PHYSICIAN PRACTICE START-UP ASSISTANCE AGREEMENT
BAYLOR REGIONAL MEDICAL CENTER AT PLANO;
CHRISTOPHER DUNTSCH, M.D.; AND
MINIMALLY INVASIVE SPINE INSTITUTE, P.A.

1st day of July, 2011

This PHYSICIAN PRACTICE START-UP ASSISTANCE AGREEMENT ("**Agreement**") is made as of the ~~6th day of June, 2011~~ ("**Effective Date**"), by and between BAYLOR REGIONAL MEDICAL CENTER AT PLANO ("**Hospital**"), on the one hand, and CHRISTOPHER DUNTSCH, M.D. ("**Physician**") and MINIMALLY INVASIVE SPINE INSTITUTE, P.A. ("**Practice**"), jointly and severally, on the other. For purposes of this Agreement, the Hospital, the Physician and the Practice are each a "**Party**" and collectively they are the "**Parties.**"

RECITALS

WHEREAS, one of the primary missions of the Hospital is to make medical services available to the residents of the Hospital Service Area (as defined below in Section 1.6), and such residents often include patients without an attending physician or the ability to pay for some or all of the services rendered;

WHEREAS, the Hospital has determined that there is a shortage of physicians specializing in Neurosurgery (the "Specialty") in the Hospital Service Area, and as a result the population residing in the Hospital Service Area is underserved in terms of the Specialty;

WHEREAS, the Practice provides neurosurgery services and desires to recruit the Physician, who specializes in the Specialty, to relocate to the Hospital Service Area, become employed by the Practice and commence making additional neurosurgery services available to residents of the Hospital Service Area; and

WHEREAS, by providing the assistance described in this Agreement to the Physician and to the Practice in connection with the Practice's recruitment and employment of the Physician, the Hospital desires to induce the Physician to relocate to the Hospital Service Area and to join the Hospital's Medical Staff so that the Physician will be able to provide the needed services to residents of the Hospital Service Area.

NOW, THEREFORE, based on the foregoing premises and the mutual promises and covenants set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE I
DEFINITIONS

In addition to the other terms specifically defined within the text of this Agreement, the following terms have the indicated meanings:

1.1 "**Commencement Date**" means the earlier to occur of ~~June 6, 2011~~ July 1, 2011 or the date on which Physician begins the Full-Time Practice of Medicine in the Hospital Service Area.

1.2 "**Concluding Date**" means the earlier of: (i) the date on which all amounts advanced to the Practice under Section 3.2 together with the accrued interest, are repaid or forgiven under Article IV, provided that should no amounts be advanced to the Physician or the Practice under Section 3.2, the Concluding Date will be the date on which the Guarantee Period ends; and (ii) the effective date of the termination of this Agreement for any reason.

1.3 **"Full-Time Practice of Medicine"** means the Physician is devoting the Physician's full professional time, attention and best efforts to directly providing patient care services and performing activities directly related to patient care for a minimum of forty (40) hours per week for at least forty-eight (48) weeks per year.

1.4 **"Guarantee Period"** shall mean the twelve (12) month period beginning on the Commencement Date.

1.5 **"Guaranteed Income"** means Fifty Thousand and no/100 Dollars ($50,000.00) per month during the Guarantee Period.

1.6 **"Hospital Service Area"** means the geographic area comprised of the following zip codes:

75093	75252	75075	75248	75023
75034	75287	75098	75080	75025
75074	75007	75070	75024	75006
75081	75044	75002	75035	75082
75040	75094	75056	75048	75069
75013	75068	75254	75001	75234
75071	75043	75009	75230	75240
75243				

1.7 **"Loan Balance"** means all then-current amounts advanced to the Practice under Section 3.2, together with and including all accrued and unpaid interest, which amounts have not been repaid or forgiven in accordance with the provisions of Article IV.

1.8 **"Net Collections"** means all cash or cash equivalents and the value of goods and services received (or unbilled for a period of thirty (30) days or more), directly or indirectly, by or for the Practice or the Physician, or any other person or entity, in exchange for or in any way related to, tied to or associated with the Physician's practice of medicine or any and all other uses of the Physician's medical training, less any refunds actually made by or on behalf of the Practice or the Physician to patients or Payors (as defined below in Section 2.4.2) for the Physician's services. Without limiting the generality of the foregoing, Net Collections shall also include distributions, dividends, and like revenue and payments received by the Physician or the Practice in connection with investments by the Physician or by the Practice on behalf of the Physician, directly or indirectly, as an owner, investor, partner, member or shareholder in any entity that makes health care items or services available to patients or other residents in the Hospital Service Area, with the exception of investments described in 42 CFR §§411.356(a) and (b), or any successor statute or regulation.

1.9 "Net Receipts" means Net Collections for any month during the Guarantee Period minus Operating Expenses for the same month.

1.10 **"Operating Expenses"** means those necessary and reasonable expenses actually incurred by or on behalf of the Physician or the Practice in connection with the Physician's medical practice on or after the Commencement Date which are: (i) deductible on federal income tax reporting forms relating to the Practice or the Physician as the case may be and (ii) consistent with the Baylor Health Care System ("BHCS") Guidelines for Physician Practice Start-up Assistance Agreements applicable to approved and

unapproved operating expenses. For purposes of this Agreement, Operating Expenses are limited to Forty-Four Thousand and no/100 Dollars ($44,000.00) per month during the Guarantee Period.

1.11 **"Practice Documentation"** means true and correct documentation, satisfactory to the Hospital in its sole discretion, which details the monthly Net Collections and Operating Expenses of the Practice and the Physician for each month during the Guarantee Period, which shall be submitted to the Hospital by the Practice or the Physician, as the case may be, on or before the fifteenth (15th) day of the month immediately subsequent to the month in which they were incurred.

1.12 **"Prime Rate"** means the rate of interest published by the *Wall Street Journal*, reflecting the base rate on corporate loans by at least seventy-five percent (75%) of the nation's thirty (30) largest banks as of the Commencement Date.

ARTICLE II
CERTAIN OBLIGATIONS OF THE PHYSICIAN AND THE PRACTICE

2.1 **Medical License; Full-Time Practice of Medicine.** Beginning on the Commencement Date and at all times thereafter until no earlier than the Concluding Date, the Physician shall: (i) be duly licensed and in good standing under the Applicable Law (as defined below in Section 6.6) of the State of Texas to engage in the unrestricted practice of medicine; (ii) be duly registered and certified to administer and prescribe medications and controlled substances; and (iii) maintain a medical practice in the Specialty, and be actively engaged in the Full-Time Practice of Medicine in the Hospital Service Area.

2.2 **Medical Staff Membership.** In order that the Physician will be eligible to care for patients, including indigent patients, seeking medical care at the Hospital, the Physician shall, at least thirty (30) days prior to the Commencement Date, apply for membership on the Hospital's Medical Staff with appropriate clinical privileges. Beginning no later than the ninetieth (90th) day after the Commencement Date the Physician shall have obtained Medical Staff membership and clinical privileges at the Hospital, and all times thereafter until no earlier than the Concluding Date, the Physician shall continuously maintain Medical Staff membership and clinical privileges at the Hospital in good standing and without restriction or limitation. Moreover, while Medical Staff membership at the Hospital with appropriate clinical privileges is a continuing condition to this Agreement, this Agreement is not, and shall not be construed as, any form of guarantee or assurance by the Hospital that the Physician will obtain or maintain Medical Staff membership or clinical privileges. Matters relating to granting of Medical Staff membership and clinical privileges are governed solely by the bylaws, rules, regulations, policies, procedures, and manuals of the Medical Staff of the Hospital (collectively, "**Medical Staff Bylaws**") as are in effect from time to time. The nonrenewal, expiration or termination of this Agreement shall not affect the Medical Staff membership or clinical privileges of the Physician at the Hospital, which status shall be separately governed by the Medical Staff Bylaws; provided, however, the event causing a termination of this Agreement may also be grounds for action under the Medical Staff Bylaws. The Physician specifically and expressly agrees that any due process or other requirements of the Medical Staff Bylaws shall not apply to the termination, expiration or nonrenewal of this Agreement. Notwithstanding anything to the contrary contained in this Agreement, the Physician shall be free, without notice to or other consent of the Hospital, to obtain and maintain medical staff membership and clinical privileges at any hospital or facility.

2.3 **Malpractice Insurance.** Beginning on the Commencement Date and at all times thereafter until no earlier than the end of the applicable statute of limitations period after the Concluding Date, the Practice or the Physician, as the case may be, shall maintain professional liability insurance for any and all claims and demands concerning or otherwise arising from or related to the practice of medicine by the Physician ("**Malpractice Insurance**"). The Malpractice Insurance shall be issued by an insurer

reasonably acceptable to the Hospital and shall be in amounts of coverage not less than that required from time to time for membership on the Hospital's Medical Staff. To the extent permitted by the applicable carrier, such insurance policy shall require the carrier to provide the Hospital with written notice of any cancellation, nonrenewal or reduction of the Malpractice Insurance coverage at least twenty (20) days in advance. If the Malpractice Insurance coverage is on a claims-made basis and the Physician ceases to be covered by Malpractice Insurance from the applicable carrier, the Practice or the Physician, as the case may be, shall obtain from an insurance carrier reasonably acceptable to the Hospital and in the amounts described above: (i) an unlimited reporting endorsement or extended coverage policy ("**Tail**"); (ii) retroactive coverage ("**Nose**"); or (iii) "**Prior Acts**" coverage with a retroactive date on or prior to the Commencement Date covering all acts or occurrences related to the practice of medicine by the Physician until no earlier than the end of the applicable statute of limitations period after the Concluding Date (collectively, "**Continuing Coverage**"). Upon request, the Practice or the Physician, as the case may be, shall promptly deliver to the Hospital certificates evidencing the Malpractice Insurance and, if applicable, the Continuing Coverage. **Notwithstanding anything to the contrary contained in this Agreement, the Hospital may terminate this Agreement immediately in the event of cancellation, nonrenewal or reduction of the Malpractice Insurance or failure to obtain Continuing Coverage.**

2.4 Medicare and Medicaid Program and Managed Care Participation.

2.4.1 Medicare and Medicaid Program Participation. As of the Commencement Date the Physician shall be a participating provider in the Medicare and Medicaid programs or shall have made application to become a participating provider in the Medicare and Medicaid programs and be actively pursuing such status. Moreover, if not obtained on or prior to the Commencement Date, the Physician shall obtain participating provider status in the Medicare and Medicaid programs no later than the sixtieth (60^{th}) day after the Commencement Date. At all times after the Commencement Date or the date on which participating provider status in the Medicare and Medicaid programs has been obtained, whichever is later, until no earlier than the Concluding Date, the Physician shall continue to be certified as a participating provider in the Medicare and Medicaid programs and shall take such other actions as are required to offer and provide services to patients whose care is reimbursed by such programs. The Practice or the Physician, as the case may be, shall provide documentation to the Hospital upon request evidencing the Physician's status as a participating provider in the Medicare and Medicaid programs, and if additionally requested, further information that services provided by the Physician have been reimbursed by such programs. **Without limiting the generality of the foregoing and anything to the contrary contained in this Agreement notwithstanding, in the event that the Physician does not become a participating provider in the Medicare and Medicaid on or at any time prior to the sixtieth (60^{th}) day after the Commencement Date, or thereafter ceases to maintain participating provider status in the Medicare and Medicaid programs at any time prior to the Concluding Date, the Hospital shall be entitled to terminate this Agreement immediately upon notice and, except as otherwise specifically provided in this Agreement, require that the Physician and the Practice immediately repay all amounts paid or advanced to the Practice or the Physician, as the case may be, under this Agreement (excluding amounts repaid under Section 4.1 or 4.2 below, but specifically including any amounts previously forgiven under Section 4.3 below); it being understood and agreed by the Parties that the Physician's participation in the Medicare and Medicaid programs is a material and ongoing condition under this Agreement.**

2.4.2 Managed Care Participation. The Hospital has, and may from time to time enter into, contracts with third parties, including without limitation health maintenance organizations, preferred provider organizations, employers, labor unions, governmental payors, third-party administrators, and insurance companies (collectively, "Payors"), providing for payment to the Hospital for its services rendered to patients. Upon request by the Hospital, the Practice and the

place whatsoever, either directly or indirectly, engage in the practice of medicine or surgery to any extent, unless otherwise specifically authorized by the Management.

