DEFINITIONS UNDER CHAPTER 74

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I. SOURCES OF DEFINITIONS

When the legislature enacted Chapter 74 of the Civil Practice and Remedies Code to limit medical negligence claims, it included certain defined terms for use in interpreting other substantive provisions of the Act.[1] The Act covers (and preempts[2]) other state law as it pertains to "health care liability claims"[3] against "health care providers."[4] Since the time it was

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1. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001 (West 2017).

2. *Id.* § 74.002 ("In the event of a conflict between this chapter and another law, including a rule of procedure or evidence or court rule, this chapter controls to the extent of the conflict.").

3. *Id.* § 74.001(13):

> Health care liability claim means 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.

4. *Id.* § 74.001(12):

> [For purposes of the Act, a] health care provider means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including: (i) a registered nurse; (ii) a dentist; (iii) a podiatrist; (iv) a pharmacist; (v) a chiropractor; (vi) an optometrist; (vii) a health care institution; or (viii) a health care collaborative certified under Chapter 848, Insurance Code. (B) The term includes: (i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and (ii) an employee,

enacted, caselaw has provided interpretation, clarification, and obfuscation of the defined terms, as set forth herein.[5]

Definitions in § 74.001 not only apply to cases brought under Chapter 74 but are also bootstrapped into negligence claims against various health maintenance organizations.[6] Chapter 88 covers those entities defined as "health care plans," health maintenance organizations, or other managed care entities[7] that undertake "to provide, arrange for, pay for, or reimburse any part of the cost of any health care services" to the extent such plans make "health care treatment decisions," defined as those that "affect[] the quality of the diagnosis, care, or treatment provided to the plan's insureds or enrollees."[8]

II. AT FIRST, COURTS USED THE BROADEST POSSIBLE INTERPRETATION OF "HEALTH CARE LIABILITY CLAIM" TO ALLOW CHAPTER 74'S PROCEDURAL AND OTHER REQUIREMENTS TO APPLY TO A VARIETY OF UNUSUAL CASES

After the enactment of Chapter 74, there was a clear swing toward inclusiveness in the application of the statute (and its procedural and damages limitations) to almost anything happening in, near, or related to a health care facility. Initially, as will be seen below, courts were willing, even generous, in their interpretation of the statute to adopt an exhaustively broad definition of "health care" and "health care provider."[9] This led to some shocking results, which, in turn, eventually led to a more tightly tailored application. Most of the citizens of Texas would, however, still be quite startled to learn what is considered "health care" in this state.

First, in *Diversicare General Partners v. Rubio*, the expansive application of the definition of "health care" under Chapter 74 began to head in directions that most reasonable consumers would not consider health care by holding that **multiple rapes and assaults of a nursing home patient** constituted health care.[10] Thereafter, a host of cases construed the statute to find health care in unlikely places until, eventually, the high-water mark was

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independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

5. *See, e.g.*, Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842 (Tex. 2005).

6. *See* CIV. PRAC. & REM. § 88.002(k), *preempted by* 29 U.S.C.A §§ 1109(a), 1132(a) (West 2019), *as declared by* Roark v. Humana, Inc., 307 F.3d 298 (5th Cir. 2002). "An enrollee who files an action under [Chapter 88] shall comply with the requirements of Section 74.351 as it relates to expert reports." *Id.*

7. It is not clear whether Chapter 88 applies to managed care entities performing services paid for by Medicare or Medicaid, or whether such claims are preempted by the Social Security Act, which expressly preempts certain state laws. *See* 42 U.S.C.A. § 1395w–26(b)(3) (West 2019).

8. *See* CIV. PRAC. & REM. § 88.001, *preempted by* 29 U.S.C.A §§ 1109(a), 1132(a), *as declared by Roark*, 307 F.3d 298.

9. *See, e.g.*, *Diversicare*, 185 S.W.3d 842.

10. *Id.* at 855.

reached in the now-infamous "cow in the road" case.[11] Therein, a retired physician whose **cows got loose on a road** and caused injury to a motorist sought to avail himself of the protections of Chapter 74.[12] Ultimately, the trial court rejected the argument and was upheld by the court of appeals, which additionally sanctioned the physician for frivolous pleadings.[13]

Between *Diversicare* and *Archer v. Tunnell* were a host of cases that would probably surprise the average Texan. The following examples, all of which courts interpreted as "health care liability claims" and "health care," exemplify the breadth of the initial trend toward an expansive definition:

- **Negligent failure to eradicate brown recluse spiders**, resulting in plaintiff being bitten, constituted health care.[14]
- A company **supplying an oxygen tank and ventilator** was a health care defendant, even if it provided no health care whatsoever.[15]
- A patient who slipped and fell on a wet bathroom floor had a health care liability claim, as **proper floor mopping** is "directly related" to health care.[16]
- Consulting on safety at a waterpark was health care.[17]
- **Defective bed maintenance** was a health care liability claim because a bed is "an integral and inseparable part of the health care services provided."[18]
- **Masturbating employees were a health care liability claim**. Where a patient was subjected to a hospital employee masturbating in front of her, she was required to file a report because such conduct was part of health care.[19]
- **Pharmacists, including compounding pharmacists**, are health care providers engaged in the rendition of health care.[20] If a pharmacist makes an error in prescribing, the claim against the pharmacist and his employer is a health care liability claim.[21]
- **Transportation services** can be health care.[22] A patient's claim for an injury sustained during the **van ride** home from the hospital was

11. *See generally* Archer v. Tunnell, No. 05-15-00459-CV, 2016 WL 519632 (Tex. App.—Dallas Feb. 9, 2016, no pet.).

12. *Id.* at *1.

13. *Id.* at *4–5.

14. Omaha Healthcare Ctr., LLC v. Johnson, 344 S.W.3d 392, 395 (Tex. 2011).

15. Turtle Healthcare Grp., LLC v. Linan, 337 S.W.3d 865, 867 (Tex. 2011) (per curiam).

16. Harris Methodist Fort Worth v. Ollie, 342 S.W.3d 525, 526–27 (Tex. 2011) (per curiam).

17. *See generally* Yamada v. Friend, 335 S.W.3d 192 (Tex. 2010).

18. Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658, 664 (Tex. 2010).

19. *See generally In re* Seton Nw. Hosp., No. 03-15-00269-CV, 2015 WL 4196546 (Tex. App.—Austin July 10, 2015, no pet.).

20. *See generally* Randol Mill Pharmacy v. Miller, 465 S.W.3d 612 (Tex. 2015).

21. *See generally* Rendon v. Walgreens, 144 F. Supp. 3d 894 (N.D. Tex. 2015).

22. *See generally* Sherman v. HealthSouth Specialty Hosp., Inc., 397 S.W.3d 869 (Tex. App.—Dallas 2013, pet. denied).

a health care liability claim.[23] The court determined that Sherman's claim was a claim against a health care provider based on a departure from accepted standards of safety and that this constituted a health care liability claim under § 74.001(a)(13).[24]

- **Laser hair removal.** The Texas Supreme Court has ruled that, at least on the facts presented in the case before it, laser hair removal operated under the auspices of a physician's office, using equipment that required a physician's license to purchase, is health care.[25] Multiple appellate opinions diverged on this issue, and the Texas Supreme Court resolved the disparity under the facts before it in favor of inclusion under Chapter 74.[26] Note, however, that the opinion is factually specific.[27]
- **It may not even be necessary to be a patient to fall under Chapter 74**.[28] A plaintiff sued two nursing homes, neither which she had ever been a patient, for negligently retaining and inadequately investigating the background of an employee who was terminated from both nursing homes and went to work at a third facility where the plaintiff was a patient and the employee sexually assaulted her.[29] She argued that Chapter 74 did not apply to her claims against the first two nursing homes because she had never been a patient at either one.[30] The court of appeals reasoned that the two nursing homes had an administrative duty, created by statute, to report any abuse or neglect by an employee, which "also implicate[d] their duty as health care providers."[31] It further reasoned that, because this duty to report cannot be separated from the two nursing homes' responsibility to ensure resident safety, the statutory duty to report abuse or neglect by a terminated employee was an inseparable part of the rendition of health care services.[32] Based on this argument, even though plaintiff was *never* a patient at either nursing home, Chapter 74 still applied.[33]
- **A claim by a bridal shop in Ohio is a health care liability claim**.[34] Coming Attractions Bridal and Formal, Inc. (CABF), a bridal shop in Akron, Ohio, was closed down by the Ohio Department of Health after it was visited by a nurse from a Dallas hospital that treated

23. *Id.* at 875.
24. *Id.*
25. *See generally* Bioderm Skin Care, LLC v. Sok, 426 S.W.3d 753 (Tex. 2014).
26. *Id.* at 762.
27. *Id.* at 763.
28. *See generally* Dunn v. Clairmont Tyler, LP, 271 S.W.3d 867 (Tex. App.—Tyler 2008, no pet.).
29. *Id.* at 868–69.
30. *Id.* at 871.
31. *Id.*
32. *Id.* at 872.
33. *Id.*
34. *See generally* Tex. Health Res. v. Coming Attractions Bridal & Formal, Inc., 552 S.W.3d 335 (Tex. App.—Dallas 2018, pet. filed).

an Ebola patient.[35] The bridal shop was unable to dispel the taint of the Ebola scare and was forced to close down.[36] The shop from Ohio sued Presbyterian Hospital in Dallas, claiming that the hospital should not have treated its nurses as it did and should not have told them that they were "free to intermingle with family, friends, and the public at large."[37] The Dallas court held, citing the *Ross* factors, that although several of the *Ross* factors did not apply to the bridal shop's claim, several did.[38] Specifically, "[t]hree of the factors support our conclusion that CABF asserts a safety standards-based HCLC, three factors do not, and one does not apply because no instrumentality was involved in the alleged negligence."[39] So a bridal shop in Ohio, suing because a potentially Ebola-infected person was improperly released to travel freely, is a health liability claimant under Chapter 74.[40]

- **The failure to deliver the products of a miscarriage to a funeral home** is a health care liability claim because it involves a "professional or administrative service[ ]" directly related to health care.[41] The crux of the plaintiffs' allegations was that the hospital failed to properly handle, identify, monitor, and dispose of a specimen resulting from a miscarriage.[42] The hospital erroneously delivered the amputated toe of another patient to the funeral home for burial.[43] The plaintiffs' claims were deemed by the court to be health care liability claims because "the identification, handling, and ultimate disposal of specimens are services that a health care provider is required to provide as a condition of maintaining its license."[44] Additionally, the court held: "[I]t is not necessary that the professional or administrative services occur during the patient's medical care, treatment, or confinement. Instead, those services only need be 'directly related' to 'health care,' including treatment that was or should have been performed during the patient's medical care, treatment, or confinement."[45]
- **Postmortem fraud designed to conceal malpractice is health care**.[46] In a closely watched case, the Texas Supreme Court held in May 2016 that a hospital's deliberately fraudulent or obfuscatory conduct,

35. *Id.* at 337.
36. *Id.*
37. *Id.* at 337–38.
38. *Id.* at 340.
39. *Id.* at 340–41.
40. *Id.* at 341–42.
41. *See generally* CHCA Bayshore, L.P. v. Ramos, 388 S.W.3d 741 (Tex. App.—Houston [1st Dist.] 2012, no pet.).
42. *Id.* at 743.
43. *Id.*
44. *Id.* at 745.
45. *Id.* at 746 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2017) (defining "health care liability claim")).
46. Christus Health Gulf Coast v. Carswell, 505 S.W.3d 528, 536 (Tex. 2016).

allegedly designed to conceal the evidence of its malpractice by fraudulently inducing the widow of a decedent to consent to an autopsy, was in fact a health care liability claim.[47]

> Given the foregoing, we conclude that the Carswells' post-mortem claims alleged departures from accepted standards of "professional or administrative services" the hospital had the duty to comply with or provide in order to maintain its license.
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> . . . Here, the question is whether the post-mortem claims by the Carswells were directly related to health care—that is, directly related to an act or treatment that was or should have been performed or furnished by the hospital for, to, or on behalf of Jerry Carswell during his treatment or confinement.
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> The Carswells' post-mortem fraud claim was essentially that immediately following Jerry's death, the hospital began covering up for the deficient health care provided to him[,]. . . failing to notify the . . . Medical Examiner's Office of Jerry's death and the circumstances surrounding it, [and] . . . obtaining Linda's consent for an autopsy at an affiliated hospital by an associated pathology practice group. . . . Given these circumstances, the claim was directly related to acts or treatments the Carswells alleged were improperly performed or furnished, or that should have been performed or furnished, to Jerry during his treatment and confinement.[48]

