No. 17-0263

In the
Supreme Court of Texas

CRAIG PERKINS and KIMBERLY PERKINS, Individually and as Representatives of the Estate of CODY PERKINS, Decedent,
Petitioners,

v.

STEPHEN X. SKAPEK, M.D., DANIEL BOWERS, M.D., PAUL DAVID HARKER-MURRAY, M.D., JEFFREY SCOTT KAHN, M.D., LAURA KLESSE, M.D., PATRICK LEAVEY, M.D., TAMRA SLONE, M.D., TANYA WATT, M.D., NAOMI WINICK, M.D., MARTHA STEGNER, M.D.
Respondents.

On Petition for Review from the
Fifth Court of Appeals at Dallas, Texas

BRIEF OF AMICI CURIAE TEXAS ALLIANCE FOR PATIENT ACCESS, TEXAS MEDICAL ASSOCIATION, TEXAS HOSPITAL ASSOCIATION, AND THE TEXAS OSTEOPATHIC MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENT'S RESPONSE TO 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 Hospital Association and the Texas Osteopathic Medical Association (Collectively referred to as "Amici Curiae") appear as Amici Curiae and respectfully submits its Brief of Amici Curiae in Support of Respondents' Response to Petition for Review, pursuant to Rule 11 of the Texas Rules of Appellate Procedure, and urge this Court to deny the petition for review or affirm the judgment of the court of

appeals.

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 to assure that reforms find their proper interpretation and application in any and 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.

Amici Curiae have compensated the law firm of Jackson & Carter, PLLC, for the preparation of this brief.

INTRODUCTION

Amici Curiae, for purposes of this Brief, adopt the Statement of the Case and Statement of Facts contained in the Response to Petition for Review (hereinafter "Response") filed by Stephen X. Skapek, M.D.; Daniel Bowers, M.D.; Paul David Harker-Murray, M.D.; Jeffrey Scott Kahn, M.D.; Laura Klesse, M.D.; Patrick Leavey, M.D.; Tamra Slone, M.D.; Tanya Watt, M.D.; Naomi Winick, M.D.; and Martha Stegner, M.D. (hereinafter "Respondents").

SUMMARY OF THE ARGUMENT

This Court should deny the Petition for Review or affirm the ruling issued by the Fifth Court of Appeals pursuant to Section 101.106(f) of the Texas Civil Practices and Remedies Code ("TCPRC"). This section provides that employees of governmental units cannot be sued in their individual capacity for acts which occurred in the course and scope of their employment.

Respondents were employed by the University of Texas Southwestern Medical Center at Dallas ("UTSW"). (CR 2005-2015). Since UTSW controlled the details of their work, Respondents qualify as "employees" under TCPRC 101.106(f) because they meet the definition of "employee" under TCPRC 101.001(2). (CR 2010-13). Respondents were paid by their employer and issued a W-2 tax form which reflected their employment status and compensation. (*Id.)*. They were working in the course and scope of their employment when providing medical services to Petitioner's son. (*Id.*). Because of these facts, Respondents meet all criteria for dismissal under TCPRC 101.106(f). Accordingly, the Court of Appeals was correct in holding that Respondents were entitled to dismissal.

ARGUMENT AND AUTHORITIES

I. The Appellate Court Correctly Held that Respondents were entitled to dismissal pursuant to Section 101.106(f) of the Texas Civil Practices and Remedies Code.

A. Section 101.106(f) of the TCPRC provides immunity for employees of governmental units.

Section 101.106(f) of the Texas Civil Practices and Remedies Code provides that "if suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment, and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed."

Respondents provided medical services to Petitioner's son because of their employment relationship with UTSW. (CR 2010-13). Respondents were in the paid employment of UTSW for "100%" of their time. (*Id.)*. In exchange for the salaries paid to the Respondents, UTSW was entitled to all professional fees generated from those services. (CR 2010, 2012).

This evidence confirms that Respondents were employees of a governmental unit and working within the course and scope of their employment when providing medical care to Petitioner's son. (CR 2005 – 2015). As such, they were entitled to dismissal pursuant to 101.106(f).

B. UTSW controlled the details of the Respondents' work.

One requirement for dismissal under 101.106(f) is that the Defendant is an "employee" of a governmental unit. "Employee" is a defined term in the Act, and means "a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." TEX. CIV. PRAC. & REM. CODE § 101.001(2).

The 5th Court of Appeals correctly held that Respondents qualified as "employees" under Section 101.001(2) because their employer controlled the details of their work. Petitioner contends that the 5th Court of Appeals erred in reaching this conclusion and bases that contention on this court's opinion in *Marino v. Lenoir,* 526 S.W.3d 403 (Tex. 2017).