2.6 Teaching, Writing, Non-Clinical Consulting, and Other Activities. Honorary fees or other remuneration generated from personal appearances, writing, teaching, non-clinical consulting, medical research, medico-legal activities, on-call stipends, deposition fees, intellectual property, or other services or activities provided by Physician (not on behalf of Association) shall not be part of this Agreement. Such remuneration shall belong solely to Physician; provided, that, any professional activity to be performed by Physician for remuneration beyond the scope of this Agreement (i) must be approved in advance by the Board of Directors, which such approval shall not be unreasonably withheld, and (ii) such activities shall not be covered by the professional liability insurance provided by the Association pursuant to this Agreement. Moreover, any honorary fees or other remuneration generated from personal appearances, writing, teaching, non-clinical consulting, medical research, medico-legal activities, on-call stipends, deposition fees, intellectual property, or other services or activities provided by Physician for or on behalf of the Association shall belong solely to the Association.

Any remuneration generated by Physician's creation or ownership (or maintenance of ownership) of any copyright, patent, or intellectual property that has been created, or is created, in whole or in part, by Physician alone and/or in conjunction with independent third parties before, during, or following the term of this Agreement shall belong solely to Physician. Notwithstanding the foregoing statement in this Section 2.6, any copyright, patent, or intellectual property created by Physician (with or without the cooperation of other physicians of Association) in the course of providing services as an employee of Association under this Agreement and through the use of identifiable funds of Association for the purposes of creating such copyright, patent, or intellectual property, or through the use of Confidential Information (as defined in Section 9.2 of this Agreement), shall remain the sole and exclusive property of Association, including any remuneration generated from such copyright, patent, or intellectual property.

ARTICLE III.

COMPENSATION

3.1 Base Compensation. As compensation for Physician's services and in consideration of Physician's other agreements and covenants as set forth herein, Association shall pay Physician a base salary per annum in the amount and subject to the terms set forth in the Addendum of Additional Terms attached hereto as Exhibit B. Subject to the conditions set forth in the Addendum of Additional Terms, the base salary, less any and all federal and state tax withholding amounts, shall be payable by Association to Physician in twelve (12) approximately equal monthly installments. Each such installment shall be made at such time and in such manner as is consistent with the compensation practices of Association then in effect with respect to physician employees.

Physician agree to use commercially reasonable efforts to enter into agreements with Payors under contract with the Hospital, which agreements will provide for payment to the Practice or the Physician, as the case may be, for professional medical services provided to patients of the Hospital covered by such Payors.

2.5 Patient Billing. The Practice or the Physician, as the case may be, shall promptly (within thirty (30) days of services being rendered) bill for all services provided by the Physician and diligently pursue collection for such services.

2.6 No Other Professional Services Contracting or Employment. Beginning on the Commencement Date and at all times thereafter until no earlier than the Concluding Date, and with the specific exception of the Practice and Practice-owned affiliates and the specific exception of shared call coverage arrangements, the Physician shall not be employed by, under contract with, or otherwise professionally associated with (not to include membership on the medical staff of a hospital or other health care facility, which is expressly permitted in this Agreement) any person or entity (including without limitation any entity formed by the Physician) in connection with the provision of professional medical services without the prior written consent of Hospital, which consent shall not be unreasonably withheld. **Without limiting the generality of the foregoing, the Physician and the Practice specifically acknowledge and agree that the Physician's or the Practice's acceptance of such employment or other association will entitle the Hospital to terminate this Agreement immediately upon notice and, except as otherwise specifically provided in this Agreement, require that the Physician and the Practice immediately repay all amounts paid or advanced to either or both of the Practice and the Physician, as the case may be, under this Agreement (excluding amounts repaid under Section 4.1 or 4.2 below, but specifically including any amounts previously forgiven under Section 4.3 below); it being understood and agreed by the Parties that the compliance by the Physician and the Practice with the provisions of this Section 2.6 is a material and ongoing condition under this Agreement.**

2.7 Representations and Warranties.

(a) The Physician and the Practice represent and warrant to the Hospital that:

(i) with the exception of anything provided to the Physician by the Practice, neither the Practice nor the Physician has received and neither will accept any other recruitment incentive, loan, payment or benefit of any kind which is given in whole or in part because the Physician has located Physician's medical practice in the Hospital Service Area;

(ii) attached and incorporated into this Agreement as Exhibit A is a true and correct copy of the employment agreement between the Practice and the Physician ("**Employment Agreement**");

(iii) the Practice and the Physician shall at all times prior to the Concluding Date strictly comply with the terms of the Employment Agreement, and the Practice and the Physician shall not deviate from, modify, amend, or terminate the Employment Agreement without the prior written notice to the Hospital; provided, however, any (A) changes to or addition of restrictions on the Physician's ability to establish a medical practice in the Hospital Service Area, in the event of termination of the Employment Agreement prior to the Concluding Date, and (B) reduction in the compensation payable to the Physician under the Employment Agreement shall be subject to the prior written approval of the Hospital, which approval shall not be unreasonably withheld;

(iv) other than the Employment Agreement, there are no agreements, contracts, leases, arrangements, or relationships, whether verbal or written, between the Physician and the Practice, and at no time prior to the Concluding Date shall the Practice and the Physician enter into any agreement, contract, lease, arrangement, or relationship, whether verbal or written (other than the Employment Agreement or an agreement for shared call coverage) without the prior written approval of the Hospital, which approval may be withheld in the Hospital's sole discretion; and

(v) at no time prior to the Concluding Date shall the Practice or the Physician enter into any agreement, contract, lease, arrangement, or relationship, whether verbal or written, with a physician or entity, which employs or which is owned or controlled, in whole or in part by, physicians, to obtain items or services, the cost of which the Practice intends to be treated as Operating Expenses, without the prior written approval of the Hospital, which approval may be withheld in the Hospital's sole discretion.

(b) The Practice represents and warrants to the Hospital that any and all restrictions on the Physician's ability to practice medicine in the Hospital Service Area, whether contained in the Employment Agreement or otherwise, are reasonable and comply with Applicable Law and shall not unreasonably restrict the Physician's ability to establish a medical practice in the Hospital Service Area, in the event of termination of the Employment Agreement prior to the Concluding Date.

(c) **Without limiting the generality of the foregoing and anything to the contrary contained in this Agreement notwithstanding, a breach by the Physician or the Practice of any of the representations and warranties contained in this Section 2.7 shall entitle the Hospital to terminate this Agreement immediately upon notice and, except as otherwise specifically provided in this Agreement, require that the Physician and the Practice immediately repay all amounts paid or advanced to the Practice or the Physician, as the case may be, under this Agreement; (excluding amounts repaid under Section 4.1 or 4.2 below, but specifically including any amounts previously forgiven under Section 4.3 below); it being understood and agreed by the Parties that compliance by the Practice and the Physician with the representations and warranties contained in this Section 2.7 is material and ongoing condition under this Agreement.**

2.8 **Participation in Educational Programs.** Upon request by the Hospital, the Physician shall participate in providing medical education through programs offered by the Hospital for physicians and other health care providers; provided, however, the Physician shall not be required to devote more than twenty (20) hours during any calendar year to such participation.

2.9 **Conflicts of Interest and Other BHCS Relationships.** The Physician represents and warrants that: (i) the Physician is not bound by any agreement or arrangement that would prevent or hinder the Physician in any manner from entering into, or from fulfilling the Physician's obligations and responsibilities under, this Agreement; and (ii) the Physician shall not enter into such an agreement or arrangement during the term of this Agreement. The Physician and Practice each jointly and separately represent and warrant to the Hospital that, other than as established by this Agreement or identified on Exhibit B, attached and incorporated into this Agreement, neither the Physician nor the Practice, or any immediate family member of the Physician or any owner or shareholder of the Practice, has any agreement or arrangement (whether oral or written) for the provision of items or services with the Baylor Health Care System ("**BHCS**") or any of its affiliated organizations. Furthermore, this Agreement shall be included in a master list of contracts that is: (a) centrally maintained and updated by BHCS and (b)

available for review by the Secretary of the United States Department of Health and Human Services upon request.

ARTICLE III
CERTAIN OBLIGATIONS OF THE HOSPITAL

3.1 **Relocation Expenses.** In addition to the practice start up-loans available under Section 3.2 below, the Hospital agrees to reimburse the Physician directly for the reasonable expenses incurred in connection with the Physician's relocation to the Plano, Texas area. Such reimbursement shall not exceed Fifteen Thousand Dollars ($15,000), and is contingent upon the Physician providing the Hospital with necessary documentation to substantiate the expenses in conformance with the Internal Revenue Service requirements and BHCS policies. If this Agreement is terminated for any reason set forth in Section 5.2(b) through 5.2(p) below, or by Physician for any reason, with the result that the Physician will no longer be engaged in the Full-Time Practice of Medicine in the Hospital Service Area prior to the end of the Guarantee Period, the Physician shall promptly repay one-twelfth (1/12) of the relocation expense reimbursement times the number of months between the effective date of such termination and the end of the Guarantee Period.

3.2 **Practice Start-up Loans.**

(a) The maximum amount Hospital shall advance to the Practice on behalf of the Physician under this Agreement shall be Six Hundred Thousand and no/100 Dollars ($600,000.00), and all advances under this Section 3.2 shall be subject to this cap on the maximum principal amount the Hospital will loan to the Physician and the Practice.

(b) The Hospital shall advance to the Practice for each month during the Guarantee Period an amount equal to the amount by which the Guaranteed Income for such month exceeds Net Receipts for the same month. Each payment shall be made on or before the last day of the calendar month after the month in which such deficit occurred.

(c) In addition, upon request by the Practice or the Physician, the Hospital may, in its discretion, advance to the Practice after the Effective Date but prior to the Commencement Date, up to the monthly amount of the Guaranteed Income (without regard to Net Receipts). Payment of any such advance shall directly reduce the amount the Practice and the Physician may otherwise request for the first month of the Guarantee Period.

(d) Nothing in this Agreement requires, or shall be construed to require, that the Practice or the Physician request any advance from the Hospital.

3.3 **Conditions to Advances, Payments and Reimbursements.** The obligation of the Hospital to make any advance, payment or reimbursement is subject to the following conditions precedent:

(a) The Hospital shall have received the following, each in the form satisfactory to the Hospital, dated on or before the date of any reimbursement, advance or other payment under this Agreement: (i) a promissory note in the form of that attached to this Agreement ("Note") and (ii) a security agreement in the form of that attached to this Agreement ("Security Agreement");

(b) The Practice shall have submitted the applicable Practice Documentation to the Hospital by the fifteenth day (15th) day of the month after the month for which an advance under Section 3.2 is requested; and

(c) Both the Practice and the Physician shall be in compliance with all covenants and requirements of this Agreement and with all other agreements, if any, between the Physician or the Practice, on the one hand, and the Hospital or any affiliates of the Hospital, on the other.

3.4 **Interest.** All amounts advanced to the Practice by the Hospital shall bear interest compounded monthly at the annual rate equal to the lesser of: (i) the Prime Rate, plus two percent (2%), or (ii) the maximum lawful rate. In the event that amounts are prepaid to the Hospital pursuant to Section 4.1, the Hospital shall, at the end of the Guarantee Period, forgive all interest that has accrued on such prepaid amounts. Each amount advanced shall begin to accrue interest on the date of such advance, and shall continue accruing interest until it is either completely repaid or forgiven.