As such, the fraud claim was a health care liability claim.[49]

The somewhat stunning opinion of the Texas Supreme Court in *Christus Gulf Coast v. Carswell* does yield one helpful thread for practitioners trying to evaluate whether a claim constitutes a health care liability claim or not: Is the claim directly related to acts or treatment of the patient?[50]

- Most recently, a health care liability claim includes **fraudulently inducing an ex-lover to have an abortion by telling her the baby is dead.**[51] Where a physician faked a sonogram (turned off the sound), told his mistress that their baby was dead, and then performed the abortion

47. *Id.* at 537, 541.
48. *Id.* at 535–36.
49. *Id.* at 537.
50. *Id.* at 535.
51. Zertuche v. Wessels, No. 04-18-00429-CV, 2018 WL 5928489, at *3 (Tex. App.—San Antonio Nov. 14, 2018, pet. filed).

himself based on her belief that the baby had in fact died, the claim was a health care liability claim.[52]

III. PLAINTIFFS TEST THE BREADTH OF THE DEFINITION OF HEALTH CARE LIABILITY CLAIMS

Not surprisingly, plaintiffs have sought to plead their cases in ways that avoid the statute. There followed a long series of cases involving recasting or refashioning claims and barring that practice. As noted in *Yamada v. Friend*, "Whether a claim is a health care liability claim depends on the underlying nature of the claim being made."[53] "Artful pleading does not alter that nature."[54] In fact, "[w]hen the underlying facts are encompassed by provisions of the [Act] in regard to a defendant, then all claims against that defendant based on those facts must be brought as health care liability claims."[55]

- Thus, when a plaintiff brought both a health care liability and an ordinary negligence claim against a doctor for negligently **advising a waterpark about safety procedures and defibrillators**, but failed to file an expert report, the plaintiff's action was dismissed.[56] Because the ordinary negligence claim was based on the same underlying facts as the health care liability claim, the Court held it too was a health care liability claim, incapable of claim-splitting, and needed to be treated as such.[57]
- Similarly, **"retaliatory discharge"** of a patient from a health care facility was a health care liability claim.[58] It is important to note that this particular form of retaliatory discharge was not an employer firing an employee, but was a care center's retaliatory discharge of a patient, allegedly because of complaints by the patient or patient's family about the patient's quality of care.[59] Following the reasoning in *Yamada*, the *Kumets* Court held that the plaintiff's claim was a health care liability claim because it was based on the same underlying facts as the claim for a breach of fiduciary duty, a claim already established as a health care liability claim.[60]
- Attempts at recasting health care liability claims as **Deceptive Trade Practices Act (DTPA) violations** have also failed. Recasting an

52. *Id.*
53. Yamada v. Friend, 335 S.W.3d 192, 196 (Tex. 2010).
54. *Id.* (citing Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 854 (Tex. 2005); Garland Cmty. Hosp. v. Rose, 156 S.W.3d 541, 543 (Tex. 2004)).
55. *Id.* at 193–94.
56. *Id.* at 193.
57. *Id.* at 193–94.
58. PM Mgmt.-Trinity NC, LLC v. Kumets, 404 S.W.3d 550, 552 (Tex. 2013) (per curiam).
59. *Id.* at 551.
60. *Id.* at 552.

unsuccessful surgery claim as a DTPA violation did not exempt the plaintiff from complying with Chapter 74's requirements.[61] Recasting claims as **DTPA, false imprisonment, or misrepresentation** will not moot the requirements of Chapter 74.[62]

- Recasting a claim **as a breach of contract** was also held impermissible.[63] The plaintiff sought to obtain reimbursement from a nursing home for inadequate services provided by the nursing home to her mother.[64] She did not file an expert report because she was seeking contractual damages only for costs of the services not provided.[65]

> [Plaintiff's] argument that she could avoid triggering Chapter 74 by omitting any allegation of injury or death and by praying only for contract damages [was] merely another variation of the artful-pleading tactic that Texas courts have frequently condemned. The legislature did not intend for plaintiffs to be able to avoid the requirements of Chapter 74 so easily.[66]

- Similar results occurred in *Ramchandani v. Jimenez*, where the suit was dismissed for failing to meet the requirements of Chapter 74.[67] The plaintiff complained that the defendant, **Ramchandani, agreed to perform surgery, but instead permitted another surgeon**, who was incompetent, to perform the surgery with poor results.[68] The plaintiff sued Ramchandani for breach of contract alleging that, since Ramchandani had agreed to perform the surgery, he was contractually bound to do so, and his failure to perform the surgery himself was a

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61. Brown v. Bowes, No. 04-04-00550-CV, 2005 WL 763287, at *1 (Tex. App.—San Antonio Apr. 6, 2005, no pet.).

62. De La Vergne v. Methodist Healthcare Sys. of San Antonio, L.L.P., No. 04-05-00307-CV, 2005 WL 3340250, at *1 (Tex. App.—San Antonio Dec. 7, 2005, no pet.). *See generally* Boothe v. Dixon, 180 S.W.3d 915 (Tex. App.—Dallas 2005, no pet.). At press time, an unanswered question is whether a **knowing fabrication of a health care document** by a nurse constitutes health care when the individual complaining of the knowing fabrication is not a patient and has no claim for traditional personal injury damages. *Weems v. Baylor, Scott & White* presents this novel issue. Weems v. Baylor, Scott & White, Hillcrest Med. Ctr., No. 06-17-00018-CV, 2017 WL 1953416 (Tex. App.—Texarkana May 11, 2017, pet. granted). The plaintiff in *Weems* is incarcerated and alleged that the nurses at Baylor, Scott & White falsified a record indicating that a patient had been shot, when, apparently, the patient had not been shot according to Mr. Weems. *Id.* Therefore, Weems claims he is wrongfully incarcerated. *Id.* Baylor, Scott & White argued that this complaint was a health care liability claim, subject to the report requirement. *Id.* The Texas Supreme Court has heard arguments and is considering the case. *Id.*

63. Victoria Gardens of Frisco v. Walrath, 257 S.W.3d 284, 289 (Tex. App.—Dallas 2008, pet. denied).

64. *Id.* at 286.

