to accomplish what it thinks is a fair result. *See* Scalia & Garner, *supra* note 25, at 174 ("A provision that seems to the court unjust or unfortunate . . . must nonetheless be given effect.").

41. Gov't § 311.023.

Statute unambiguous.[42] The court reasoned that "[a]lthough [§ 311.023] may grant us legal permission, not all that is lawful is beneficial."[43] Nevertheless, the court still found it necessary to proffer dicta as to why legislative history was unhelpful.[44] The court disregarded statements made by legislators that seemed to be at odds with the court's interpretation because "statements explaining *an individual legislator's* intent cannot reliably describe *the legislature's* intent."[45] While this assertion is valid under Texas precedent,[46] the court glossed over the fact that "the Senate *voted unanimously* to publish portions of these debates '*to establish legislative intent regarding*' the bill."[47]

In other cases, however, the Texas Supreme Court has recognized that § 311.023 can be invoked even when a statute is unambiguous on its face.[48] In *Ojo v. Farmers Group, Inc.*, for example, the court resorted to extrinsic aids even when the provision of the Insurance Code at issue was "void of any language" that caused ambiguity.[49] In fact, "[t]he Court nowhere state[d]—or even suggest[ed]—the Insurance Code is ambiguous."[50] Nevertheless, the court insisted on consulting extrinsic aids for more evidence of legislative intent.[51] Justice Willett issued a concurring opinion highlighting the inconsistencies in the court's statutory interpretation jurisprudence:

> If there is no ambiguity, 'that is the end of the inquiry.' Today, with whiplash-inducing speed, the Court says the opposite, that even *absent* ambiguity, it will consider an agency's construction of the statute—and not merely as noninterpretive 'background,' but rather, as the Court declares, 'to determine the Legislature's intent.'[52]

The court's departure from textualism in *Ojo* is not as anomalous as Justice Willett suggested; the court has resorted to extrinsic aids even without finding ambiguity on multiple occasions.[53]

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42. Tex. Health Presbyterian Hosp. of Denton v. D.A., 569 S.W.3d 126, 136 (Tex. 2018).

43. *Id.* (citation omitted).

44. *See id.* at 136–37.

45. *Id.* at 136.

46. *See, e.g.*, AT & T Commc'ns of Tex., L.P. v. Sw. Bell Tel. Co., 186 S.W.3d 517, 528–29 (Tex. 2006) ("[T]he statement of a single legislator, even the author and sponsor of the legislation, does not determine legislative intent.").

47. *See Tex. Health*, 569 S.W.3d at 136 n.14 (emphasis added) (citation omitted).

48. *See, e.g.*, Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 433 (Tex. 2011); *see also* Helena Chem. Co. v. Wilkins, 47 S.W.3d 486, 493 (Tex. 2001).

49. *Ojo*, 356 S.W.3d at 434.

50. *Id.* at 440 (Willett, J., concurring in part) (citations omitted).

51. *Id.* at 433 (majority opinion).

52. *Id.* at 443 (Willett, J., concurring in part) (internal citations omitted).

53. *See, e.g.*, Franka v. Velasquez, 332 S.W.3d 367, 381 n.66 (Tex. 2011) (quoting Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 290–93 (2005) (discussing the legislative history of House Bill 4)); Klein v. Hernandez, 315 S.W.3d 1, 6 (Tex. 2010) (invoking § 311.023 and consulting legislative history); Harris Cty. Dist. Att'y's Office v. J.T.S., 807 S.W.2d 572, 573–74 (Tex. 1991) (finding the Code Construction Act "control[ling]" even absent ambiguity).

Section 311.023 has also led to discrepancies between the Texas Supreme Court and the Court of Criminal Appeals. While the Court of Criminal Appeals refuses to address § 311.023 by claiming that legislative attempts "'to control the attitude or the subjective thoughts of the judiciary' violate the separation of powers doctrine," the Texas Supreme Court is inconsistent in its application of the Statute.[54]

The Texas Supreme Court's pliancy in its invocation of § 311.023 leads to unpredictability and poses serious questions for potential litigants in statutory interpretation cases. Predictability and clarity in the court's interpretation methods are essential to "legislators who draft statutes, agencies that implement them, courts that interpret them, and citizens who live under them."[55] Yet the court's inconsistent application of § 311.023 has led to one important question: "Upon what basis will the Court determine that extratextual tools have a legitimate role even when the controlling statute is clear on its face?"[56] While the answer to this question may be unknown, future Texas litigants in statutory interpretation cases with favorable legislative history and the like should always bring § 311.023 to the court's attention. Who knows, maybe their insistence on § 311.023's "eclectic approach to statutory interpretation"[57] will bode better for them than the family in *Texas Health*.

II. CONCLUSION

The Texas Supreme Court's decision in *Texas Health* elicits two important concerns for future statutory interpretation issues. First, the question of what makes a statute "unambiguous" on its face is still up in the air. In *Texas Health*, the court used poor analogies, circular reasoning, and inconsistent legal standards to find a statute unambiguous. This decision leaves resounding uncertainty regarding the court's methodology in future statutory interpretation issues. Although analogous statutes may be elusive, the court should resort to persuasive authority to find comparable statutes to justify its conclusions rather than settling for analogies that are clearly distinguishable. It appears that, at least in *Texas Health*, the court used a predetermined outcome to produce its analysis, not the other way around.

Second, the court's inconsistent application of Code Construction Act § 311.023 leads to serious questions about the statute's role in Texas law. Without clear direction from the Texas Supreme Court regarding the applicability of § 311.023, lawyers cannot accurately prepare their cases and effectively advise their clients. Moreover, lower courts in Texas are left in the dark considering conflicting mandatory precedent. In the future, the

54. The validity and role of § 311.023 has been subject to much debate among courts. *See* Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209, 263–65 (2015). The discussion in this note is limited to the inconsistency § 311.023 has created rather than an argument for or against the provision.

55. *Ojo*, 356 S.W.3d at 443.

56. *Id.* at 444.

57. Staszewski, *supra* note 54, at 263.

Texas Supreme Court should clearly delineate the role of § 311.023 and prescribe the proper analytical framework to enhance clarity in statutory interpretation cases. While the Texas Supreme Court should seek to resolve ambiguity in statutory interpretation cases, unfortunately (yet ironically), its own approach is nothing less than ambiguous.