3.5 **Access to Books and Records.** Beginning on the Commencement Date and at all times thereafter until no earlier than the Concluding Date, the Practice shall provide the Hospital with access to any and all of the Practice's books and records, including but not limited to, banking records, accounting ledgers, tax returns and other sources, so that Hospital may verify that the Physician is engaged in the Full-Time Practice of Medicine and monitor Net Collections, Net Receipts, Operating Expenses and other matters material to this Agreement. Furthermore, to the extent applicable, the Practice and the Physician shall comply with Applicable Law governing the maintenance of documentation to verify the cost of services rendered under this Agreement. Until the expiration of four (4) years after the Concluding Date, the Physician and the Practice shall make available, upon written request of the Secretary of the Department of Health and Human Services, the Comptroller General of the United States, or any of his duly authorized representatives, this Agreement, and books, documents, and records of the Practice and the Physician, as applicable, that are necessary to certify the nature and extent of such costs. If the Physician or the Practice receives a request or demand to disclose any books, documents or records relevant to this Agreement for the purpose of an audit or investigation, the Physician or the Practice, as the case may be, shall immediately provide a copy of such request or demand to the Hospital and, upon written request by the Hospital, make available to the Hospital all such books, documents or records.

ARTICLE IV
PAYMENTS AND CREDITS

4.1 **Required Prepayments.** For each month, if any, during the Guarantee Period that Net Receipts exceed Guaranteed Income, the Practice shall pay to the Hospital, as a required prepayment of the Loan Balance, one hundred percent (100%) of Net Receipts in excess of the Guaranteed Income for such month, up to the total amount of the outstanding principal of the Loan Balance. For each such month that the Practice is required to make a payment hereunder, such payment shall be made on or before the end of the month subsequent to the month to which such payment applies.

4.2 **Optional Prepayments.** The Practice and the Physician may prepay, at any time, a part of or the entire amount of the outstanding Loan Balance without penalty. Any partial payment will not excuse or reduce any scheduled payment until the entire Loan Balance is paid in full.

4.3 **Forgiveness of Payments.** At the end of the Guarantee Period and provided that the Practice and the Physician have performed all obligations and met all conditions set forth in this Agreement and all other agreements, if any, between the Practice or the Physician, on the one hand, and the Hospital or any affiliates of the Hospital, on the other, the then-current Loan Balance, together with accrued interest, shall be subject to forgiveness as follows:

(a) The Hospital will forgive one-third (1/3) of the Loan Balance on and as of the last day of the twelfth (12th) month after the end of the Guarantee Period;

(b) The Hospital will forgive one-half (1/2) of the remaining Loan Balance on and as of the last day of the twenty-fourth (24th) month after the end of the Guarantee Period; and

(c) The Hospital will forgive the remaining Loan Balance on and as of the last day of the thirty-sixth (36th) month after the end of the Guarantee Period.

4.4 **Tax Consequences**. The Physician and the Practice understand and agree that they are solely responsible for obtaining advice on the tax consequences of payments, reimbursements, advances, and credits that occur or are provided under this Agreement and that any amounts credited to the Loan Balance as a result of forgiveness or amounts reimbursed or paid by the Hospital to the Physician or the Practice will be reported as income to the Physician or the Practice, as the case may be, in accordance with the Internal Revenue Code.

ARTICLE V
TERM AND TERMINATION

5.1 **Term**. The term of this Agreement shall commence on the Effective Date and shall continue thereafter until the Concluding Date, unless terminated as provided in this Agreement.

5.2 **Termination by the Hospital**. Occurrence of any of the following prior to the Concluding Date shall entitle the Hospital to terminate this Agreement, effective immediately upon written notice:

(a) the Physician's death or permanent and total disability, such that the Physician can no longer engage in the Full-Time Practice of Medicine;

(b) the Physician fails to commence the Full-Time Practice of Medicine within the Hospital Service Area by the Commencement Date, or, at any time thereafter until no earlier than the Concluding Date, to be continuously engaged in the Full-Time Practice of Medicine in the Hospital Service Area;

(c) the denial, termination, suspension, probation, revocation, voluntarily relinquishment under threat of, or subject to, disciplinary action, or any other restriction of the Physician's: (i) license to practice medicine in the State of Texas or in any other jurisdiction; (ii) certificate or registration to prescribe medications and controlled substances in the State of Texas or in any other jurisdiction; (iii) specialty board certification; or (iv) medical staff membership or clinical privileges at the Hospital or any other hospital or health care facility;

(d) the Physician fails to apply for membership on the Hospital's Medical Staff and appropriate clinical privileges at least thirty (30) days prior to the Commencement Date, or to be appointed to the Hospital's Medical Staff with appropriate clinical privileges on or before the ninetieth (90th) day after the Commencement Date, through no fault of the Hospital;

(e) Physician's conduct in the Hospital that the Hospital determines: (i) fails to conform to applicable Hospital polices; or (ii) otherwise constitutes a threat to the health, safety or welfare of any person or persons;

(f) charge or conviction of the Physician or the Practice (including any plea of *nolo contendere* or its equivalent) for any crime involving fraud, moral turpitude, or immoral conduct;

(g) a finding that the Physician has engaged in unprofessional or unethical conduct by any board or professional organization having a right or privilege to pass upon the professional conduct of the Physician, and discipline the Physician therefor;

(h) cancellation, nonrenewal, reduction, or failure to obtain no later than the Commencement Date and maintain until no earlier than the Concluding Date the Malpractice Insurance or to obtain the Continuing Coverage, in either case as set forth in Section 2.3;

(i) the Physician fails to become a participating provider in the Medicare and Medicaid programs or the Physician fails to maintain participating provider status in the Medicare and Medicaid programs, at any time prior to the Concluding Date as set forth in Section 2.4.1;

(j) the Physician or the Practice is excluded or debarred from any state or federal health care program;

(k) employment, contracting, or other professional association of the Physician in violation of Section 2.6;

(l) the failure of the Physician or the Practice to comply with the representations and warranties set forth in Section 2.7, or should any such representation or warranty no longer be true or correct;

(m) without the prior written consent of the Hospital, the agreement by the Physician or the Practice: (i) to an arrangement whereby any person, other than an employee of the Practice, provides administrative services required for the day-to-day operation of the Practice and the Physician's practice of medicine, unless such services are limited strictly to billing and collection services; (ii) to sell, assign, transfer or convey all or substantially all of the Practice's or the Physician's assets or medical practice to any person or entity; or (iii) to the engagement of the Physician by any person or entity other than the Practice to provide any professional medical services which requires fifty percent (50%) or more of the time devoted by the Physician to the Full-Time Practice of Medicine;

(n) the Physician or Practice fails or refuses to provide access to books and records as required under Section 3.5, or provides Practice Documentation that is inaccurate, incorrect or otherwise misleading;

(o) the appointment of a receiver for any part of the Collateral (as defined in the Security Agreement), assignment of the Collateral for the benefit of any creditor by the Physician or the Practice or the commencement of any bankruptcy or insolvency proceedings under any Applicable Law by or against the Physician or the Practice; or

(p) any other breach of a material term of this Agreement, the Security Agreement or the Note by the Physician or the Practice that is not cured within ten (10) business days after written notice of such breach is provided to the Physician or the Practice, as the case may be.

5.3 Termination by the Physician or the Practice. Breach by Hospital of any material term of this Agreement that is not cured within thirty (30) business days after written notice of such breach is provided by the Physician or the Practice to the Hospital shall permit either or both of the Physician and the Practice to immediately terminate this Agreement, effective upon delivery of written notice of termination.

5.4 Effects of Termination.

(a) In the event the Practice or the Physician terminates this Agreement under Section 5.3 or the Hospital terminates this Agreement under Section 5.2(a), no further amount shall be due and payable by the Hospital, and neither the Practice nor the Physician shall be required to repay any outstanding Loan Balance, which Balance shall, in such event, be considered forgiven.

(b) In the event that the Hospital terminates this Agreement pursuant to any of Sections 5.2(b) through 5.2(p): (i) no further amount shall be due and payable by the Hospital; (ii) the Physician and the Practice shall be jointly and severally liable to immediately repay any outstanding Loan Balance, and if applicable pursuant to Section 2.4.1, 2.6, or 2.7, any amount previously forgiven under Section 4.3, together with accrued interest, without any notice of acceleration, notice of intent to accelerate, or any other notice, demand or presentment, or any other action whatsoever required of the Hospital, and any such outstanding Loan Balance, shall not be subject to any further forgiveness; and (iii) the Hospital may exercise all of the Hospital's rights and remedies under this Agreement, the Note and the Security Agreement, as well as those available under Applicable Law or in equity.

ARTICLE VI
GENERAL PROVISIONS

6.1 Assignment. Neither the Practice nor the Physician may assign or delegate their respective rights, duties or obligations under this Agreement without obtaining the prior written consent of the Hospital. The Hospital may assign or delegate its rights, duties and obligations under this Agreement without the consent of the Practice or the Physician to BHCS or an entity owned or controlled by BHCS; provided, however, such assignment or delegation shall not relieve the Hospital of any of its responsibilities to ensure performance under this Agreement. The Hospital may not assign or delegate its rights, duties or obligations under this Agreement to any person or entity other than BHCS or an entity owned or controlled by BHCS without obtaining the prior written consent of the Practice and the Physician.

6.2 Governing Law; Venue. This Agreement shall be construed and governed according to the Applicable Law of the State of Texas, without giving effect to its conflict of laws provisions. The Parties expressly agree that this Agreement is executed and shall be performed in Collin County, Texas and venue of all disputes, claims and lawsuits arising hereunder shall lie in Collin County, Texas.

6.3 Waiver of Breach. Waiver by any Party of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver of any prior, concurrent or subsequent breach of the same or similar provision. None of the provisions of this Agreement shall be considered waived by a Party except when such waiver is given in writing.

6.4 Relationship of the Parties. The Parties mutually understand and agree that for purposes of this Agreement, the Practice and the Physician, on the one hand, and the Hospital, on the other, are independent contractors, and neither the Practice nor the Physician is an agent (whether actual, apparent or ostensible) or employee of the Hospital. The Hospital shall neither have nor exercise any control or direction over the medical judgment of the Physician or over the methods or manner by which the Physician practices medicine. Nothing contained in this Agreement is intended to give or shall be construed as giving that degree of control or direction on the part of the Hospital that creates an employer-employee, joint venture, or landlord/tenant relationship between the Hospital, on the one hand, and the Practice and the Physician, on the other. Other than the payments described in Article III, the Physician shall not be entitled to any salary or other compensation from the Hospital or to any employee benefits

provided by the Hospital, including disability, life insurance, pension and annuity benefits, educational allowances, professional membership dues, and sick, holiday, or vacation pay as a result of this Agreement. The Hospital shall not withhold from amounts, if any, reimbursed or advanced to the Practice or the Physician under this Agreement any sum for income tax, unemployment insurance, social security or any other withholding pursuant to any Applicable Law or other requirement of any governmental body applicable to employers. With respect to income earned by the Physician, the Practice and the Physician, as the case may be, shall submit reports and returns, make any necessary payments, and maintain any records required by any applicable local, state or federal governmental agency. The Parties agree to take any and all action as may be reasonably requested by any of them to inform the public, patients of the Hospital, and others using the Hospital of the independent contractor nature of their relationship.

6.5 Entire Agreement; Representation; Construction. This Agreement, together with the Note and the Security Agreement, which are hereby incorporated into this Agreement, constitutes the entire agreement among the Parties regarding its subject matter and supersedes all prior or contemporaneous discussions, representations, correspondence, offer letters, letters of intent, memoranda and agreements, whether oral or written, pertaining to the subject matter of this Agreement. By executing this Agreement, the Parties acknowledge that they have been represented, or have had the opportunity to be represented, by legal counsel, and have had the opportunity to review and consider the terms of the Agreement. The language of this Agreement shall be construed as a whole according to its fair and common meaning. The various titles of the sections in this Agreement are used solely for convenience and shall not be used for interpreting or construing any word, clause, paragraph, or subparagraph of this Agreement.