65. *Id.*

66. *Id.* at 289 (citation omitted).

67. *See generally* Ramchandani v. Jimenez, 314 S.W.3d 148 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

68. *Id.* at 149.

> breach of contract.[69] "Dr. Ramchandani's alleged failure to perform the surgery as agreed and his alleged designation of another doctor to perform the surgery are necessarily part of the rendition of health care services."[70]

IV. CLAIMS BY EMPLOYEES AGAINST HEALTH CARE PROVIDERS

A whole subset of cases now involves claims by employees of health care entities. Much of this dispute has arisen over how to interpret the Texas Supreme Court's decision in *Texas West Oaks Hospital, LP v. Williams* as it relates to the Texas Medical Liability Act's (TMLA) safety prong.[71] The Court displayed a disagreement about the contours of the statutory definition of "health care liability claim."[72] The Court held that a hospital employee's suit against his employer for negligence was a health care liability claim.[73] Justice Lehrmann was joined by Justices Medina and Willett in her dissent:

> The Court's strained reading of the statute runs counter to express statutory language, the Legislature's stated purposes in enacting the current version of chapter 74, and common sense. Further, the Court's decision undermines the balance struck by the Legislature to encourage employers to become subscribers under the Workers Compensation Act.[74]

The dissent also pointed out that the majority's decision undermined the stated legislative purpose of reducing health care liability claims:

> [I]n the future, employees in [Plaintiff]'s position will be forewarned that they must provide an expert report and undoubtedly will do so. The upshot of the Court's decision is that medical professional liability insurers will be responsible for claims that normally would have fallen under a health care employer's workers compensation or comprehensive liability coverage.[75]

More recently, in *Psychiatric Solutions, Inc. v. Palit*, the Texas Supreme Court declared that a mental **health professional's negligence claim against his employer for injuries sustained while restraining a patient** during an emergency was a health care liability claim.[76] In contrast, the Texarkana court

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69. *Id.*
70. *Id.* at 152.
71. *See generally* Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171 (Tex. 2012).
72. *See generally id.*
73. *Id.* at 183–86 (explaining that to qualify as a health care liability claim, a claim that is based on departures from accepted standards of safety need not be directly related to health care).
74. *Id.* at 193.
75. *Id.* at 200.
76. Psychiatric Sols., Inc. v. Palit, 414 S.W.3d 724, 724 (Tex. 2013).

distinguished *Williams*.[77] In *Good Shepherd Medical Center v. Twilley,* the plaintiff was a **worker who fell from a ladder** in an on-the-job injury and sued the hospital for OSHA violations.[78] Twilley's claim did not meet the TMLA requirement that a claim have at least an indirect relationship to health care.[79] The court noted, "The claim in *Williams* had an indirect relationship to health care; Twilley's claim [did] not."[80] Analogously, the Dallas Court of Appeals recently ruled that injuries sustained from irritants in sewage fumes and chemicals at a nurse's workplace did not constitute a health care liability claim.[81] Additionally, in construing a fact pattern involving a **slip and fall of a hospital employee** at work, the Dallas court ruled that injury to an employee "must have some indirect, reasonable relationship to health care in order to constitute a health care liability claim."[82]

Citing *Twilley*, the court emphasized that the plaintiff was not a recipient of health care, and "the gravamen of [her] claims—[workplace injuries]—was unrelated to the provision of health care to the patient population or to anyone else."[83] This emphasis has been noted by other courts as well.[84] For example, an ambulance **driver's claim for carbon monoxide poisoning** was not a health care liability claim.[85]

Notwithstanding these distinctions, an indirect relationship to health care may be found in health care employees' claims, despite direct patient involvement.[86] In *Morrison v. Whispering Pines Lodge*, the Texarkana appellate court distinguished *Twilley*, holding that a **nursing home employee's slip and fall in a resident's shower** after another employee mopped the shower was a health care liability claim because it "occurred as a result of [the nursing home]'s actions in attempting to carry out its legal duty to provide a sanitary environment for its residents."[87]

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77. *See generally* Good Shepherd Med. Ctr.-Linden, Inc. v. Twilley, 422 S.W.3d 782 (Tex. App.—Texarkana 2013, pet. denied).

78. *Id.* at 783.

79. *Id.* at 784.

80. *Id.* at 785.

81. *See generally* Baylor Univ. Med. Ctr. v. Lawton, 442 S.W.3d 483 (Tex. App.—Dallas 2013, pet. denied).

82. McKelvy v. Columbia Med. Ctr. of McKinney Subsidiary, L.P., 511 S.W.3d 197, 199 (Tex. App.—Dallas 2015, pet. denied) (citing *Lawton*, 442 S.W.3d at 486).

83. Williams v. Riverside Gen. Hosp., Inc., No. 01-13-00335-CV, 2014 WL 4259889, at *4 (Tex. App.—Houston [1st Dist.] Aug. 28, 2014, no pet.) (alterations in original omitted).

84. *Id.* at *6 (declining to extend *Loaisiga v. Cerda*, stating, "the gravamen of [the employee's] claim that she tripped over an extension cord is a garden-variety slip-and-fall claim that is completely untethered from the provision of health care").

85. Good Shepherd Hosp., Inc. v. Masten, No. 12-13-00005-CV, 2014 WL 6792683, at *6 (Tex. App.—Tyler Dec. 3, 2014, pet. denied).

86. *See* Morrison v. Whispering Pines Lodge I, L.L.P., 428 S.W.3d 327, 329 (Tex. App.—Texarkana 2014, pet. denied).

87. *Id.* at 334 (citing Omaha Healthcare Ctr., LLC v. Johnson, 344 S.W.3d 392, 395 (Tex. 2011)) (stating that it is a "nursing home's broad duty to provide health care for its residents").

