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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLER

No. 17-0256

In the
Supreme Court of Texas

Texas Health Presbyterian Hospital of Denton, Marc Wilson, M.D., and Alliance OB/GYN Specialists, PLLC d/b/a OB/GYN Specialists,
Petitioners,

v.

D.A. and M.A., Individually and as Next Friends of A.A., a Minor,
Respondents.

On Petition for Review from the
Second District Court of Appeals at Fort Worth, Texas

BRIEF OF AMICI CURIAE TEXAS ALLIANCE FOR PATIENT ACCESS, TEXAS MEDICAL ASSOCIATION, TEXAS HOSPITAL ASSOCIATION, TEXAS OSTEOPATHIC MEDICAL ASSOCIATION, TEXAS ASSOCIATION OF OBSTETRICIANS AND GYNECOLOGISTS, AND THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, FILED IN SUPPORT OF PETITION FOR REVIEW

Respectfully submitted,

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

The Texas Alliance for Patient Access, Texas Medical Association, Texas Osteopathic Medical Association, Texas Hospital Association, Texas Association of Obstetricians and Gynecologists and the American College of Obstetricians and Gynecologists ("Amici Curiae") respectfully submit this Brief of Amici Curiae, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, and urge this Court to grant the Petition for Review, reverse the ruling of the court of appeals and answer the trial court's certified question as directed by Petitioner.

INTEREST OF AMICI CURIAE

Texas Alliance for Patient Access ("TAPA") is an association of over 250 health care interests providing medical care to Texas residents. Its members include physicians, hospitals, nursing homes, physician groups, physician liability carriers, and charity clinics, as well as other entities that have an interest in assuring timely and affordable access to quality medical and health care. TAPA seeks to improve access to health care by supporting meaningful and sustainable health care liability reforms and assuring that reforms find their proper interpretation and application in all jurisprudence affecting health care liability and liability insurance procurement and costs in the State of Texas.

The Texas Medical Association ("TMA") is a private, voluntary, non-profit association representing more than 50,000 Texas physicians, residents and medical students. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention, and cure of disease, and improvement of public health. Today, TMA's maxim continues in the same direction: Physicians caring for Texans. TMA's diverse physician members practice in all fields of medical specialization. TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.

The Texas Hospital Association ("THA") is a non-profit trade association that represents 459 hospitals across the state. THA advocates for state and national

legislative, regulatory, and judicial actions in support of accessible, cost-effective, high-quality health care. As a representative of its member hospitals, the THA is vitally interested in and concerned about the matters before this Court, which will affect the liability of hospitals.

The Texas Osteopathic Medical Association ("TOMA") is a private, voluntary, non-profit association founded in 1900 to serve and represent the professional interests of more than 5,000 licensed osteopathic physicians in Texas. TOMA's mission is to promote health care excellence for the people of Texas, advance the philosophy and principles of osteopathic medicine and to loyally embrace the family of the osteopathic profession and serve their unique needs.

The Texas Association of Obstetricians and Gynecologists was founded in 1929 and is the oldest women's health organization in Texas. TAOG is dedicated to promoting the art and science of medicine, specifically obstetrics and gynecology, for the betterment of women's health care in Texas. The Texas Association of Obstetricians and Gynecologists is a leading force in Texas for solutions, knowledge and tools that promote health care for women. The Texas Association of Obstetricians and Gynecologist's core values are leadership in the promotion of the doctor-patient role and in the advocacy of patients' health, excellency in the quality of service and information provided to patients, and integrity and ethical behavior in all areas of medical practice.

The American College of Obstetricians and Gynecologists (ACOG) is a non-profit educational and professional organization with more than 58,000 members, including more than 4,000 in the State of Texas. ACOG's members represent approximately 90% of all board-certified obstetricians and gynecologists practicing in the United States. As the leading professional association for physicians who specialize in the healthcare of women, ACOG strongly advocates for quality care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of the changing issues facing women's health care.[1]

Organizations listed as *Amici Curiae* have compensated the law firm of

[1] Courts, including the U.S. Supreme Court, frequently rely on submissions by *amici* as authoritative sources of medical information on issues concerning women's healthcare. *See, e.g.*, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312, 2315 (2016) (citing *amici* brief submitted by ACOG and other medical organizations in reviewing clinical and privileging requirements); *Stenberg v. Carhart*, 530 U.S. 914, 932-936 (2000) (quoting ACOG's *amicus* brief extensively and referring to ACOG as among the "significant medical authority" supporting the comparative safety of the healthcare procedure at issue); *Hodgson v. Minnesota*, 497 U.S. 417, 454 n.38 (1990) (citing *amici* brief submitted by ACOG and other medical organizations in assessing law concerning medical notification); *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983) (citing ACOG publication in discussing "accepted medical standards" for the provision of obstetric-gynecologic services); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 916–17 (9th Cir. 2014) (citing brief submitted by amici ACOG and other medical organizations further support of a particular medical regimen), *cert. denied*, 135 S. Ct. 870 (2014); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 738 F.3d 786, 790 (7th Cir. 2013) (citing ACOG's amicus brief in evaluating the relative safety of certain medical procedures); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 168 (4th Cir. 2000) (extensively discussing ACOG's guidelines and describing those guidelines as "commonly used and relied upon by obstetricians and gynecologists nationwide to determine the standard and the appropriate level of care for their patients"); *Stuart v. Camnitz*, 774 F.3d 238, 251-252, 254-255 (4th Cir. 2014) (citing ACOG's amicus brief and committee opinion in its discussion of informed consent).