In *Marino,* this Court determined that the evidence did not support a dismissal for the employed physician because the facts presented failed to prove that the governmental unit controlled the details of the physician's work. *Marino* @ 410. However, the facts in *Marino* are significantly different than the facts in the instant case. In *Marino,* the governmental entity's handbook stated that the employer would only provide "administrative and educational functions" such as "issuance of paychecks", "maintenance of records", and malpractice insurance.

(*Id.* @ 406). Importantly, the Handbook also stated that the teaching staff (and not the governmental entity) would supervise the Physician. (*Id.).* Accordingly, the governmental entity's handbook transferred the direct supervision of the employee from the governmental entity to the teaching staff at a different facility. Because of that transfer, the governmental unit no longer controlled the details of the physician's work and the physician did not qualify as an employee under 101.001(2). (*Id.* @ 408).

In the instant case, UTSW never transferred supervision of the employed physicians nor is there language in any UTSW handbook or policy manual that dictates such a transfer take place. UTSW retained control of the employees and that control qualifies them for dismissal under 101.106(f).

Another key factor in the *Marino* opinion was this specific provision in the governmental entity's bylaws, which states:

> "4. All physicians employed by the corporation for the purpose of serving as a member of the staff of any hospital or hospitals that are neither owned nor operated by the corporation shall, in the performance of their duties as members of the staff of such hospital or hospitals, <u>be subject to the direction and control of the hospital or hospitals upon whose staff he serves</u>. No physician employed by the corporation shall serve upon the staff of a hospital not owned or operated by the corporation unless and until the

> governing body of such hospital shall agree in writing to assume full responsibility for the direction and control of the acts of such physician while serving upon the staff of the hospital and shall further agree in writing to hold the corporation harmless from all liability which may arise out of acts performed by such physician while engaged in the scope and course of his duties as a member of the staff of such hospital. No director, officer, or employee of the corporation shall be authorized to act on behalf of the corporation to direct or control the acts of any physician employed by the corporation while said physician is serving as a member of the staff of any hospital or hospitals not owned or operated by the corporation."

(Id. @ 407) [emphasis added]. These bylaws disavow control of the employee by stating that the employee is under the specific direction and control of the Hospital where they render medical services. (*Id.).* This court determined that the employer could not disavow control of the employee in both their handbook and their bylaws and still assert that they controlled the daily activities of that same employee for purposes of Section 101.106(f). (*Id. @* 408).

In the instant case, there is no evidence that UTSW disavowed ownership or control of the Respondents. In fact, all medical services provided by Respondents to any patient were provided on behalf of UTSW. (CR 2010-13). In return for their salary, Respondents assigned all billings for those services back to UTSW.

(*Id.)*. Additionally, Respondents were always subject to the policies and procedures of UTSW. (*Id.)*.

UTSW never transferred or disavowed control of their employees. The specific facts and circumstances surrounding Respondents' employment are significantly different than the employment scenario in *Marino*, thereby justifying dismissal under 101.106(f).

II. Reversing the Appellate Court Would Significantly Disrupt the Relationships between Physicians and Hospitals

Texas has long-standing precedent recognizing that "physicians are considered to be independent contractors with regard to hospitals at which they enjoy staff privileges". *Espalin v. Children's Medical Center of Dallas*, 27 S.W.3d 675, 684 (Tex. App.—Dallas 2000, no pet.)(citing *Baptist Memorial Hospital System v. Sampson*, 969 S.W.2d 945, 948 (Tex. 1998); *Berel v. HCA Health Services of Texas, Inc*., 881 S.W.2d 21, 23 (Tex. App.—Houston [1st Dist.] 1994, writ denied)). A physician's agreement to follow hospital bylaws similar to the ones in the instant case does not change that precedent regardless of whether the physician works for a medical group, is employed by a nonprofit health corporation, or, as in this case, is employed by an academic institution.

The Petitioners argue that by virtue of accepting the terms of a hospital's medical staff bylaws, a physician employed by a governmental entity relinquishes

their position as an employee and becomes subject to the complete control of the hospital. While the physician does accept the terms of the hospital's medical staff bylaws, this does not change the employment status between the physician and their employer. This remains true when the physician is employed by an academic institution because fulfilling teaching and clinical duties at a hospital are required elements of the physician's employment. The simple act of agreeing to abide by a hospital's medical staff bylaws does not change the physician's employment status with an academic institution or any other employer.

The Petitioners' argument does not reflect the reality of employment relationships among physicians who maintain privileges to treat their patients at a hospital. If, as Petitioner asserts, an employed physician cannot maintain privileges at a hospital while being employed with a governmental academic institution, physician employment at academic institutions may very well end.

CONCLUSION AND PRAYER

THEREFORE, for the preceding reasons, Amici Curiae TAPA, TMA, THA and TOMA respectfully urge this Court to either deny the Petition for Review or, if the Petition for Review is granted, affirm 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 2,625 words.

By: /s/ Brian G. Jackson
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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 14th day of February, 2018, on the following individuals:

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