The 2015 Texas Legislature added the following sentence to § 13 to eliminate the inclusion of claims by health care provider employees against their employers as health care liability claims.[88] This problem arose as a result of the Texas Supreme Court's ruling in *Texas West Oaks Hospital, LP v. Williams* as it relates to the TMLA's safety prong.[89]

"The term does not include a cause of action described by Section 406.033(a) or 408.001(b), Labor Code, against an employer by an employee or the employee's surviving spouse or heir."[90]

V. SANITY BEGINS TO RETURN IN RESPONSE TO A FLOOD OF LITIGATION HELD TO BE HEALTH CARE LIABILITY CLAIMS

One of the first cracks in the wall of all-inclusiveness appeared in a **failure-to-properly-eradicate-spiders** case.[91] While the majority held that failing to properly eradicate brown recluse spiders in a nursing home constituted health care, a strong dissent appeared, indicating the beginning of a shift on the Court.[92] "[T]he Court radically departs from our clear assurances that there can be 'premises liability claims in a health care setting that may not be properly classified as health care liability claims . . . .'"[93]

Finally, in 2012, in the face of the onslaught of cases alleging conduct as health care, the Supreme Court began to put the brakes on the practice, holding that a defendant physician who was alleged to have "palmed" plaintiff's breasts throughout a stethoscope examination of her heart was not engaged in health care.[94] The Court finally began to create a vehicle for claimants to get out from under the mantle of Chapter 74 in the appropriate case, starting, as here, with cases of sexual assault. The Court held that the TMLA "creates a *rebuttable presumption* that a patient's claims against a physician or health care provider based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement are [health care liability claims]."[95] *But* the Court also provided a guideline for pleading and proving a claim not belonging under Chapter 74:

> [A] claim against a medical or health care provider for assault is not [a health care liability claim] if the record conclusively shows that (1) there is no complaint about any act of the provider related to medical or health care services other than the alleged offensive contact, (2) the alleged offensive

88. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2017).

89. *See generally* Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171 (Tex. 2012).

90. CIV. PRAC. & REM. § 74.001(a)(13).

91. *See generally Johnson*, 344 S.W.3d. 392.

92. *Id.* at 396.

93. *Id.* at 396–97 (Lehrmann, J., dissenting) (citing Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 854 (Tex. 2005)).

94. *See generally* Loaisiga v. Cerda, 379 S.W.3d 248 (Tex. 2012).

95. *Id.* at 252 (emphasis added).

> contact was not pursuant to actual or implied consent by the plaintiff, and (3) the only possible relationship between the alleged offensive contact and the rendition of medical services or health care was the setting in which the act took place.[96]

Thus, plaintiffs now have a vehicle for litigating, free of the constraints of Chapter 74, even though the *Loaisiga* plaintiffs failed to do so: "[T]he record does not contain sufficient information to conclusively show that Dr. Loaisiga's conduct could not have been part of the examination he was performing."[97]

A practice tip may be gleaned from Justice Hecht's concurrence/dissent: "[I]t seems unlikely that a chart notation, 'groped patient unnecessarily', will be found, and the expert may need to base his opinion on an interview with the claimants."[98]

Loaisiga alone, however, was not enough to stem the flood of alleged health care liability claims, and the Court has since made additional attempts to reduce the endless litigation over whether a claim does or does not constitute a health care liability claim. The next step was a delineation of "non-exclusive" factors to be considered by the trial court in determining whether or not a claim falls under the ambit of Chapter 74.[99] Those factors are as follows:

> 1. Did the alleged negligence of the defendant occur in the course of the defendant's performing tasks with the purpose of protecting patients from harm;
> 2. Did the injuries occur in a place where patients might be during the time they were receiving care, so that the [special] obligation . . . to protect persons [undergoing] medical care [was] implicated;
> 3. [W]as the claimant in the process of seeking or receiving health care;
> 4. [W]as the claimant providing or assisting in [the provision of] health care;
> 5. [Are the allegations] based on safety standards arising from [the] professional duties owed by the health care provider[s];
> 6. If [some sort of mechanical] instrumentality was involved . . . was it a[n instrument] used in [the provision of] health care; or
> 7. Did the [injury] occur [as a result of compliance or lack thereof] with safety-related [government or accrediting regulations]?[100]

96. *Id.* at 257.
97. *Id.* at 259–60.
98. *Id.* at 265 (Hecht, J., concurring in part and dissenting in part).
99. Ross v. St. Luke's Episcopal Hosp., 462 S.W.3d 496, 505 (Tex. 2015).
100. *Id.*

Later, the Court reinforced *Ross v. St. Luke's Episcopal Hospital* in **a slip-and-fall** case, holding that injury to a visitor at a hospital was not a health care liability claim because it did not demonstrate a substantive relationship between safety standards the visitor alleges the hospital breached and health care.[101] And, indeed, since *Ross*, there have been fewer reported opinions involving this battle.

VI. THE DISSENTING VOICES

A minority of cases have held various claims to be beyond the ambit of Chapter 74:

- **Wrongful vaginal penetration**. In *Wasserman v. Gugel*, an orthopedic surgeon allegedly sexually assaulted a plaintiff during an examination of her lower back.[102] The court held, "[u]nder no reasonable view of the allegations we are presented with here could it be argued that a surgical consult for back surgery would require Wasserman, an orthopedic surgeon, to insert his finger into Gugel's vagina and ask if had she [sic] feelings in that location."[103]
- **Use of a treadmill** at a hospital-owned facility is not health care since it is not "directly related to health care" or "an inseparable part of the rendition of health care services."[104]
- **Failure to obtain consent to an autopsy** was not a health care liability claim because no "patient" was involved.[105] One court of appeals held dead bodies are not patients:

> This clearly implies that a person must be alive in order to be a "patient." This court has previously held that a body was not a patient, nor was an autopsy a form of medical treatment. We agree with such a holding, as the idea that a cadaver can be a "patient" is, on its face, illogical. As such, we hold that a dead body is not a patient and conclude that a body does not receive "medical care, treatment, or confinement" after death. Therefore, we hold that the claim brought by Graham is not a health care liability claim. As such, no expert opinion was required to be filed . . . .[106]

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101. Galvan v. Mem'l Hermann Hosp. Sys., 476 S.W.3d 429, 431 (Tex. 2015) (per curiam).

