Case No. 03-05-00620-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN, TEXAS

TEXAS ORTHOPAEDIC ASSOCIATION, TEXAS MEDICAL ASSOCIATION, and ANDREW M. KANT, M.D.

Plaintiffs/Appellants,

v.

TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

Defendant/Appellee.

Appeal from the 126th Judicial District Court
Travis County, Texas

BRIEF *AMICI CURIAE* OF AMERICAN MEDICAL ASSOCIATION, AMERICAN ASSOCIATION OF ORTHOPAEDIC SURGEONS, TEXAS ACADEMY OF FAMILY PHYSICIANS, TEXAS OPHTHALMOLOGICAL ASSOCIATION, TEXAS PEDIATRIC SOCIETY, AND TEXAS SOCIETY OF ANESTHESIOLOGISTS

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STATEMENT OF INTERESTS

The American Medical Association ("AMA"), an Illinois non-profit corporation headquartered in Chicago, is an association of approximately 245,000 physicians, residents, and medical students. Its members practice in every state and in all fields of medical specialty. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. It is the largest medical society in the United States.[1]

The American Association of Orthopaedic Surgeons ("AAOS") is a non-profit organization that serves approximately 28,000 members internationally. Its mission is to serve the profession, champion the interests of patients, and advance the highest quality of musculoskeletal health.

The Texas Academy of Family Physicians ("TAFP"), a constituent chapter of the American Academy of Family Physicians, is a medical specialty organization dedicated to the delivery of quality health care. The mission of TAFP is to equip family physicians in Texas with the right tools to improve the health of patients and their families and to advance and represent the specialty of family medicine.

The Texas Ophthalmological Association ("TOA") is a non-profit organization of 800 ophthalmologists practicing in Texas. Founded in 1956, its purpose is to promote and advance the science and art of medical eye care in the State of Texas.

[1] The AMA submits this Brief *Amici Curiae* on its own behalf and as a member of the Litigation Center of the AMA, a coalition of medical societies representing the interests of organized medicine in the courts.

The Texas Pediatric Society ("TPS"), the Texas Chapter of the American Academy of Pediatrics, is a non-profit organization of 3,400 Texas pediatricians and medical students. Its mission is to ensure that the children of Texas are safe and healthy, that its members are well informed and supported, and that the practice of pediatrics in Texas is both fulfilling and economically viable.

The Texas Society of Anesthesiologists ("TSA") is a voluntary, nonprofit medical association of 2,486 Texas physicians who practice the medical specialty of anesthesiology. Its members evaluate patients, determine anesthesia plans, administer anesthetics, medically direct Certified Nurse Anesthetists and Anesthesia Assistants, monitor patients during surgical, obstetrical and other diagnostic and therapeutic procedures, and provide post-anesthetic care in hospitals, ambulatory surgery centers and office settings throughout Texas.

The TAFP, the TOpA, the TPS, and the TSA join in this brief partly because of their concern that the healthcare of Texans could be immediately and adversely impacted if the podiatry Rule at issue in this case is allowed to stand. They also join because of a concern that the courts could, if issues are not presented forcefully, unreasonably defer to ill-considered scope of practice determinations by administrative boards dominated by self-interested non-physician health care practitioners.

ARGUMENT

Introduction

This case involves an attempt by the Texas State Board of Podiatric Medical Examiners (the "Board") to expand the scope of podiatry in Texas to unprecedented levels.[2] Chapter 202 of the Texas Occupations Code (the "Podiatry Act") limits the practice of podiatry to treatment of the "foot." The Board seeks to expand this scope of practice to include treatment of anatomical structures found well beyond the boundaries of the foot.

The Board suggests that this case deals with the limited issue of whether the "ankle" is part of the "foot" and thus within the purview of podiatric treatment. For the reasons set forth in Appellants' brief (which will not be repeated here), it would be improper to include the ankle with the foot. In addition to that basic argument, however, the expanded definition of podiatry would go far beyond the treatment of the ankle. Should this Court affirm the judgment of the lower court, podiatrists in Texas would arguably be permitted to provide treatment to body parts extending far beyond the foot or the ankle, even above the knee—a clear departure from the currently accepted practices of podiatrists in any jurisdiction. At the same time, the Board's regulation omits many of the anatomical structures clearly covered by even the narrowest definition of "foot." As such, its definition of "foot" is grossly inaccurate.