Jackson & Carter, PLLC, for the preparation of this brief.

INTRODUCTION

Amici include leading medical organizations and organizations representing medical providers, such as hospitals, throughout Texas. *Amici* submit this brief to not only stress the legal basis for granting the Petition for Review but also to describe the harmful and unintended consequences that will occur if the Court of Appeals' erroneous interpretation of the statute is permitted to stand.

For purposes of this Brief, *amici* adopt the Statement of the Case and Statement of Facts contained in the Petition for Review (hereinafter "Petition") filed by Texas Health Presbyterian Hospital of Denton, Marc Wilson, M.D., and Alliance OB/GYN Specialists, PLLC d/b/a OB/GYN Specialists, hereinafter "Petitioners").

SUMMARY OF THE ARGUMENT

This Court should grant review and reverse the Court of Appeals' ruling that Section 74.153 of the Texas Civil Practice & Remedies Code does not afford an elevated standard of proof for healthcare providers that treat obstetrical patients with emergency conditions unless the patient has first been evaluated in a hospital emergency department.

The clear and unambiguous wording of Section 74.153 of the Texas Civil Practice & Remedies Code states that an elevated standard of proof is appropriate

for healthcare providers that treat patients in an emergency condition in three separate areas of the hospital: 1) the emergency department; or 2) the obstetrical unit; or 3) a surgical suite if the patient has previously been evaluated or treated in the emergency department. Unlike patients treated in a surgical suite, the statute does not require a patient to be evaluated in the emergency department before being treated in the obstetrical unit for the elevated standard of proof to apply.

Including the obstetrical unit as a location where an elevated standard of proof applies to care reflects the real-world manner in which pregnant patients are treated. Pregnant women with emergency medical conditions enter hospitals via two primary locations—the emergency department or the obstetrical department. Both locations treat pregnant patients for emergencies related to pregnancy, labor, delivery and other conditions. Depending on the needs of the pregnant patient, some are instructed to report directly to the obstetrical unit if they are experiencing an emergency condition. The plain wording of Section 74.153 reflects this reality and applies an elevated standard of proof to the treatment provided in both locations at the hospital. Healthcare providers should not be deprived of the protections afforded them in this statute by the Legislature. Such a result is contrary to the plain language of the statute and the Legislature's intent, and would lead to disincentives that could negatively affect the health and wellbeing of pregnant women.

Accordingly, *amici* urge this Court to hold that the standard of proof

recognized by section 74.153 applies to medical care provided in an obstetrical unit regardless of whether the patient was first evaluated in a hospital emergency department.

ARGUMENT AND AUTHORITIES

I. The plain language of Section 74.153 affords healthcare providers an elevated standard of proof when treating patients with an emergency medical condition in the obstetrical department regardless of whether the patient was first evaluated in the emergency department.

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

> "In a suit involving a health care liability claim against a physician or health care provider for injury or death of a patient arising 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,** the claimant bringing the suit may only prove that the treatment or lack of treatment by the physician or health care provider departed from the accepted standards of medical care or health care only if the claimant shows by a preponderance of the evidence that the physician or health care provider, with willful and wanton negligence, deviated from the degree of care and skill that is reasonably expected of an ordinarily prudent physician or health care provider in the same or similar circumstances." (Emphasis added).

The language of the statute is clear and requires that plaintiffs meet an elevated standard of proof (willful and wanton negligence) in certain medical malpractice cases. This elevated standard is applied if the claim arises out of emergency medical care rendered in: 1) a hospital emergency department; or 2) an obstetrical unit; or 3) a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department.

The Court of Appeals erroneously held that this elevated standard does not apply to emergency medical care in an obstetrical department unless it is rendered "immediately following the evaluation or treatment of a patient in a hospital emergency department." By requiring each patient to have first been evaluated or treated in a hospital emergency department before affording the healthcare provider with an elevated standard of proof, the Court of Appeals stripped protections for the providers that are clearly articulated by the Texas Legislature in Section 74.153.

The Court of Appeals interpretation is incorrect. First, the plain text of the statute reveals that the "immediately following" phrase only modifies "surgical suite" and does not apply to the Emergency Department or the Obstetrical Department. If the Legislature intended the "immediately following" phrase to apply to all three locations, the Legislature would have used one prepositional phrase instead of three and the statute would have read "in a hospital emergency department, obstetrical unit, or surgical suite immediately following..." The Legislature intentionally chose to separate surgical suite from the other locations, resulting in the "immediately following" phrase only modifying "surgical suite."