102. Wasserman v. Gugel, No. 14-09-00450-CV, 2010 WL 1992622, at *3 (Tex. App.—Houston [14th Dist.] May 20, 2010, pet. denied).

103. *Id.*

104. Valley Baptist Med. Ctr. v. Stradley, 210 S.W.3d 770, 772 (Tex. App.—Corpus Christi 2006, pet. denied), *overruled by* Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171 (Tex. 2012).

105. Hare v. Graham, No. 2-07-118-CV, 2007 WL 3037708, at *3 (Tex. App.—Fort Worth Oct. 18, 2007, pet. denied).

106. *Id.* (citation omitted).

- **Fraudulent billing**. Claims of fraudulent billing asserted against a health care provider are not considered health care liability claims subject to the statutory expert report requirement.[107]
- **Tripping over wires**. Suits over injuries caused by tripping over wires in a hospital room is not a health care liability claim.[108] The test is whether the injury results from actions that are in some way "inseparable parts of the rendition of medical services and the standards of safety within the health care industry."[109] Warning about the presence of wires on the floor cannot, as a matter of law, be held to be an inseparable part of the medical standards of care or health care services, nor is medical testimony required to determine whether such wires should run across the floor.[110]
- **Slip and fall by visitor**. A slip and fall by a visitor at a hospital did not constitute a health care liability claim.[111] In an instance where a nonpatient was visiting a patient at Seton Medical Center, a Seton nurse employee activated an automatic door to admit the visiting plaintiff.[112] The plaintiff was injured and sued.[113] Seton claimed the cause of action was a health care liability claim, but the court, citing the *Ross* factors, determined that, based on those factors, the claim was not a health care liability claim.[114]
- **Improper sexual relationship**. A claim against a therapist for initiating an improper sexual relationship with a patient after the termination of the patient's hospital stay is not health care.[115] There is no "substantial and direct relationship" between the defendant's actions and the patient's care and treatment.[116] Further, the sexual relationship "[c]ertainly . . . [did] not constitute an 'inseparable or integral part' of [the patient's] health care."[117] As to the entity that retained the therapist, the plaintiff complained that the entity, Nexus, failed to properly

107. *See generally* Pallares v. Magic Valley Elec. Coop., Inc., 267 S.W.3d 67 (Tex. App.—Corpus Christi 2008, pet. denied).

108. *See generally* Dall. Homes for Jewish Aged, Inc. v. Leeds, No. 05-09-00756-CV, 2010 WL 1463439 (Tex. App.—Dallas Apr. 14, 2010, no pet.).

109. *Id.* at *3 (quoting Dual D Healthcare Operations, Inc. v. Kenyon, 291 S.W.3d 486, 489 (Tex. App.—Dallas 2009, no pet.)).

110. *Id.*

111. *See generally* Reddic v. E. Tex. Med. Ctr. Reg'l Health Care Sys., 474 S.W.3d 672 (Tex. 2015) (per curiam); Methodist Healthcare Sys. of San Antonio, Ltd. v. Dewey, 423 S.W.3d 516 (Tex. App.—San Antonio 2014, pet. denied); Doctors Hosp. at Renaissance, Ltd. vs. Mejia, No. 13-12-00602-CV, 2013 WL 4859592 (Tex. App.—Corpus Christi Aug. 1, 2013, pet. denied).

112. *See generally* Seton Family of Hosps. v. Haywood, No. 03-13-00817-CV, 2015 WL 4603594 (Tex. App.—Austin July 29, 2015, no pet.).

113. *See generally id.*

114. *Id.* at *1–2.

115. Nexus Recovery Ctr., Inc. v. Mathis, 336 S.W.3d 360, 370 (Tex. App.—Dallas 2011, no pet.).

116. *Id.*

117. *Id.* (quoting Marks v. Luke's Episcopal Hosp., 319 S.W.3d 658, 664 (Tex. 2010)).

inquire about the therapist's background.[118] The Dallas Court of Appeals held that this was not health care because it "[did] not concern any 'act or treatment performed or furnished, or that should have been performed or furnished, by Nexus for, to, or on behalf of [plaintiff] during [plaintiff's] medical care, treatment, or confinement.'"[119] Although the failure to inquire may be "related" to the plaintiff's care and treatment, it did not constitute or implicate an "inseparable or integral part" of that care and treatment, as required in the Texas Supreme Court's ruling in *Marks v. St. Luke's Episcopal Hospital*.[120] Importantly, the court of appeals held that part of the basis for its opinion was that no expert testimony is required in order to determine that the therapist–defendant violated statutory prohibitions against sexual relationships with patients.[121] A lay individual can determine that the statute was violated.[122] The court of appeals also permitted the plaintiff's claim against Nexus for failing to act to stop the abuse once it knew or had reason to know that the exploitation was in progress.[123] Rejecting the proposition that such a claim constituted a health care claim under the Act, the court of appeals carefully differentiated sexual abuse that takes place on a health care defendant's premises and during a hospitalization versus an improper sexual relationship that takes place after the patient's discharge from the health care facility.[124]

- **Fraudulent counseling.** A health care provider who induced a plaintiff into a "counseling" session in order to obtain information for her husband to use against her in a divorce was not practicing health care, but was fraud.[125] Thus, the plaintiff was not required to have a Chapter 74 report to the effect that his fraudulent inducement to the counseling session was wrongful.[126] This was true even though the plaintiff's claims overlapped with her underlying health care liability claim.[127]
- **Assault with nail polish**. A plaintiff, an employee of the defendant-hospital, was admitted for a tonsillectomy.[128] While he was anesthetized, two nurses "paint[ed] his fingernails and toenails with pink nail polish," wrapped his thumb with tape, and wrote "'Barb was

118. *Id.*
119. *Id.* (alteration omitted).
120. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10) (West 2017)).
121. *Id.* at 370–71.
122. *Id.*
123. *Id.*
124. *Id.* at 373.
125. Cardwell v. McDonald, 356 S.W.3d 646, 648 (Tex. App.—Austin 2011, no pet.).
126. *Id.* at 655–56.
127. *Id.*
128. Drewery v. Adventist Health Sys./Tex., Inc., 344 S.W.3d 498, 499 (Tex. App.—Austin 2011, pet. denied).

here' and 'Kris was here' on the bottoms of his feet."[129] The conduct was not health care.