[2] The Board consists of nine members, six of whom are practicing podiatrists. Tex. Occ. Code § 202.051 (2005).

Amici recognize the role of non-physician health care practitioners, such as podiatrists, in providing health care to their patients. However, such care should be based on appropriate education, training, and experience. Therefore, *amici* believe that the determination of the scope of practice of such practitioners should involve a careful, objective review of the existing scope of practice and an assessment of what additional services a redefinition would authorize.

The Texas Legislature must surely have considered patient safety and public protection as primary objectives when it enacted the Podiatry Act. Non-physician health care practitioners should have sufficient education and training to provide safe patient care. In the context of their practice, such practitioners must be prepared to evaluate individual patient cases objectively and refer those that require skills beyond their education and training to a physician or other appropriate health care expert.

In the present case, none of these considerations were reflected in the Board's careless attempt to define the term "foot" in its regulations. Under accepted legal standards, the "foot" does not include the "ankle." Moreover, the Board's definition is imprecise, incomprehensible, and in clear conflict with mainstream medical views. Therefore, this Court should invalidate the definition and reverse the lower court's decision in favor of the Board.

I. THE BOARD'S DEFINITION CONFLICTS WITH THE UNAMBIGUOUS LANGUAGE OF THE PODIATRY ACT AND EXCEEDS THE BOARD'S RULEMAKING AUTHORITY.

The Podiatry Act establishes the right to practice podiatry in Texas. The scope of practice of podiatry is therefore dependent on the Podiatry Act's definition of "podiatry,"

which it defines as "the treatment of or offer to treat any disease, disorder, physical injury, deformity, or ailment of the human foot by any system or method." Tex. Occ. Code § 202.001(a)(4). Neither the word "foot" nor the term "human foot" is defined in the statute. However, on January 17, 2001, the Board promulgated the following definition in its rules governing the conduct of podiatrists:

> Foot -- The foot is the tibia and fibula in their articulation with the talus, and all bones to the toes, inclusive of all soft tissues (muscles, nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus and all bones to the toes.

22 Tex. Admin. Code § 375.1(2) (2005) (the "Rule"). According to the Board, the Rule defines the "foot" as being inclusive of the "ankle."

A. The Rule Is Inconsistent With The "Ordinary Meaning" Of "Foot."

This definition, however, is inconsistent with the Podiatry Act. Specifically, the Rule diverges from the "ordinary meaning" of the term "foot," as employed in the statute.

The Board relies on *City of Austin v. Southwestern Bell Tel. Co.*, 92 S.W.3d 434 (Tex. 2002), for the proposition that it is the "chief job" of the courts to determine the legislative intent of a statute's terms. (Board Brief at 23.) *Austin*, however, states that unless a term is given a "specific statutory definition," courts must employ the "ordinary meaning" of the term.

In the present case, there is no statutory definition of the term "foot." Therefore, this Court must rely on its "ordinary meaning," which under Texas common law is defined as "the terminal part of the vertebrate leg upon which an individual stands consisting...of all the structures...***below*** the ankle joint." (Emphasis added.)

Northwestern Nat'l Cas. Co. v. Blayne Health McCoslin, 838 S.W.2d 715, 718 (Tex. App. – Waco 1992, writ denied) (providing the "ordinary meaning" of the word "foot").

This common law definition is unambiguous, as it is consistent with the definitions found in most mainstream medical and English dictionaries. *See Bantam Medical Dictionary* 177 (2d rev. ed. 1996) (defining "foot" as "the tarsus, the five metatarsal bones, and the phalangeal bones plus the surrounding tissues; anatomically, the bones and tissues of the ankle are ***excluded***" (emphasis added)); *Black's Medical Dictionary* 243 (40th ed. 2004) (defining "foot" as "that portion of the lower limb situated ***below*** the ankle joint" (emphasis added)); *Dorland's Illustrated Medical Dictionary* 721 (30th ed. 2003) (defining "foot" as "the tarsus, metatarsus, and phalanges and the tissues encompassing them," all of which are located ***beneath*** the articulation of the tibia and fibula with the talus); *Oxford English Dictionary*, vol. VI, at 12 (2nd ed. 1989) (defining "foot" as the "lowest part of the leg ***beyond*** the ankle-joint" (emphasis added)). Clearly the foot is a distinct anatomical structure located beneath the ankle.