6.6 Change in Applicable Law; Severability. The Parties recognize that this Agreement is at all times subject to applicable federal, state and local law, together with any amendments and binding interpretations thereof including but not limited to HIPAA and HITECH and the regulations promulgated thereunder; the Social Security Act and the regulations promulgated thereunder; Texas laws and regulations; the rules, regulations and policies of the Office of Inspector General of the Department of Health and Human Services, the Centers for Medicare and Medicaid Services ("**CMS**"), the Internal Revenue Service ("**IRS**") and the Texas Department of State Health Services ("**TDSHS**"); new legislation or regulations, such as a new federal or state economic stabilization program or health insurance program; and other changes in reimbursement for hospital or medical services (collectively, "**Applicable Law**"). Any provision of Applicable Law that invalidates this Agreement or a portion of this Agreement, or that would cause any of the Parties to be in violation of Applicable Law or jeopardize the tax-exempt status of Hospital, BHCS or any other BHCS affiliate, shall be deemed to supersede such provision of this Agreement and shall require reformation of this Agreement. Moreover, if any term or provision of this Agreement is held illegal, invalid or unenforceable to any extent pursuant to Applicable Law or otherwise, the remainder of this Agreement shall not be affected thereby and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by Applicable Law. The Parties shall exercise their reasonable best efforts to accommodate the terms and intent of this Agreement to the greatest extent possible consistent with the Applicable Law. If the Parties are unable to mutually agree regarding the reformation of this Agreement called for by Applicable Law, any Party may terminate this Agreement by giving the other Parties ninety (90) days prior written notice.

6.7 Corporate Practice of Medicine. Nothing contained in this Agreement is intended or shall be construed: (a) to constitute the use of a medical license for the practice of medicine by anyone other than a licensed physician; (b) to aid the Hospital or any other corporation to practice medicine when such corporation is not licensed to practice medicine; or (c) to do any other act or create any other arrangements in violation of the Texas Medical Practice Act.

6.8 Confidentiality. Neither the Practice nor the Physician shall disclose the terms of this Agreement to anyone other than designated legal counsel, tax advisors and accountants unless necessary to implement the terms of this Agreement. Breach of this provision shall be considered a material breach of this Agreement.

6.9 Notices. Notices or communications to be given under this Agreement shall be provided to the appropriate Party in writing either by personal delivery, overnight delivery service, confirmed telefacsimile or registered or certified mail, postage prepaid, as follows:

To the Hospital:

Baylor Regional Medical Center at Plano
4700 Alliance Blvd.
Plano, Texas 75093
Attn: President
Telefacsimile: (469) 814-2999

With a copy to:

BHCS Law Department
4005 Crutcher Street, Suite 300
Dallas, Texas 75246
Telefacsimile: (214) 820-1535

To the Physician:

Christopher Duntsch, M.D.
Minimally Invasive Spine Institute, P.A.
6957 West Plano Parkway, Suite 2600
Plano, TX 75093
Telefacsimile: (214) 948-6308

To the Practice:

Minimally Invasive Spine Institute, P.A.
6957 West Plano Parkway, Suite 2600
Plano, TX 75093
Telefacsimile: (214) 948-6308
Attn: President

or to such other addresses and to such other persons as a Party may from time to time designate by notice given as provided in this Section 6.9. Such notices or communications shall be deemed to have been given: (i) upon receipt if by personal delivery; (ii) one (1) business day after delivery if by an overnight delivery service; (iii) upon transmission confirmation if by telefacsimile; and (iv) three (3) business days after deposit in the United States mail if sent by regular, registered or certified mail, postage prepaid.

6.10 Health Care Services Laws and Regulations. The Parties enter into this Agreement with the intent of conducting their relationship in full compliance with Applicable Law, including without limitation, the federal Anti-Fraud and Abuse statute and regulations, the so-called "Stark Law" and its implementing regulations, and the Texas Prohibition on Solicitation of Patients. Notwithstanding any

unanticipated effect of any of the provisions of this Agreement, none of the Parties shall intentionally conduct itself under this Agreement in a manner that would constitute a violation of any provision of the federal Anti-Fraud and Abuse statute and regulations, the Stark Law and its implementing regulations, or the Texas Prohibition on Solicitation of Patients. Moreover, nothing contained in this Agreement shall require (directly or indirectly, explicitly or implicitly) the Practice and the Physician, on the one hand, and the Hospital, on the other, to refer or direct any patients to one another or to otherwise use one another's facilities or those of any BHCS affiliate. This Agreement does not prohibit, and shall not be construed to prohibit, the Physician from obtaining membership on the medical staff of any other hospital or health care facility or from referring patients to or utilizing the services of any other hospital or health care provider.

6.11 **Further Acts**. Each Party agrees to cooperate fully with the other Parties to take such further action and execute such other documents or instruments as necessary or appropriate to implement this Agreement.

6.12 **Amendments**. This Agreement shall be amended only by a written instrument signed by the Parties.

6.13 **Force Majeure**. No Party shall be liable or be deemed in breach of this Agreement for any failure or delay of performance which results, directly or indirectly, from acts of God, civil or military authority, public disturbance, accidents, fires, or any other cause beyond the reasonable control of such Party.

6.14 **Remedies**. The remedies provided to the Parties by this Agreement are not exclusive or exhaustive, but are cumulative of each other and in addition to any other remedies the Parties may have under Applicable Law or in equity.

6.15 **Attorney Fees**. If a Party brings an action against another Party or Parties to enforce any condition or covenant of this Agreement, the prevailing Party or Parties, in addition to other relief awarded by a court or arbitrator, shall be entitled to recover from the non-prevailing Party or Parties its court costs and reasonable attorneys' fees incurred in such action.

6.16 **Electronic Execution; Counterparts.** This Agreement may be executed electronically, in accordance with the Uniform Electronic Transactions Act. In addition, the Agreement may be executed in multiple counterparts, with each counterpart considered an original whether or not such counterpart is executed electronically.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

BAYLOR REGIONAL MEDICAL CENTER AT PLANO

By: _____
Jerri Garison, President

MINIMALLY INVASIVE SPINE INSTITUTE, P.A.

By: _____
Its: Douglas Wall

_____
Christopher Duntsch, M.D., INDIVIDUALLY

EXHIBIT A
EMPLOYMENT AGREEMENT

EXECUTION VERSION

PHYSICIAN SERVICES AGREEMENT

BETWEEN

MISI, P.A.

AND

CHRISTOPHER DUNTSCH, M.D.

Dated as of May 24, 2011

PHYSICIAN SERVICES AGREEMENT

THIS PHYSICIAN SERVICES AGREEMENT (this "Agreement") is made and entered into as of the 24 day of May, 2011 by and between **MISI, P.A.**, a Texas professional association ("Association"), and **CHRISTOPHER DUNTSCH, M.D.** ("Physician").

WITNESSETH:

WHEREAS, Association is a professional association that duly renders authorized professional medical services and services incident thereto through its employees and independent contractors who are duly licensed to practice medicine in the State of Texas;

WHEREAS, Physician is a practicing physician who is or will be upon the Commencement Date (as hereinafter defined) duly licensed and in good standing to practice medicine in the State of Texas; and

WHEREAS, Association desires to employ Physician and Physician desires to become employed by Association, all on the terms and conditions herein set forth.

NOW, THEREFORE, in consideration of the premises, the mutual covenants herein contained, and other consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereby covenant and agree as follows:

ARTICLE I.
EMPLOYMENT

1.1 General. Association agrees to employ Physician, and Physician agrees to be employed by Association, as hereinafter set forth for the term of this Agreement.

1.2 Conditions to Employment. Physician's employment by Association shall be conditioned upon the execution and delivery by Physician of (i) that certain Physician Recruitment Agreement dated as of May 24, 2011 (the "Physician Recruitment Agreement") by and among Physician, Association and Baylor Regional Medical Center at Plano ("Baylor Plano"), (ii) the Promissory Note in substantially the form attached hereto as Exhibit A; and (iii) such other documents as the Association deems to be necessary and appropriate to implement the transactions contemplated by the Physician Recruitment Agreement.

ARTICLE II.
EMPLOYMENT AND DUTIES

2.1 Duties of Physician. During the term of this Agreement, Physician shall, subject to the reasonable direction and instructions of Association, practice medicine as an employee of Association and perform such other duties as are reasonably assigned to him from time to time by the officers of the Association (the "Officers") or the Board of Directors of Association (the

"Board of Directors") (the Officers and/or the Board of Directors being hereinafter collectively referred to as the "Management"). Such duties shall include, without limitation, the following:

(a) Physician shall devote his full professional time, attention, and energies to rendering spinal surgical services and services incident thereto at the Association's offices located at 6957 West Plano Parkway, Suite 2600, Plano, Texas 75093 and at such other places in the State of Texas as may be designated from time to time by and for the benefit of Association;

(b) Physician shall provide "on call" services with other physician employees and physician independent contractors of Association as appropriate to Physician's practice and geographic location;

(c) Physician agrees to keep and maintain (or cause to be kept and maintained) appropriate and accurate records relating to all professional services rendered by him hereunder and to attend to all billing reports, claims, and correspondence required in connection with his services rendered under this Agreement;

(d) Physician agrees to promote, by entertainment or otherwise, to the extent permitted by law and the applicable canons of professional ethics and applicable parts of this Agreement, the professional practice of Association;

(e) Physician shall attend, to the extent reasonable and necessary to abide by the continuing medical education ("CME") requirements of the Texas Medical Board, with respect to Physician's medical license and the certifying board with respect to Physician's board specialty (if any), professional conventions and post-graduate seminars and participate in professional societies and will do all things reasonably necessary to maintain and improve his professional skills;

(f) Physician shall be and remain duly licensed by the State of Texas to practice medicine without restriction and shall comply with and be controlled and governed by, and otherwise perform services hereunder in accordance with, applicable law and the ethics and standards of care of the medical community or communities in which Physician shall from time to time provide services;

(g) Physician shall maintain a federal Drug Enforcement Administration certificate without restrictions, to the extent necessary for Physician's practice;

(h) Physician shall maintain at Baylor Plano and such facilities as may be designated by Association, full hospital medical staff memberships and clinical privileges as are appropriate to Physician's specialty and as are determined by Association to be necessary in connection with participation in contracts with third-party payors negotiated by Association or on Association's behalf by an agent of Association;

(i) Physician shall perform all professional services through Association in accordance with all applicable federal, state and local laws and regulations and with prevailing standards of care and medical ethics and with practice protocols and policies

as adopted from time to time by Association;

(j) Physician shall maintain eligibility for insurance under the professional liability policy or policies at a commercially reasonable cost as determined by Association carried by or on behalf of Association for Physician's practice;

(k) Physician shall abide by any reasonable guidelines adopted by Association designed to encourage the appropriate, efficient and cost-effective delivery of medical services, subject always to the clinical judgment and final determination of Physician, and cooperate with and participate in all other Association programs regarding quality assurance, utilization review, risk management and peer review; and

(l) Physician shall perform such other duties as Association and Physician may from time to time mutually agree and shall satisfy such other reasonable requirements as established from time to time by Association.

2.2 Professional Judgment. Physician shall be free to exercise his own judgment regarding the diagnosis and treatment of any particular patient, and all such decisions shall be the responsibility of Physician which shall be rendered in accordance with the standards of medical practice in the community.

2.3 Patients; Fees. Physician specifically agrees that the Management shall have the sole right to designate and assign patients to Physician for treatment and that the Management shall determine the fees to be charged by Association for the professional services rendered by Physician hereunder. Further, the Management will have authority over acceptance or refusal of any person as a patient of Association.

2.4 Certain Restrictions. Physician shall not, without the prior written consent of the Board of Directors of Association:

(a) Employ any monies, property, or effects belonging to Association, or engage the credit thereof, or contract any debt on account thereof, except in the due and regular course of business and upon the account or for the benefit of Association;

(b) Compromise, release, or discharge any debt due to Association without receiving the full amount thereof;

(c) Knowingly do or suffer any act or thing whereby the property or effects of Association or any part thereof may be attached seized, or taken in execution; or

(d) Lend any money of, or to, Association.