Further, the Court of Appeals' interpretation of the Statute's wording also creates a redundancy that does not make sense and could not have been intended by the Legislature. If the "immediately following" phrase applies to all three locations, the statute would effectively read "in a hospital emergency department .

. . immediately following evaluation or treatment in a hospital emergency department." The Legislature could not have intended the statute to read in such a manner, especially in light of their deliberate insertion of the word "or" three times in that sentence. The Court of Appeals' interpretation does not make sense and ignores the specific language used by the Legislature. Clear, plain language trumps absurdity. *Hallmark Marketing Co., LLC v. Hegar*, 488 S.W.3d 795, 798 (Tex. 2016).

Interpreting Section 74.153 to afford an elevated standard of review for all emergency treatment in the obstetrical department is also consistent with previous rulings from this Supreme Court. In *Texas West Oaks v. Williams*, this Court followed a similar approach in analyzing another section of Chapter 74. *Tex. West Oaks v. Williams*, 371 S.W.3d 171 (Tex. 2012). The issue in that case centered on how the modifying phrase "directly related to health care" applied to a list containing "medical care, or health care, or safety or professional or administrative services" in the definition of "health care liability claim." *Id*. at 184-185. This Court held that modifying "phrases should only be applied to the portion of the sentence immediately preceding it. *Id*. at 185. Thus, the "directly related" phrase only modified "professional or administrative services" because if the modifier were applied to the entire list it would result in a nonsensical construction. *Id*.

II. The Court of Appeals' interpretation of Section 74.153 is inconsistent with the reality of how pregnant patients receive medical care.

The language contained in Section 74.153 reflects the real world of emergency care for pregnant patients. The Legislature understood this reality and crafted language that provided a heightened standard of proof for both the emergency department and the obstetrical unit. "[L]abor and delivery units frequently serve as emergency units for pregnant women . . . ." *See* American College of Obstetricians and Gynecologists, Committee Opinion No. 667 Jul. 2016 (reaffirmed 2018). Common obstetrical emergencies include: 1) the patient who presents in late pregnancy with vaginal bleeding; 2) the patient who presents in late pregnancy with elevated blood pressure; and 3) the patient who presents in late pregnancy with new onset of seizures (eclampsia). *See* The American College of Obstetricians and Gynecologists, Guidelines for Perinatal Care, 229-30 (Sarah J. Kilpatrick, MD, FACOG, et al. eds., 8th ed. 2017). Physicians, in some cases, instruct pregnant patients to report directly to the hospital's obstetrical unit instead of presenting to the emergency room. In many cases, the obstetrical unit is the best place for these patients to be treated and an initial visit to the emergency department only results in a delay in obtaining care. That is why some hospitals have policies that require patients past a certain point in their pregnancy to be seen in the obstetrical unit instead of the emergency department except in cases of

trauma (i.e. car wreck). If the Court of Appeals interpretation of Section 74.153 is affirmed, physicians and hospitals will be incentivized to route pregnant patients through the emergency department instead of sending them directly to the obstetrical unit regardless of whether the emergency department is the best place for those patients to receive care. In re-routing patients, valuable time for intervention will be lost. The legislature envisioned these types of emergent scenarios when it worded Section 74.153 to include the obstetrical unit. This Court should not endorse an interpretation of Section 74.153 that could result in delays for pregnant women seeking emergency care in a hospital unit that is not best suited for their needs.

Further, many times healthcare providers respond to emergencies in the obstetrical unit. Pregnant patients who are suffering from an emergency condition often warrant additional physicians being called to render aid. These physicians are responding to an emergency and are often treating a patient without the benefit of an existing patient-physician relationship with that individual. In this situation, the emergency condition arises in the obstetrical unit and is appropriately treated there as well. This type of emergency in an obstetrical unit is exactly the reason the Legislature included an elevated standard of proof in Section 74.153 for both the emergency department and the obstetrical unit. There is nothing in Section 74.153

that eliminates the elevated standard of proof for healthcare providers rendering emergent care to pregnant patients in the obstetrical unit.

For the reasons set forth above, as well as the arguments set forth in Petitioner's Brief on the Merits, *Amici Curiae* would strongly urge the Court to hold that the elevated standard set forth in Section 74.153 applies to emergency medical care provided in an obstetrical unit regardless of whether the patient was first evaluated in a traditional hospital emergency department. Any other interpretation is not only contrary to the language of the statute, but also will discourage providers from rendering emergent care in the most appropriate setting.

CONCLUSION AND PRAYER

THEREFORE, for the preceding reasons, Amici Curiae Texas Alliance for Patient Access, Texas Medical Association, Texas Osteopathic Medical Association, Texas Hospital Association, Texas Association of Obstetricians and Gynecologists, and the American College of Obstetricians and Gynecologists respectfully urge this Court to grant the Petition for Review and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of Amicus Curiae was prepared using Microsoft Word 2010, which indicated that the total word count (exclusive of those items listed in rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, as amended) is 3370 words.

By: /s/ Brian G. Jackson
Brian G. Jackson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Amicus Curiae was served on the 2nd day of October, 2018, on the following individuals:

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