Customary usage also supports the separateness of the foot and the ankle. The Current Procedural Terminology ("CPT"),[3] for instance, separates the codes for musculoskeletal surgeries between those performed on the "Leg (Tibia and Fibula) and Ankle Joint," designated by numbers in the 27000s, and those performed on the "Foot

[3] CPT is a listing of descriptive terms and identifying codes for reporting medical services and procedures performed by health care professionals (including physicians and podiatrists). The purpose of the terminology is to provide a uniform language that will accurately describe medical, surgical, and diagnostic services, and will thereby provide an effective means for reliable nationwide communication among health care professionals, patients, and third parties. *CPT 2006*, at vii.

and Toes," designated by numbers in the 28000s. *See CPT 2006 Standard Edition* 93-96 (AMA Press 2006), attached as Ex. A. The CPT is the most widely accepted nomenclature for the reporting of procedures and services performed by health care professionals under government and private health insurance programs. It was designated by the United States Department of Health and Human Services as the national coding standard for physicians and other health care professional services and procedures under the Health Insurance Portability and Accountability Act. *See* 45 C.F.R. § 162.1002 (2006).

Even the American Podiatric Medical Association ("APMA") itself defines "podiatry" as "a field of medicine" that focuses on "preventing, diagnosing, and treating conditions associated with the foot ***and*** ankle." (Emphasis added.) *See What is Podiatry?*, *at* http://www.apma.org/s_apma/sec.asp?CID=8&DID=2819. The Texas Podiatric Medical Association ("TPMA") similarly distinguishes between the foot and the ankle in defining "podiatrist" as a "health care professional whose total training focuses on the foot, ankle and related body systems." *See What is a Podiatrist?*, *at* http://www.txpma.org/what_is_a_podiatrist.html. It stands to reason that the foot and the ankle are two separate structures. Thus, if the Texas Legislature had intended the practice of podiatry in Texas to include treatment of the ankle, it would have explicitly stated so in the Podiatry Act.

Nonetheless, the Board and Intervenors, the TPMA and Bruce A. Scudday, D.P.M., argue that the Rule is consistent with the legislative history of the Podiatry Act. This Court, however, need not consider the "legislative history" in interpreting the

Podiatry Act, as the "ordinary" meaning of its terms are unambiguous. *Comdisco, Inc. v. Tarrant County Appraisal Dist.*, 927 S.W.2d 325, 327 (Tex. App. – Fort Worth 1996, writ ref'd) (legislative history should not be used to contradict the "plain and ordinary" meaning); *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278, 283-84 (Tex. 1999) (legislative history of a statute cannot be used to alter the unambiguous meaning of a statute); *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997) (courts should not resort to extrinsic aids in construing an unambiguous statute, and courts must find the legislature's intent as expressed in the language of the statute); *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 914 (Tex. App. – Houston [14th] 2005, no pet. h.) (legislative history cannot be used to contradict unambiguous language of statute).

The TPMA and Dr. Scudday also rely on *Texas Dept. of Protective and Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 175 (Tex. 2004), in arguing that the doctrine of "Legislative Acceptance" dictates that the Rule be adopted, since the Podiatry Act was re-enacted without change following the Rule's promulgation. The doctrine of Legislative Acceptance, however, only applies to *ambiguous* statutes. *Id. Mega Child* states, "If the statutory text is unambiguous, a court must adopt the interpretation supported by the statute's plain language." *Id.* In the present case, the term "foot," as used in the Podiatry Act, is unambiguous.