2.5 Exclusive Service. Except as specifically permitted by Section 2.6 herein below, Physician shall devote his full-time and best efforts to the performance of Physician's duties under this Agreement. During the term of this Agreement, Physician shall not at any time or

3.2 Bonus Compensation. In addition to the base compensation provided for in Section 3.1 hereof, Physician shall receive bonus compensation at such times and in such amounts as set forth in the Addendum of Additional Terms attached hereto as Exhibit B.

3.3 Memberships. Association shall reimburse expenses incurred by Physician with respect to (i) the license fees for the state(s) in which Physician practices for Association, and (ii) the dues for Physician's membership in the local and state medical societies, and the state and national specialty boards in which Physician holds membership that are relevant to Physician's employment by Association which the Board of Directors of Association, in its discretion, deems an appropriate organization for membership by Physician up to a maximum amount set forth in the Addendum of Additional Terms attached hereto as Exhibit B.

3.4 Professional Fees; Assignment and Delivery of Revenues. Physician acknowledges that Association shall be entitled to bill and to receive all fees generated by Physician pursuant to professional services rendered on behalf of Association hereunder, and all such fees shall be and remain the property of Association. Physician expressly and irrevocably transfers, assigns, and otherwise conveys to Association all right, title, and interest of Physician in and to any fees, whether in cash, goods, or other items of value, resulting from or incident to Physician's practice of medicine pursuant to this Agreement during the term hereof and hereby appoints Association as attorney-in-fact for collection of same or otherwise enforcing Physician's interests thereto.

Physician acknowledges that Association shall:

(a) Bill in Association's name, under its provider number(s) and on its behalf all claims (including co-payments due from patients) for reimbursement or indemnification from payors (as defined below), fiscal intermediaries or patients for all covered medical services provided by Physician or Association to patients;

(b) Take possession of and endorse in the name of Physician or Association all cash, notes, checks, money orders, insurance payments, and any other instruments received as payment of accounts receivable (and Physician covenants to transfer and deliver promptly to Association all funds received by Physician from patients or payors for medical services), all such funds to be deposited directly into an Association account and to be applied in a manner consistent with Association's business practices;

(c) Deposit all collections directly into an Association account with a banking institution selected by Association and approved by Association and to make withdrawals from such Association account for such purposes as are consistent with the Association's business practices;

(d) Collect and receive in (i) Association's name and on its behalf, and (ii) Physician's name and on Physician's behalf, all accounts receivable generated by such billings and claims for reimbursement and upon notice to and approval from Physician, to place such accounts for collection with an agency outside of Association, settle and compromise claims, and institute legal action for the recovery of accounts; and

(e) Sign checks on behalf of Association and make withdrawals from Association accounts for payments as requested from time to time by Association.

Physician shall cooperate fully with Association in facilitating such collections; including endorsing checks and making delivery to Association of all revenues, in whatever form, received from patients or payors on their behalf, and completing all forms necessary for the collection of said revenues, including, without limitation, executing and delivering to each financial institution wherein Association maintains an account, such additional documents or instruments as may be necessary to evidence or effect the power of attorney granted hereby to Association; provided, however, that, in the event an account receivable or claim for reimbursement is placed for collection with an agency outside of Association, then Physician shall be held harmless and indemnified against any and all losses, claims, actions or liabilities (except for professional liabilities) arising from or relating to such collection. If Association assigns said power of attorney, then Physician shall execute a power of attorney in favor of the assignee in a form acceptable to Association.

For purposes of this Section, "payors" shall mean any persons or entities that, on behalf of a patient, enrollee or employee, pay or reimburse Physician or Association for providing health care services or for managing the provision of health care services, such as insurance companies, managed care plans, employers or the Medicare and Medicaid programs. The provisions of this Section shall survive the termination of this Agreement.

ARTICLE IV.

TERM AND TERMINATION

4.1 Term of Employment. The initial term of employment hereunder shall be for the period set forth in the Addendum of Additional Terms attached hereto as Exhibit B (the "Initial Term"). Upon expiration of the Initial Term, this Agreement will be automatically extended for additional successive one (1) year periods thereafter unless either party shall notify the other party in writing at least one hundred and twenty (120) days prior to the next scheduled expiration date that the notifying party intends to terminate this Agreement as of such scheduled expiration date.

4.2 Termination of Agreement. This Agreement may be terminated under any of the following circumstances:

(a) Termination by Association immediately upon the date of the death of Physician or the date Physician is inducted into active military service (subject to the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994; 38 U.S.C. § 4301–4335; and the federal regulations promulgated thereunder);

(b) Termination by Association immediately upon the inability of Physician to perform fully Physician's duties hereunder, whether by reason of injury or illness (physical or mental) incapacitating Physician either for a continuous period exceeding sixty (60) calendar days, or for a noncontinuous period exceeding ninety (90) calendar days during any 12-month period, excluding any leaves of absence approved in writing

by Association. In this regard, Association shall have the right to have Physician examined at such reasonable times by such physicians as Association may designate, and Physician will be available for and submit to such examination as and when requested;

(c) Termination by Association immediately upon the date of the suspension, revocation or restriction of Physician's license to practice medicine by the State of Texas for any cause or upon the date of the suspension or revocation of Physician's hospital staff privileges for a period of five (5) days or more at any hospital at which Physician then holds such privileges;

(d) Termination by either party immediately upon material breach of this Agreement, which breach shall have remained uncorrected (i) for seven (7) consecutive days following written notice to the breaching party from the non-breaching party in the event of a payment default hereunder, or (ii) for ten (10) consecutive days following written notice to the breaching party from the non-breaching party in the event of any other material breach;

(e) Termination by Association immediately upon Association's determination that Physician has repeatedly failed or refused to comply with the reasonable policies, standards and regulations of the Association, which may from time to time be established or announced by the Association and the Association has provided written notice of such failure or refusal, following which Physician has not cured within ten (10) days of such notice;

(f) Termination by Association immediately upon Association's determination that Physician has intentionally and repeatedly refused to follow specific instructions of Association's Board of Directors and the Association has provided written notice of such, following which Physician has not cured within ten (10) days of such notice (provided, that, such instructions are made in good faith, are reasonable, not arbitrary or capricious, and do not require Physician to be subjected to criminal or civil liability or any other disciplinary action);

(g) Termination by Physician immediately upon the dissolution of the Association; and

(h) Termination at any time by mutual written consent of the parties.

4.3 Effects of Termination. In the event of a foregoing occurrence, neither party shall have any further obligations hereunder except for (i) obligations accruing prior to the date of termination, such as compensation and services and (ii) obligations, promises, or covenants contained herein which are expressly made to extend beyond the term of this Agreement, including, without limitation, confidentiality of information and indemnities (which covenants and agreements shall survive the termination or expiration of this Agreement).

4.4 Transition Following Notice of Termination. Following any notice of termination of employment hereunder, whether given by Association or Physician, Physician shall fully cooperate with Association in all matters relating to the completion of his pending work on

behalf of Association and the orderly transfer of such work to the other professional employees of Association. On or after the giving of notice of termination hereunder and during any notice period, Association will be entitled to such full-time or part-time services of Physician as Association may reasonably require up to the termination date. Association will specifically have the right to terminate the active services of Physician at the time notice of termination is given and pay to Physician the compensation due to him under Article III for the duration of the notice period.

ARTICLE V.

PAID TIME OFF AND LEAVE

5.1 Paid Time Off Allocation. Physician shall be entitled to take paid time off in the amount set forth in the Addendum of Additional Terms attached hereto as Exhibit B. In addition, Physician shall be entitled to the holidays afforded by Association to its physician employees under Association's then current holiday policy. Unused days of paid time off may not be carried over from one fiscal year to another beyond the Association allowed reserve, and additional income will not be given for vacation time or holidays not taken during any year.

5.2 Professional Meetings and Continuing Medical Education. Physician shall be entitled to take off time each year without any reduction in his base compensation, for the purposes of attending professional meetings and continuing medical education conferences. In connection therewith, Association will reimburse Physician for the reasonable costs incurred in attending such professional meetings or continuing medical education conferences. The Physician shall submit evidence satisfactory to Association for all expense items in excess of Twenty-Five Dollars ($25.00) for which Physician seeks reimbursement hereunder. The amount of time that Physician is entitled to take off annually for such purposes and the maximum amount for which Physician will be reimbursed in connection therewith are set forth in the Addendum of Additional Terms attached hereto as Exhibit B.

ARTICLE VI.

BENEFITS

6.1 Standard Employee Benefits. Physician and Physician's dependents shall be entitled to receive any hospitalization and major medical and life insurance benefits provided by Association in accordance with Association's standard personnel policies. After one (1) year of full-time employment, Physician shall also be entitled to participate in any profit sharing, pension or other employee benefit plan for which he is eligible. Enrollment dates are January 1 and July 1 of each calendar year.

6.2 Employee Business Expenses. Physician is encouraged and expected, from time to time, to promote the business of Association. Association anticipates that Physician will incur expenses for travel, entertainment, professional advancement, and community service. Under the

Association's general policies, such employee expenses are not subject to reimbursement unless they are essential and directly related to the enhancement of Association's practice and Physician's standing among members of the medical profession. The Management will review any such expense that Physician believes should be reimbursed and may, at its election, decide to reimburse Physician for these expenses upon presentation by the Physician of an itemized expense voucher.

6.3 Working Facilities. Association shall provide during the term of this Agreement such telephone, office, facilities, equipment, personnel and supplies as Association deems are appropriate and reasonable for the practice of medicine by Physician.

ARTICLE VII.

PROFESSIONAL LIABILITY INSURANCE

7.1 Professional Liability Insurance. Association agrees to obtain and maintain throughout the term of this Agreement a policy or policies of insurance insuring Physician's risks of comprehensive general liability and professional medical liability incurred in connection with providing professional services for Association hereunder, in such amounts, with such limits of liability, with such company or companies and under such terms and conditions as are mutually acceptable to Association and Physician, naming Physician and Association as named insureds to the extent that their individual, respective and collective interests may appear.

7.2 Tail Insurance Requirements. Upon the termination of this Agreement for any reason other than by Association pursuant to Sections 4.2(c), (d), (e), or (f), Association shall obtain and will maintain for a period of two (2) years from the expiration or termination date of this Agreement, professional liability insurance tail coverage, or equivalent continuing professional liability insurance, covering claims made against Physician and/or Association relating to events that occurred or allegedly occurred during the term of this Agreement. Alternatively, if this Agreement is terminated by Association pursuant to Sections 4.2(c), (d), (e) or (f) or, if this Agreement is terminated by Physician without cause, then Physician shall obtain and will maintain for a period of two (2) years from such termination of this Agreement, professional liability insurance tail coverage, or equivalent continuing professional liability insurance, covering claims made against Physician and/or Association relating to events that occurred or allegedly occurred during the term of this Agreement. Such insurance shall be generally comparable to the professional liability insurance obtained and maintained by Association on behalf of Physician pursuant to Section 7.1. If the party required to obtain such insurance (the "Insuring Party") fails to provide the other party (the "Insured Party") with written evidence of the Insuring Party's having obtained such insurance, the Insured Party may, but shall not be required to, obtain and maintain such insurance on behalf of the Insured Party and invoice the cost thereof, together with any other costs incurred in connection with obtaining and maintaining such insurance, to the Insuring Party and the Insuring Party shall be required to promptly reimburse the Insured Party for such invoiced amount.

ARTICLE VIII.

PAYOR CONTRACTS; PATIENTS, CASE RECORDS, AND HISTORIES

8.1 Payor Contracts. Physician acknowledges and agrees that Association shall act as Physician's exclusive agent to negotiate and execute contracts ("Payor Contracts") with health maintenance organizations, insurance companies, preferred provider organizations and various other entities that pay or arrange for the payment of medical services (collectively, "Payors"). Physician agrees to render medical services in Physician's area of expertise to patients covered by Payor Contracts entered into by Association to the extent that payment thereof is covered by such contracts. During the term of this Agreement, Physician shall not unilaterally negotiate or execute any Payor Contract, but shall refer to Association all inquiries from Payors relating to the negotiation and/or entering into such contracts. Physician acknowledges that he shall have no right, power or authority to negotiate or execute any Payor Contract on behalf of Association without the express consent of the Association's Board of Directors. Any Payor Contract negotiated and/or executed by Physician in contravention to the provisions of this Section 8.1 shall be null and void and without effect as to Association.