- **Claims for restriction of privileges**. A claim by podiatrists against a hospital for restricting its privileges is not a health care liability claim.[130] "Appellees' claims do not involve care or treatment that was rendered to any patient. Instead, their claims relate to a dispute between Hendrick and them as to the scope of the practice of podiatry . . . . Therefore, Hendrick's act of eliminating privileges was not 'directly related to health care.'"[131]
- **Wrongful termination suits by residents** are not health care liability claims:[132]

> The [Texas] [S]upreme [C]ourt has stated that "the Legislature did not intend for the expert report requirement to apply to every claim for conduct that occurs in a health care context." Daneshfar's employment- and education-based causes of action are not the types of claims the legislature intended the protections of the Texas Medical Liability Act to apply.
>
> We conclude the record does not show that Daneshfar's claims are health care liability claims. Therefore, he is not a claimant as defined by the Act, and he is not subject to the expert-report requirement of section 74.351(a).[133]

- **Suit against a pharmacy for assault.** If a pharmacy employee assaults a customer, the claim is not a health care liability claim.[134]
- **Suits by the State of Texas for Medicaid fraud.** A suit by the State of Texas against a health care provider for Medicaid fraud is not a health care liability claim, the State of Texas is not a "claimant" (because the state is not a "person" as required by the definition in Chapter 74), and the 120-day expert-report requirement does not apply to the State.[135]
- Further, a suit by the State of Texas **seeking injunctive and other relief against a nursing home** is not a health care liability claim under Chapter 74, and no 120-day report is required, even though expert

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129. *Id.*

130. Hendrick Med. Ctr. v. Tex. Podiatric Med. Ass'n, 392 S.W.3d 294, 299 (Tex. App.—Eastland 2012, no pet.).

131. *Id.* at 298.

132. Baylor Univ. Med. Ctr., Inc. v. Daneshfar, No. 05-17-00181-CV, 2018 WL 833373, at *1 (Tex. App.—Dallas Feb.12, 2018, pet. denied).

133. *Id.* at *9 (footnotes omitted) (citation omitted).

134. Walgreen Co. v. Stewart, No. 01-17-00080-CV, 2017 WL 5893251, at *1 (Tex. App.—Houston [1st Dist.] Nov. 30, 2017, no pet.).

135. Malouf v. State *ex rel.* Ellis, 461 S.W.3d 641, 644–47 (Tex. App.—Austin 2015, pet. denied).

medical testimony will be required to prove the State's claims.[136] The Court acknowledges the difficulty in excepting out such claims, given the scope of recent expansive Texas Supreme Court pronouncements: Claims "which require[] the use of expert health care testimony to support or refute the allegations" are health care liability claims.[137] However, "even when expert medical testimony is not necessary, the claim may still be [a health care liability claim]."[138] The broad language of the TMLA evidences legislative intent for the statute to have expansive application.[139] According to the Texas Supreme Court, the "breadth of the statute's text" essentially creates a rebuttable presumption that a claim is a health care liability claim if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement.[140]

The court concluded: "[W]e conclude that the term 'damages' in the TMLA does not include civil penalties sought by the State rather than a private litigant."[141]

VII. DEFINITIONS OF EMERENCY MEDICAL CARE, BONA FIDE EMERGENCY, AND THE WILLFUL AND WANTON STANDARD

Section 74.153 of the Texas Civil Practice and Remedies Code provides:

> 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 obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, the claimant bringing the suit may prove that the treatment or lack of treatment . . . departed from accepted standards of medical care . . . with wilful and wanton negligence . . . .[142]

The legislature may have borrowed the language defining emergency medical care from the federal Emergency Medical Treatment and Active Labor Act (EMTALA).[143] Under EMTALA, liability is imposed only if the

136. *See* State v. Emeritus Corp., 466 S.W.3d 233, 251 (Tex. App.—Corpus Christi 2015, pet. denied).

137. Psychiatric Sols., Inc. v. Palit, 414 S.W.3d 724, 727 (Tex. 2013); *see* Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 182 (Tex. 2012).

138. *Williams*, 371 S.W.3d at 182 (citing Murphy v. Russell, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam)).

139. Loaisiga v. Cerda, 379 S.W.3d 248, 256 (Tex. 2012).

140. *Id.* at 252.

141. *Emeritus*, 466 S.W.3d at 249.

142. TEX. CIV. PRAC. & REM. CODE ANN. § 74.153 (West 2017).

143. *See* 42 U.S.C.A. § 1395dd(e)(1) (West 2019).

patient is actually diagnosed with an emergency medical condition.[144] Under EMTALA, a physician is not liable unless he diagnoses an emergency medical condition.[145] The Texas Insurance Code also provides a definition of emergency medical care.[146]

"Bona fide emergency services" are further defined as "any actions or efforts undertaken in a good faith effort to diagnose or treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions."[147]

When looking at the Texas Health and Safety Code definition of "hospital" in combination with the specific language in Chapter 74, § 74.153 of the Civil Practice and Remedies Code, a reasonable conclusion is that emergency medical care provided outside a general, special, or mental health hospital does not require the heightened burden of proof and does not require the plaintiff to prove that the provider's conduct was "willful and wanton."[148] Emergency care provided in those "noncovered" settings only requires the claimant to meet the traditional standard of proof.[149]

Pursuant to the express language in Chapter 74, the Emergency Medical Care Statute (EMCS) does not apply to medical care or treatment that occurs after the patient is stabilized and capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.[150] The EMCS also does not apply to emergency care or nonemergency care to a patient that presents to the emergency department

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> [EMTALA defines the term] "emergency medical condition" [to mean]:
> (A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, (ii) serious impairment of bodily functions, or (iii) serious dysfunction of any bodily organ or part . . . .