Most importantly, however, the Board, the TPMA, Dr. Scudday, and the APMA all fail to cite a single medical or English dictionary that defines the foot as including the ankle. Perhaps this is because there is none. The APMA erroneously cites two medical

texts, *Gray's Anatomy of the Human Body*, by Henry Gray, and *Anatomy of the Foot and Ankle*, by S. K. Sarrafian, as supporting its interpretation of the foot. (APMA Brief at 16-17.) These authorities do *not* support that the foot should include any anatomical structure located *above* the articulation of the tibia and the fibula with the talus. In fact, *Gray's Anatomy* identifies the bones of the foot as including "the tarsus, metatarsus, and phalanges," all of which are located *beneath* the articulation of the tibia and fibula with the talus. Henry Gray, *Gray's Anatomy of the Human Body* 291 (30th Am. ed. 1985). *Anatomy of the Foot and Ankle*, merely suggests that the foot and the ankle can be conceptualized as a "functional unit." (APMA Brief at 17.) This is a far cry from defining the foot and the ankle as indistinguishable structures.

B. The Rule Is Invalid Under The Rulemaking Provision Of The Podiatry Act And Texas Common Law, Because It Is "Unreasonable."

The Rule is also invalid, because it defines "foot" in an "unreasonable" manner. The Podiatry Act only authorizes the Board to adopt "reasonable or necessary rules, regulations, and bylaws." Tex. Occ. Code § 202.151 (2005). Thus, an "unreasonable" rule would exceed the Board's rulemaking authority. Moreover, courts are only required to defer to an agency's rulemaking authority if its rule is "reasonable." *City of Austin*, 92 S.W.3d at 441. Therefore, any rule that is "unreasonable" would be invalid under the Podiatry Act and under Texas common law.

In the present case, the Rule is "unreasonable" because it conflicts with the "ordinary" meaning of the word "foot." *Supra*, at 7-9. The foot and the ankle are two distinct anatomical structures. Therefore, the Rule should be deemed invalid.

C. The Board Is Not Empowered To Expand The Scope Of Its Own Authority Unilaterally.

The Board, the TPMA, and Dr. Scudday suggest that this Court should defer to the expertise of the Board. (Board Brief at 23; TPMA Brief at 29-32.) While it is generally true that a court will defer to an administrative agency's interpretation of a statute, such deference is only appropriate with respect to an agency "charged with its enforcement." *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). Therefore, deference should not be given to an agency rule that affects the meaning of a statute for which the agency is not responsible.

In the present case, the Board's definition of "foot" directly affects the meaning of the Texas Medical Practice Act, Tex. Occ. Code § 151.001, *et seq.* (2005) (the "Medical Practice Act"), a statute that the Board is not charged with enforcing. The purpose of the Medical Practice Act is "to protect the public interest" by regulating the granting of the privilege to practice medicine and "its subsequent use and control." Tex. Occ. Code § 151.003. The Medical Practice Act exempts certain non-physician health care practitioners, such as "licensed podiatrist[s] engaged strictly in the practice of podiatry as defined by law," from its regulatory requirements. Tex. Occ. Code § 151.052.

The Rule effectively expands the scope of this exemption by redefining "podiatry." The Board should not have the power to expand this exemption clause unilaterally and thus affect the application and construction of the Medical Practice Act. This statute was intended to be administered by individuals who have expertise in the area of medical practice. The Board is not so qualified.

In addition, not only does the Board lack the knowledge and expertise necessary to determine the circumstances in which the requirements of the Medical Practice Act should apply, the members of the Board are directly representative of an industry that has financial and political incentives to expand such an exemption. The Board is composed of six practicing podiatrists and three general members of the public.[4] Tex. Occ. Code § 202.051 (2005). It is therefore influenced by the commercial interests of podiatrists and not by those who have expertise in the practice of medicine. Allowing the Board to have such power would be reckless and a threat to public health.

II. THE BOARD'S DEFINITION OF "FOOT" INCLUDES STRUCTURES THAT EXTEND INTO THE UPPER LEG AND EXCLUDES SOFT TISSUES THAT ARE CLEARLY PART OF THE FOOT.