8.2 Patients and Records of Association. Physician acknowledges that any papers, X-rays or other imaging materials, slides, medical data, medical records, patient lists, fee books, patient records, files, or other documents or copies thereof, or other confidential information of any kind pertaining to Association's business, sales, financial condition, products, or medical activities, belong to and will remain the property of Association. Physician further agrees that should Physician's active service with Association terminate for any reason, Physician will neither take nor retain any property of Association without prior written authorization from Association. Notwithstanding the foregoing, Physician will have the right to request, receive, and use in continuing his practice, if living and then licensed to practice medicine, such copies of documents as any patient or former patient treated by Physician specifies in writing directed to Association; provided, that, (i) the disposition of such copies is subject to such patient's control, and approval of release (ii) Physician pays in advance the amount per chart with respect to any such patient as established by the Texas Medical Board of Examiners under Section 159.008 of the Texas Occupation Code and (iii) Physician shall become the Medical Record Custodian of such patient chart. Association shall continue to operate as the Medical Record Custodian of all patient charts which remain at Association.

ARTICLE IX.

NONDISCLOSURE OF CONFIDENTIAL INFORMATION

9.1 Background. Physician understands and acknowledges that Association has developed and contemplates the further development of unique concepts and techniques in the management and marketing of Association's business and services.

9.2 Physician's Obligations. Physician understands and acknowledges that Physician will have access to "Confidential Information" concerning Association's business and that Physician has a duty at all times not to use such information in competition with Association or to disclose such information or permit such information to be disclosed to any other person, firm, association, or other third party during the term of this Agreement or at any time thereafter. For

purposes of this Agreement, "Confidential Information" shall include, without limitation, any and all secrets or confidential technology, proprietary information, customer or patient lists, trade secrets, records, notes, memoranda, data, ideas, process, methods, surgical and other techniques, systems, formulas, patents, models, devices, programs, computer software, writings, research, personnel information, customer or patient information, plans or any other information of whatever nature in the possession or control of Association that is not generally known or available to members of the general public. Physician further agrees that if his employment hereunder is terminated for any reason, he will neither take nor retain, without prior authorization from Association originals or copies of any records, papers, programs, computer software, documents, x-rays or other imaging materials, slides, medical data, medical records, patient lists, fee books, files or any other matter of whatever nature which contains Confidential Information.

9.3 Subsequent Employment. Physician expressly agrees that for a period of five (5) years after the termination of this Agreement, he will not accept any position, enter into a contractual arrangement or have any interest in any business or organization if by doing so Physician would be required to disclose Confidential Information except to the extent disclosure is made in the course of treating Physician's patients as contemplated under Section 8.2 of this Agreement.

9.4 Survival of Protective Covenants. Each covenant in this Article IX on the part of Physician shall be construed as an agreement independent of any other provision of this Agreement, and shall survive the termination of this Agreement, and the existence of any claim or cause of action of Physician against Association, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by Association of such covenant.

ARTICLE X.

REMEDIES

Physician acknowledges that the covenants of Physician set forth in Articles VIII and IX are necessarily of a special, unique, and extraordinary nature and that the loss arising from a breach thereof cannot reasonably and adequately be compensated by money damages, as such breach will cause Association to suffer irreparable harm. Physician recognizes and acknowledges that irreparable injury will result to Association and its respective business and property in the event of any breach by Physician of any of the provisions of Articles VIII and IX. Physician's continued employment hereunder is predicated in part upon the covenants of Physician as set forth in Articles VIII and IX. In the event of any breach of any of Physician's covenants as set forth in Articles VIII and IX, Association or any of its successors or assigns shall be entitled, in addition to any other remedies and damages available, to injunctive relief to restrain the violation of such covenants by Physician or by any person or persons acting for or with Physician in any capacity. Association shall be entitled to such injunctive relief without the necessity of posting a bond of cash or otherwise. The rights and duties of the parties set forth in Articles VIII and IX and the provisions of this Article X shall survive termination of this Agreement.

ARTICLE XI.

REPRESENTATIONS AND WARRANTIES

Physician represents and warrants to Association as follows:

(a) Physician is, or will be upon the Commencement Date, duly licensed to practice medicine under the laws of the State of Texas;

(b) Physician has complied with all applicable laws, rules and regulations relating to the practice of medicine and is able to enter into and perform all duties under this Agreement;

(c) Physician possesses a valid federal narcotics number which has never been revoked or suspended (other than a temporary suspension, now cured, resulting solely from late filing of renewal papers);

(d) Physician's medical staff privileges at any hospital have never been (other than for delinquency in the completion of medical records) and are not in the process of being curtailed, suspended, revoked or otherwise the subject of any proceedings which can or could have resulted in the same;

(e) Neither Physician's provider number for and eligibility to participate in Blue Cross Blue Shield, Medicare or Medicaid programs nor Physician's eligibility to participate in any other third-party payment system has ever been or is in the process of being curtailed, suspended, revoked or otherwise the subject of any proceedings which can or could have resulted in the same;

(f) Physician has not been convicted of a criminal offense related to participation in the delivery of medical care service under Titles XVIII, XIX or XX of the Social Security Act;

(g) Physician's license to practice medicine in any state has never been revoked (not including revocation solely for non-payment of filing or renewal fees), suspended, restricted or otherwise curtailed nor has Physician been placed on probation by any medical licensing board; and

(h) Physician is not a party to or bound by any other agreement or commitment, or subject to any restriction or agreement related to previous employment or consultation containing confidentiality or non-compete covenants or other relevant restrictions which may have a possible present or future adverse effect on Association or Physician in the performance of his duties under this Agreement.

Physician agrees to immediately notify Association of any act or circumstance which occurs or is discovered during the term of this Agreement, which in itself or with the passage of

time and/or the combination with other reasonably anticipated factors renders or will render any of these representations and warranties to be untrue.

ARTICLE XII.

SUBSTANCE ABUSE POLICY

It is Association's policy (the "Policy") that none of its employees shall use or abuse any controlled substances at any time (other than those medications lawfully prescribed by a medical doctor in a reasonable diagnosis and which do not interfere with the Physician's capacity to perform his obligations under this Agreement) or be under the influence of alcohol or be affected by the use of alcohol during the time period required to perform their duties and obligations under any employment arrangements. Association and Physician both acknowledge and agree that the purpose of this Policy is for the benefit of Association, Physician and the individuals whom they serve.

In compliance with this Policy, Physician agrees to submit to random drug testing immediately upon Association's request. Testing may include, but shall not be limited to, the taking of blood and urine samples and utilization of gas chromatography. In the event that a positive test result is reached indicating a violation of the Policy, Physician may, at his own expense and subject to the supervision and approval of Association of the manner and testing facilities utilized, elect to have a second drug test performed, at a time which is no longer than two (2) days after the initial positive results were received by Association and Physician. Association may, in its sole and absolute discretion, terminate Physician for cause in the event either: (i) a positive test result is received in the initial drug test and the Physician fails to exercise his option for a second test in the manner provided for in this Article, or (ii) positive test results are received from both tests. Association may, at any time, retest Physician pursuant to the terms of this Article.

ARTICLE XIII.

MISCELLANEOUS PROVISIONS

13.1 Additional Assurances. Physician shall from time to time execute such additional instruments and documents as the parties may deem reasonably necessary to effectuate this Agreement.

13.2 Consents Approvals and Discretion. Except as herein expressly provided to the contrary, whenever in this Agreement any consent or approval is required to be given by either party, or either party must or may exercise discretion, the parties agree that such consent or approval shall not be unreasonably withheld or delayed and such discretion shall be reasonably exercised.

13.3 Governing Law. THIS AGREEMENT, AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HERETO, SHALL BE GOVERNED BY AND

CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE SUBSTANTIVE LAWS OF THE STATE OF TEXAS, WITHOUT REGARD TO ITS PRINCIPLES OF CONFLICTS OF LAWS.

13.4 Arbitration. The parties shall use their respective best efforts to settle amicably any disputes, differences or controversies arising between the parties out of or in connection with or in respect of this Agreement. However, if not so settled then the same shall be submitted to arbitration and to the fullest extent permitted by law, be solely and finally settled by arbitration, except as specifically provided otherwise herein. The arbitration proceeding shall be held in Dallas, Texas, before a single arbitrator and shall be conducted in accordance with the American Health Lawyers Alternative Dispute Resolution Service Rules of Procedure for Arbitration. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction, or application may be made to such court for a judicial acceptance of the award and any order of enforcement as the case may be. The arbitrator shall not award any party punitive, exemplary, multiplied or consequential damages, and each party hereby irrevocably waives any right to seek such damages in arbitration or in judicial proceedings. Each party shall bear its own costs in the arbitration and the fees and expenses of the arbitration shall be shared equally by the parties. Notwithstanding the foregoing, the arbitrator shall have the right and authority to apportion among the parties all reasonable costs, including attorney's fees and witness fees, taking into account relative fault of the parties. The foregoing provisions of this Section 13.4 do not limit the right of a party to seek injunctive or other equitable relief from a court of competent jurisdiction pending resolution of a dispute by arbitration.

13.5 Jurisdiction. Subject to the provisions of Section 13.4, each of the parties hereto submits to the exclusive jurisdiction of any state or federal court sitting in Dallas, Texas, in any action or proceeding arising out of or relating to this Agreement and agrees that all claims in respect of the action or proceedings may be heard and determined in any such court and hereby expressly submits to the personal jurisdiction and venue of such court for the purposes hereof and expressly waives any claim of improper venue and any claim that such courts are an inconvenient forum. Each of the parties hereby irrevocably consents to the service of process of any of the aforementioned courts in any such suit, action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to its address set forth in Section 13.10, such service to become effective ten (10) days after such mailing.

13.6 No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any party hereto by virtue of the authorship of any of the provisions of this Agreement.

13.7 Attorneys' Fees. Subject to Section 13.4 hereof, in the event that any action or proceeding is commenced by either party hereto for the purpose of enforcing any provision of this Agreement, the party to such action or proceeding may receive as part of any award, judgment, decision or other resolution of such action or proceeding its costs and attorneys' fees as determined by the person or body making such award, judgment, decision or resolution.

Should any claim hereunder be settled short of the commencement of any such action or proceeding, the parties in such settlement may mutually agree to include as part of the damages alleged to have been incurred reasonable costs of attorneys or other professionals in investigation or counseling on such claim.

13.8 Benefit/Assignment. Subject to any provisions herein to the contrary, this Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, successors, and assigns; provided, however, that neither party may assign this Agreement or any of such party's rights or obligations hereunder without the prior written consent of the other party.

13.9 Waiver of Breach. The waiver by either party hereto of a breach or violation of any provision of this Agreement shall not operate as, or be construed to be, a waiver by such party of any subsequent breach of the same or other provision hereof.

13.10 Notices. All notices, claims or other communications to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be deemed to have been given (i) when delivered personally to the recipient, (ii) when sent by facsimile followed by delivery by reputable overnight courier service (providing proof of delivery), (iii) one day after being sent to the recipient by reputable overnight courier service (charges prepaid) and providing proof of delivery, or (iv) five (5) days after being deposited in the United States mail, postage prepaid and sent by either registered or certified mail, return receipt requested. Such notices, claims and other communications shall be sent to Physician and Association at the addresses indicated below or to such other address or to the attention of such other person as the recipient party has specified by prior written notice to the sending party.

If to Association:

MISI, P.A.
10400 N. Central Expressway
Dallas, Texas 75231
Attn: Chief Executive Officer

If to Physician:

Christopher Duntsch, M.D.
1564 Vance Avenue
Memphis, Tennessee 38104

14.11 Severability. This Agreement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules and regulations. In the event any state or federal laws or regulations, now existing or enacted or promulgated after the date hereof, are interpreted by judicial decision, a regulatory agency or legal counsel in such a manner as to indicate that this Agreement or any provision hereof may be in violation of such laws or regulations, the parties hereto shall amend this Agreement as necessary to preserve the underlying economic and financial arrangements between the parties hereto and without

substantial economic detriment to either party. Neither party shall claim or assert illegality as a defense to the enforcement of this Agreement or any provision hereof; instead, any such purported illegality shall be resolved pursuant to the terms of this Section.