Id. § 1395dd(e)(1)(A). The standard for the imposition of liability under EMTALA is not whether the hospital fails to properly stabilize or transfer a patient after the hospital determines that the individual potentially has an emergency medical condition, it is whether it does so after determining that the individual has an emergency medical condition. *See id.* The standard is a subjective one. Harris v. Health & Hosp. Corp., 852 F. Supp. 701, 704 (S.D. Ind. 1994).

144. *See* CIV. PRAC. & REM. § 74.001(a)(7). Not all medical care provided in an emergency room is considered emergency medical care. To determine whether the Emergency Medical Care Statute applies, it is necessary to ascertain if the services provided constitute bona fide emergency care. *Id.*

145. *See* 42 U.S.C.A. § 1395dd(d)(1).

146. *See* TEX. INS. CODE ANN. § 1201.060 (West 2017) (defining emergency care as "bona fide emergency services provided after the sudden onset of a medical condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in: (1) placing the patient's health in serious jeopardy; (2) serious impairment to bodily functions; or (3) serious dysfunction of any bodily organ or part"); *see also* TEX. HEALTH & SAFETY CODE ANN. § 773.003 (West 2017) (reciting the same definition).

147. Turner v. Franklin, 325 S.W.3d 771, 778 (Tex. App.—Dallas 2010, pet. denied).

148. *See* CIV. PRAC. & REM. §§ 74.001(a)(16), .153.

149. *See id.* § 74.153.

150. *Id.* §§ 74.001(a)(7), .153.

with a nonemergency condition.[151] Additionally, if a health care provider's negligence causes the emergency, § 74.153 does not apply.[152]

The term does not apply to care that occurs after the patient is stabilized and capable of receiving treatment as a nonemergency patient or that is unrelated to the original medical emergency.[153] Federal courts have consistently held that emergency care does not apply if the health care providers "did not perceive the situation as an emergency or did not treat the condition as an emergency."[154]

Unlike federal courts, at least one state appellate court has indicated that health care providers may use the protections of the EMCS even when there is a nonemergency diagnosis and nonemergency medical care is provided if a patient presented to the emergency room with what was, in fact, an emergency condition.[155] In reaching this conclusion, the Dallas Court of Appeals concluded that "the legislature's purpose in enacting the statute [was] to provide physicians or health care providers a prospective incentive to provide emergency medical care in uncertain circumstances."[156] In a discussion of the relevant definitions, the court of appeals noted that a subcomponent of the definition of emergency medical care is medical care, which is modified by the definition of practicing medicine, which includes diagnosis and treatment.[157] Based on this interpretation, the court of appeals concluded that even a nonemergency diagnosis and nonemergency treatment is protected by the statute if it was provided in good faith when the patient was presented to the emergency room with an emergency condition.[158]

The Houston Court of Appeals for the First District has described the willful and wanton negligence standard as synonymous with gross negligence, saying that it means an "entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right[s] or welfare of the person or persons to be affected by it."[159]

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151. *See id.* § 74.001(a)(7).

152. S.J. of Tex., 78th Leg., R.S. 5004 (2003).

153. CIV. PRAC. & REM. §§ 74.001(a)(7), .153.

154. Hawkins v. Montague County, No. 7:10-CV-19-O, 2010 WL 4514641, at *16 (N.D. Tex. Nov. 1, 2010); *see* Guzman v. Mem'l Hermann Hosp. Sys., No. H-07-3973, 2009 WL 780889, at *9 (S.D. Tex. Mar. 23, 2009).

155. Turner v. Franklin, 325 S.W.3d 771, 778–80 (Tex. App.—Dallas 2010, pet. denied).

156. *Id.* at 779.

157. *Id.* at 778 (citing CIV. PRAC. & REM. § 74.001(a)(19); TEX. OCC. CODE ANN. § 151.002(13) (West 2017)).

158. *Id.* at 777–78.

159. Little v. Needham, 236 S.W.3d 328, 334 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *accord* Dunlap v. Young, 187 S.W.3d 828, 836 (Tex. App.—Texarkana 2006, no pet.) (Good Samaritan case); Graham v. Adesa Tex., Inc., 145 S.W.3d 769, 772 (Tex. App.—Dallas 2004, pet. denied); Wheeler v. Yettie Kersting Mem'l Hosp., 866 S.W.2d 32, 50 n.25 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (Good Samaritan case). The legislative history of the Emergency Medical Care Statute further indicates that the legislature intended the willful and wanton standard to equate to a gross negligence standard. *Turner*, 325 S.W.3d at 780. During the senate hearing adopting the conference committee report on H.B.

VIII. CONCLUSION

From the review of cases interpreting whether a plaintiff's claims are subject to the procedural and substantive requirements imposed by Chapter 74, one thing is clear—a prudent practitioner should assume any claim, even peripherally involving health care, is covered by the Act. Reported cases have evolved in inconsistent ways, seemingly due to the variety of ever-changing policy goals espoused by Texas courts in general. In the years immediately following the enactment of the TMLA, definitions were construed broadly to snare all of a plaintiff's possible claims with procedural requirements unique to health care liability claims under Chapter 74.

Over time, cases have somewhat relaxed the standard under very specific fact patterns, often leaving the practitioner with little real clarity on whether his particular case's facts are covered or not. In cases that are close calls, practitioners should always follow the requirements of Chapter 74. Similar caution should apply in considering potential emergency cases.

Definitions seldom make a case, but can often kill a case. Failure to understand and apply the definitions properly to a set of facts can lead to cases dismissed for failure to comply with the procedural requirements of Chapter 74 and expose meritorious claims to dismissal, with prejudice, on technical grounds. Compliance with Chapter 74 requirements is difficult, time consuming, and, by design, expensive, but the alternative is worse.

4, Senator Ratliff, in response to a question concerning the language in Texas Civil Practice and Remedies Code § 74.153, stated: "Both willful and wanton negligence are covered, but this is basically a gross negligence standard." S.J. of Tex., 78th Leg., R.S. 5004 (2003); *see also Turner*, 325 S.W.3d at 780 (discussing how this is a gross negligence standard). In light of this body of law, in *Turner*, the Dallas Court of Appeals concluded that willful and wanton as used in § 74.153 means gross negligence. *Turner*, 325 S.W.3d at 780–81.