If the Board is to define the "foot," it must use language that is both understandable and precise. With respect to the Rule, it has failed to do so, as its definition of "foot" is fundamentally flawed. Not only does it inaccurately include the ankle, it also includes numerous anatomical structures that extend as high as the upper leg. The Rule also excludes many soft tissues that are unquestionably part of the foot but do not insert into the ankle, such as the skin surrounding the foot. Consequently, under this definition of "foot," podiatrists in Texas would be authorized to perform many

[4] By contrast, the Texas Medical Board ("TMB"), the agency charged with administering the Medical Practice Act, is composed of 19 members: nine Medical Doctors, three Doctors of Osteopathic Medicine, and seven representatives of the public. Moreover, membership to the TMB must be approved by the Texas Legislature, as each member is appointed with the "advice and consent of the senate." This requirement does not apply to members of the Board. Tex. Occ. Code § 152.002 (2005).

medical procedures for which they are unlicensed and untrained and also be prohibited from performing even some of the most basic treatments to the foot.

A. The Rule Is Overly Expansive, Because It Includes Anatomical Structures That Extend Far Beyond The Ankle Or The Foot.

The Board, the TPMA, Dr. Scudday, and the APMA devote significant portions of their briefs solely to the issue of whether the ankle should be included in the Rule and thus within the scope of practice of podiatry. (*See* Board Brief at 11-19; TPMA Brief at 30; and APMA Brief at 14-24.)

As stated above, *amici* agree with Appellants, the Texas Orthopaedic Association, the Texas Medical Association, and Andrew Kant, M.D., that the ankle is *not* part of the foot and that the two are distinct anatomical structures. Nonetheless, even if this Court should find otherwise and deem the ankle to be a part of the foot, the Rule should still be invalidated. This case deals with much more than just the right of podiatrists to treat the ankle. In fact, the Rule is far more expansive than the Board suggests. It not only includes the bones of the ankle, but also numerous anatomical structures that extend well above the ankle.

The Rule states that the "foot" is "inclusive of ***all soft tissues*** (muscles, nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus." (Emphasis added.) 22 Tex. Admin. Code § 375.1(2). Many of these "soft tissues," however, are not localized around the foot or the ankle. For instance, the tibial nerve extends from the foot through the entire leg, ultimately merging with the sciatic nerve near the groin. *See* Ex. B at 482,

483, 485, and 504.[5] The peroneal nerve diverges from the tibial nerve at a point just above the knee. It then wraps around the upper end of the fibula ("fibular head") and diverges into two branches, both extending into the foot. *See id.* The sural nerve extends from the foot to the calf and then branches off into the tibial and peroneal nerves. *See* Ex. B at 483 and 504. The saphenous vein runs from the foot, up the inner leg and thigh, merging with the femoral vein at the groin. *See* Ex. B at 508. The anterior and posterior branches of the tibial artery and vein branch off from the popliteal artery and vein at the knee and extend downward into the foot on both the front and back sides of the leg. *See* Ex. B at 477. The dorsalis pedis artery extends from the top of the foot through the ankle to the anterior tibial artery. *See* Ex. B at 485. These are just a few examples of the numerous "soft tissues" that insert into the articulation of the tibia and fibula with the talus but continue past the ankle and often beyond the knee into the upper leg.

The Rule contains no language limiting the proximity of these "soft tissues" to any particular region. Thus, a podiatrist could, under the Rule, treat *any* anatomical structure, so long as any part of it inserts into the articulation of the tibia and fibula with the talus (*i.e.*, the ankle). Since many such structures extend well beyond the foot or even the ankle, the Rule would allow podiatrists to provide treatments as far as the upper leg. Moreover, since the Podiatry Act allows podiatrists to "treat any disease, disorder, physical injury, deformity, or ailment" that occurs on these structures "by any system or

[5] The highlighted anatomical illustrations attached as Exhibits B and F are excerpted from Frank H. Netter, M.D., *Atlas of Human Anatomy* 477-508 (2d ed. 2000).

method," the types of procedures that podiatrists could perform would be effectively unbounded. Tex. Occ. Code § 202.001(a)(4).