13.12 Gender and Number. Whenever the context of this Agreement requires, the gender of all words herein shall include the masculine, feminine, and neuter, and the number of all words herein shall include the singular and plural.

13.13 Divisions and Headings. The divisions of this Agreement into sections and the use of captions and headings in connection therewith are solely for convenience and shall have no legal effect in construing the provisions of this Agreement.

13.14 Exhibits. The terms and provisions contained in the Exhibits attached hereto shall be and hereby are incorporated herein by reference for all purposes.

13.15 Entire Agreement; Amendment. This Agreement supersedes all previous contracts, and constitutes the entire agreement of whatsoever kind or nature existing between or among the parties respecting the subject matter and no party shall be entitled to benefits other than those specified herein. As between or among the parties, no oral statements or prior written material not specifically incorporated herein shall be of any force and effect. The parties specifically acknowledge that, in entering into and executing this Agreement, each is relying solely upon the representations and agreements contained herein and not others. All prior representations or agreements, whether written or oral, not expressly incorporated herein, are superseded and no changes in or additions to this Agreement shall be recognized unless and until made in writing and signed by the parties hereto.

13.16 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument, and it shall not be necessary in making proof of this Agreement to produce or account for more than one such counterpart.

[Remainder of Page Intentionally Left Blank]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above.

ASSOCIATION: **MISI, P.A.**

By: _____
Printed Name: Douglas S. Won, M.D. 5/24/11
Title: Director

By: _____
Printed Name: Michael Rimlawi, D.O. 5/24/11
Title: Director

PHYSICIAN:

_____
Printed Name: Christopher Duntsch, M.D.

#937710v5

EXHIBIT B

ADDENDUM OF ADDITIONAL TERMS

Additional Terms and Provisions

1. Base Compensation. Pursuant to Section 3.1 of the Agreement, Association shall pay Physician a base salary of Six Hundred Thousand Dollars ($600,000.00) per annum for the first and second year(s) that the Agreement is in effect.

2. Incentive Bonus Compensation. Pursuant to Section 3.2 of the Agreement, not later than forty-five (45) days after the end of each full year that Physician is employed by Association, Association shall determine, award and pay to Physician such additional incentive bonus compensation, if any, as shall be determined to be payable by the Management of Association. Association shall determine and pay to Physician the following incentive bonus compensation:

(a) For the year beginning on the Commencement Date and ending on June 14, 2012, Physician shall be paid forty percent (40%) of all Gross Collections collected by Association and that are generated by Physician in excess of Eight Hundred Thousand Dollars ($800,000.00); and

(b) For the year beginning on the June 15, 2012 and ending on June 14, 2013, Physician shall be paid forty percent (40%) of all Gross Collections collected by Association and that are generated by Physician in excess of Eight Hundred Thousand Dollars ($800,000.00).

For purposes of this Paragraph 2, the term "Gross Collections" shall mean the revenues collected by Association for medical services personally rendered by Physician hereunder.

3. Membership, Dues and Fees. Pursuant to Section 3.3 of the Agreement, Association shall reimburse Physician up to an aggregate amount of Two Thousand Six Hundred Dollars ($2,600.00) per annum for fees associated with establishing and maintaining a medical practice in the State of Texas. In addition to this annually permitted reimbursement, Association shall reimburse Physician up to an aggregate amount of One Thousand Five Hundred Dollars ($1,500) per annum, for expenses associated with professional society fees, medical staff dues, and professional subscriptions.

In addition to this annually permitted reimbursement, Association shall also reimburse Physician for the full documented amount of all fees and expenses associated with obtaining and maintaining board certification(s) previously approved by the Association.

4. Term of Employment. Pursuant to Section 4.1 of the Agreement, the initial term of the Agreement shall commence as of June 15, 2011 (the "Commencement Date") and, subject to earlier termination pursuant to Section 4.2 of the Agreement, shall end at midnight on the

second (2nd) year anniversary of the Commencement Date (the "Termination Date"). The term of the Agreement shall be subject to renewal as set forth in Section 4.1 of the Agreement.

6. Paid Time Off Allocation. Pursuant to Section 5.1 of the Agreement, Physician shall be entitled to an allocation of one hundred and twenty (120) hours annually to use for personal time off. Such allocation shall be scheduled at the mutual agreement of Association and Physician and shall abide by Association policies for such matters. Neither party's agreement in this respect shall be unreasonably withheld.

7. Professional Meetings and Continuing Medical Education. Pursuant to Section 5.2 of the Agreement, Physician shall be entitled to (i) take off up to five (5) business days per annum to attend professional meetings and continuing medical education conferences, which shall not be counted toward the maximum number of vacation days set forth above, and (ii) be reimbursed up to Two Thousand Five Hundred Dollars ($2,500.00) per annum in connection with Physician attending any such meetings and conferences.

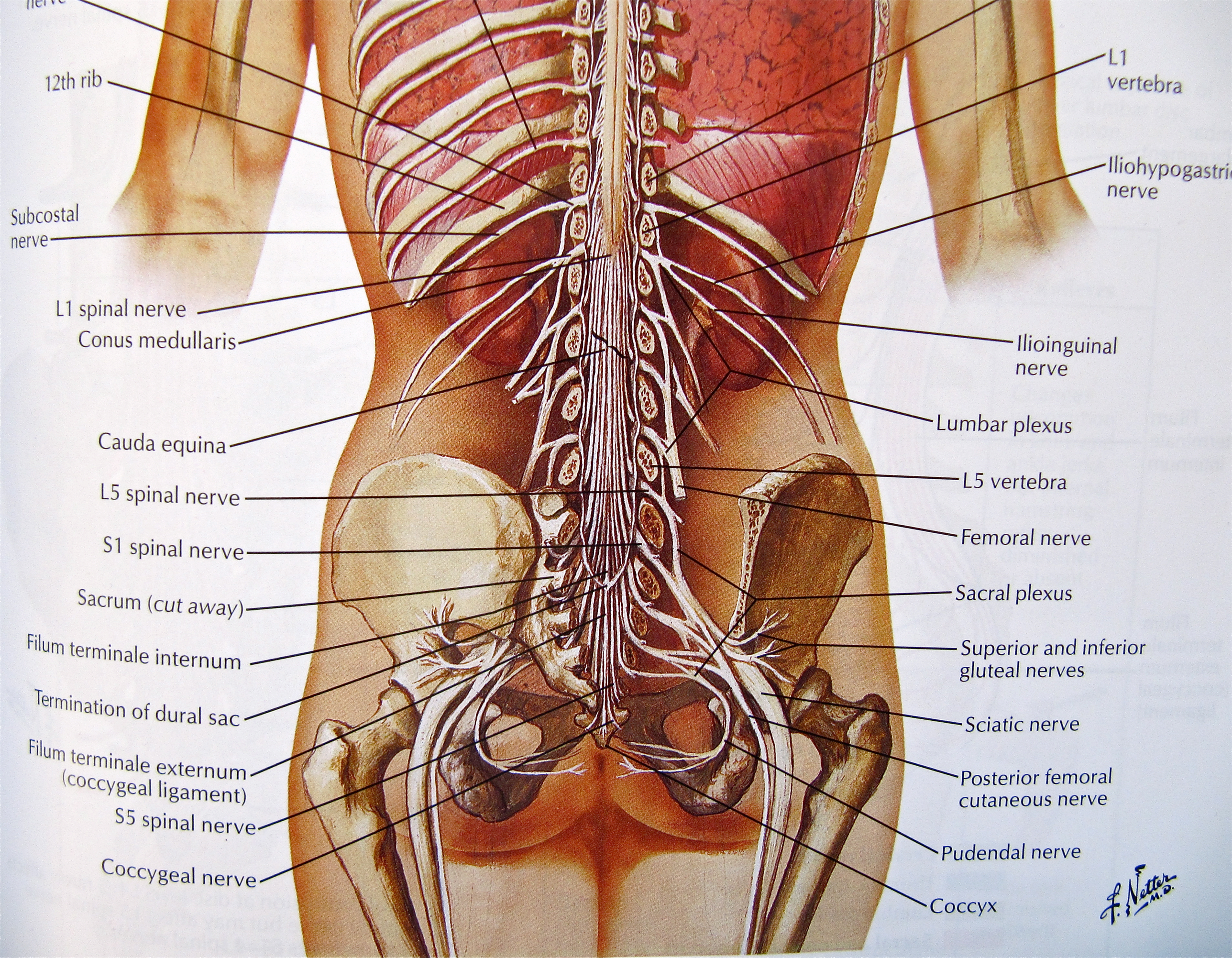
8. Health Insurance. Pursuant to Section 6.1 of the Agreement, Physician shall be entitled to health insurance benefits and term life insurance for Physician only on the same basis as health insurance benefits and/or term life insurance are provided to all other physician employees of Association. Family enrollment in said benefits is optional and cost of such benefits for Physician's dependents will be the sole responsibility of Physician.

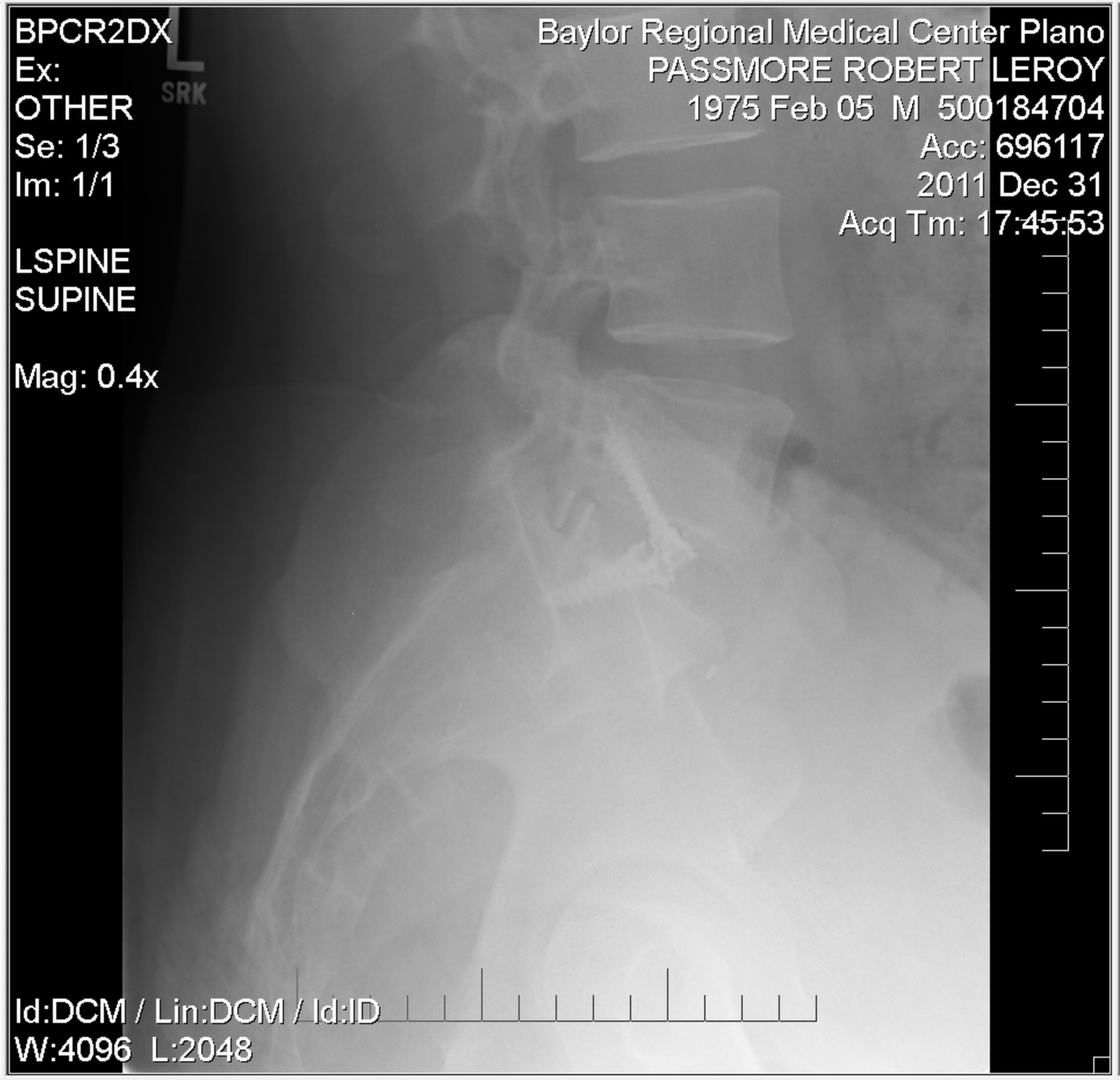
9. Professional Liability Insurance. Pursuant to Section 7.1 of the Agreement, Physician shall be entitled to professional liability insurance in a minimum amount equal to that in place for each of the other physician employees of the Association.