This expansion of podiatry would include procedures that podiatrists are untrained, unqualified, and—by a fair definition of the Podiatry Act—unlicensed to perform. For instance, entrapment of the peroneal nerve (*i.e.*, a pinched peroneal nerve) requires a surgical procedure performed at the fibular head, just below the knee. *See* T. Fabre, M.D., et al., *Peroneal Nerve Entrapment*, 80-A Journal of Bone and Joint Surgery 47-53 (1998), attached as Ex. C. Biopsies of the sural nerve, which are used to determine the nature of neuropathies (*i.e.*, nerve damage), and grafts of the saphenous vein, which are used for various vascular bypass surgeries (*i.e.*, repair of damaged blood vessels), both involve surgeries on the leg. *See* C. M. Gabriel, et al., *Prospective Study of the Usefulness of Sural Nerve Biopsy*, 69 Journal of Neurology, Neurosurgery & Psychiatry 442-446 (2000), attached as Ex. D, and John W. Hallett, Jr., et al., *Comprehensive Vascular and Endovascular Surgery* 108-110 (Mosby 2004), attached as Ex. E. Under the Rule, however, such procedures may fall within the scope of podiatry.

B. The Rule Erroneously Excludes "Soft Tissues" Of The Foot That Do Not Insert Into The Articulation Of The Tibia And Fibula With The Talus.

The Rule is also flawed because it fails to include certain anatomical structures that are unquestionably part of the foot but do not insert into the articulation forming the ankle. Under the Rule, the foot is "inclusive of all soft tissues that...insert" into the articulation of the tibia and fibula with the talus. 22 Tex. Admin. Code § 375.1(2). There are, however, numerous soft tissues that do *not* "insert" into this articulation but are still

considered part of the foot. These include the toe nails, the plantar fascia (connective tissue extending from the heel to the ball of the foot, forming the arch), the intrinsic muscles of the foot (muscles contained entirely within the foot)—such as the interosseous muscles (attached to the metatarsal bones), the abductor hallucis muscle (extending from the inner heel to the base of the big toe), the adductor hallucis muscles (crossing the inner sole of the foot)—the metatarsal and plantar ligaments (fibrous tissue connecting the bones of the foot), and countless other soft tissues that are intrinsic to the foot. *See* Ex. F at 496, 499, and 500.

The skin covering the foot is another example. Under the language of the Rule, podiatrists would not be permitted to treat or make incisions into the skin around the foot, since the skin is not a bone and does not insert into the articulation of the tibia and fibula with the talus. Clearly, no reasonable person would agree that the scope of practice of podiatry should be so limited.

On the other hand, should the skin be liberally construed to "insert" into the articulation forming the ankle, and thus within the definition of "foot," then the skin at any location on the body should equally be considered part of the foot, as the skin is considered a single organ and no mention is made as to the proximity of the "soft tissues" to the foot. *See* W. Mitchell Sams, Jr. & Peter J. Lynch, *Principles and Practice of Dermatology* 1 (2d ed. 1996), attached as Ex. G. Thus, taken to the extreme, the Rule would permit podiatrists to treat or perform surgery on facial skin or any other part of the skin throughout the body.

Conclusion

WHEREFORE, *amici curiae*, the American Medical Association, the American Association of Orthopaedic Surgeons, the Texas Academy of Family Physicians, the Texas Pediatric Society, the Texas Ophthalmological Association, and the Texas Society of Anesthesiologists, ask this Court to reverse the lower court's final judgment and invalidate the Rule.

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DISCLOSURE STATEMENT

Under Rule 11(c) of the Texas Rule of Appellate Procedure, *amici curiae*, the American Medical Association, the American Association of Orthopaedic Surgeons, the Texas Academy of Family Physicians, the Texas Ophthalmological Association, the Texas Pediatric Society, and the Texas Society of Anesthesiologists, state that no fee was paid or will be paid in preparation of this brief.

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CERTIFICATE OF SERVICE

I certify that on April 6, 2006, copies of the preceding Brief *Amici Curiae* of American Medical Association, American Association of Orthopaedic Surgeons, Texas Academy of Family Physicians, Texas Ophthalmological Association, Texas Pediatric Society, and Texas Society of Anesthesiologists were served by certified mail, return receipt requested, on:

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