EXHIBIT B
OTHER BHCS RELATIONSHIPS

The Physician and/or the Practice have the following other BHCS Relationships:

- None


12th rib
Subcostal nerve
L1 spinal nerve
Conus medullaris
Cauda equina
L5 spinal nerve
S1 spinal nerve
Sacrum (*cut away*)
Filum terminale internum
Termination of dural sac
Filum terminale externum (coccygeal ligament)
S5 spinal nerve
Coccygeal nerve
L1 vertebra
Iliohypogastric nerve
Ilioinguinal nerve
Lumbar plexus
L5 vertebra
Femoral nerve
Sacral plexus
Superior and inferior gluteal nerves
Sciatic nerve
Posterior femoral cutaneous nerve
Pudendal nerve
Coccyx



Christopher Duntcsh <duntsch@bellsouth.net>
Re: Fwd: Occam's Razor
December 11, 2011 11:42 AM

I hope you read this and understood this and it grabbed your heart in the right way.

It would be impossible or at least a great deal of work to build this clinic without you.

But everything else either is replaceable with a bad ass professional admin asst, or necessarily avoidable including several other things that do not need to be mentioned. My point is that outside of the clinic, (primarily because of my heart), it is much easier to be without you than with you on the fence and all over the place with your feelings. It is even easier (and of course better) to do the same with you deeply in love with me and rolling with me like my mother fucking soldier. Either get in, get out and just run clinic, and I will even let you off the hook on all of the above if you protect my heart, but if you can't do that then you can't do anything other than run the clinic in relation to me. Not because I am some terrible person with no heart, but because I am a wonderful person with a sensitive and big heart (size of Texas by the way). And most importantly, your words are beautiful but have a tiny fraction of the significance of your actions towards me in so many ways for some many reasons with so many meanings and implications attached to each one.

From: Kimberly <kkmorgan13@yahoo.com>
To: Christopher Duntsch <duntsch@bellsouth.net>
Sent: Sun, December 11, 2011 11:06:43 AM
Subject: Fwd: Occam's Razor

Kimberly Morgan, Ed.D, FNP-C, RNFA
Texas Neurosurgical Institute
The office of
Christopher Duntsch MD, Ph.D
469-443-0446 Ofc
469-443-0456 Fax
972-529-0480 cell
MAJ US Air Force Medical Corp
Adjunct Professor, Texas Woman's University, Graduate School of Nursing

Begin forwarded message:

From: Christopher Duntsch <duntsch@bellsouth.net>
Date: December 9, 2011 4:01:06 CST
To: Kimberly Morgan <kkmorgan13@yahoo.com>
Subject: Occam's Razor

Kim,

There are three ways to explain this to you.

Directly, bluntly.

Verbose and kind with analogies and subtle yearning for empathy if I can just get you to understand.

Whoop the shit out of your heart and mind and soul.

Before you read the word "before", your entire face was painfully grimacing in confusion and that "what the fuck are talking about look" that you give me around 47 times a day.

I am going to choose bluntly, and if you still don't get it then we can sit in a dark corner and I will explain in great detail some other time.

And if you still don't get it and your actions continue to follow me or run ahead or simply walk on me then out of love I won't whoop the shit of you. But it will change things in a sequential manner. I already have. But each step has been anything other than what is in my heart for you.

Unfortunately, you cannot understand that I really am building an empire, and I am so far outside the box that the earth is small and the sun is bright. And I have around 3 minutes left to change my mind and go back, and of course I always do. But that is something that you probably are again scrunching in confusion over yet you know what I mean. The funny thing is you are likely alone reading yet still scrunching ... but for who? Yourself?

Here is the deal.

I have about 6 companies in play. And about 80 people I have to talk to daily or weekly.

I have three lawsuits.

I have 1M in debt, 10M invested, and 22 years of pain in misery already on the table.

I have 6 chances at making enough of this and that to do what is next.

I do not have the patience to put all my money on one horse.

Anyone close to me thinks that I likely am something between god, einstein, and the antichrist. Because how can I do anything I want and cross every discipline boundary like its a playground and never ever lose. But unfortunately, despite the fact I am winning it is not happening fast enough. What is the problem Kim? It is simply that everyone else is human and there is nothing I can do about it. And so I pick and choose my humans and try to help them and show them. Give them patience and kindness. And never harm anyone unless they even think of doing the same to someone I love.

But everyone of them fail me nearly on a daily basis. There loyalty comes and goes, they lose huge amounts of money, they kill deals, they disrespect me, they can't pull their weight, they don't have patience, faith, they don't believe. Except of course when I put 100K on the table or strike a deal with biotech the size of texas while I take a nap and design the next design for something. Then everyone believes. And when they do, its all love and respect and honor and yes sir right away sir. But give them one week and suddenly they forget and greed grows on their skin and they begin to believe this is their work, their ideas,

their 22 years and 20,000 hours in the lab and OR and at the table doing real business with the people in charge of what the fuck ever I want to do business with.

You, my child, are the only one between me and the other side. I am ready to leave the love and kindness and goodness and patience that I mix with everything else that I am and become a cold blooded killer. The sad fact is that I would go faster do better and catch more respect and honor by fucking every one in the brain, emotionally and mentally controlling them in a manner that borders on abuse, taking no prisoners, and sending everyone in my way, and especially that fucks with me to hell for the simple fact they thought they could much less tried.

You stopped me dead in my tracks. I found a beautiful woman, a deep heart, a charismatic jedi mind fuck natural who was smart and capable, and that fit into my personal life and real life like a glove. And for about 1 week I suddenly changed my opinion of the world. It was no longer me rolling like this and growing like that and what the fuck ever needed to be, it was you and I doing that, and doing that as two people that acted like one. Two people that don't have to speak, just see into each other eyes and have conversations that are a semblance of a calculus based physics russian novel by Dostoevsky that was revised by Newton then Einstein then when he died in bed with a pencil and paper desperate for a theory of everything he died without the one thing he had to have, and Neils Bohr fucked him because he was right, and so was Einstein, buy Bohr did not have to touch each electron in its cloud at a given point in space and time to believe in quantum mechanics, but Einstein did and never could have so he did not believe and died lost. And he died alone and miserable and without honor. Because he could not see.

1 week and then everything unraveled. At first I thought it was simply my world and that it was too much for you. Then it seemed that it was nothing more than boring to you ... so then I thought it was my vodka bottle and neurostimulants, but I watched you closely and besides concern for my healthy you were chill and rolled with me on that. Then I thought I was to you just a crazy old overweight out of shape unhealthy 40 year old and without something more physically you were bored of me faster than I would ever admit. I still believe that is likely true. Drive and hurt and life and people have ruined me and I don't even care. Then I thought you were scared that I was too diluted, or it was all too crazy, or that of all the things I need to take down one at a time, the one you needed to go fast the most was going to get fucked.

I am going with the last one. That is why I stopped on a dime. Stopped trying to impress you or show off or even share with you what the 100 emails and 20 calls and 50 texts on a given day are about. Because its seems that while that goes on, as long as I keep you out of that mentally and physically and ideologically, and keep moving in your clinical world with me, you are blissfully ignorant, or simply ignore the rest. I did that. It worked. So I am fairly certain I am right.

But here is the deal. At any given moment, you can never make up much less know the pain and anger and frustration and genius and drive and destruction and architecture I have put down on the table when it was time to do so, and all just before I showed up to wherever you and were supposed to be.

What is the point of all this.

You don't know Kim. And you don't know me. And you expend a lot energy making simple complex. And complex things ridiculous.

This is what you have got to do for me.

Keep it simple. Never ever fucking argue with me and banter or what the fuck ever in front of anyone. When we are alone, my love for you will let you do so because that is your nature. But not in front of my lawyers and accountants and partners and employees and friends. And never when I not standing there.

You were a major in a military organization, and that is the only reason you can have a slight inkling of the manner in which I want you to treat me and respect me.

There was a moment in time where you owned me, and I looked you in the eyes, held you in my arms, and said I am so in love with you, but my god I am so in love with the way you treat me, with respect, and honor. Like a man among men, who run a world that is filled with children.

But then that all just went away one day and has not really every come back.

There was another time where you met me at the door of the hospital, and took my brief case, and walked me into some ghetto sled pretend grand rounds, and showed me more honor and respect then you have in the last month combined.

I love you dearly. But you are not the woman I thought you were, you are strong and tough and brave and good and real, but you are still a small helpless child that sits in my lap and decides when to smile, when to scream, and when be small and quiet. That is fine. But at some point you will lose me or gain me, but either way you will realize I hold you in my hand. And that any weakness or reality of my own humanity I ever showed you was out of respect and a trust that I could be that real with you and would not change your thoughts and feelings about me. I was wrong.

This is the simplest way I can tell you what I need from you.

Everything you do is perfect, except when you and are together in certain contexts. In some you are a kitten puring in my lap, in others you are wonderful and fun and fill my heart with joy. In others you simply fuck me repeatedly and not in any way that I would consider enjoyable. And I let you. But my patience is thin these days. If I turned to you, when there was no where to turn, and then you turned on me, even once, then where do I turn. This probably confuses you and maybe you think I am being dramatic or what the fuck ever.

What I am being is what I am, one of kind, a mother fucker stone cold killer that can buy or own or steal or ruin or build whatever he wants. And only other people and his heart have made it difficult. You showed and made me believe and then took my mother fucker away. You took my girl away. And I won't forgive you for that for a long time.

But nonetheless. I love you desperately. And think the world of you. And will cut a mother fucker down who looks at you twice in other manner than love and respect and honor. Whatever you want from me you will get.

But only if you do the following:

Show me real and extraordinary respect in front of others, at the very least.

Never put my name in your mouth with others unless you are showing me respect and setting a precedent with them.

Never collect my lawyers in scientists and friends, etc, as you do, in any manner that involves a perceived sexuality by gestures or even innocent flirting. You are a princess, and you can do the same with your brain and subtle not overt.

You are my girl. I own you, that is my nature, or you are not mine. I own what others think of you. And if your mannerisms make Collin and Edward think you would ever be on their team, or Rimlawi think he can walk into my clinic and sit with you for one hour and disrespect me, or every other male think of you as any thing else other than someone that I hold up and pour love and respect on, and the only one, then you are fucking up and and I will not be here for long. I will always be here, but not like that.

You are a child in my hands, and you are safe, but you won't be the woman I turn to if you can't stop being the girl who was abused somehow by some guy some time and that hurt makes you treat me in ANY OTHER WAY THAN WHAT YOU KNOW I WANT FROM YOU. Whether you lash out or simply sulk when the time comes to step up for me.

If you don't get this, that is the same as if you did but don't care. If you do, then walk softly and be very concerned. Not about your job, I will never let you go. But about my heart, and whether our hearts continue to be in the same room for the same reason. That is something I can't control, but that you are in control and not doing a great job of.

Let me simplify things:

Jedi mind fuck with your brain, not your breasts or sexual euphemisms

Never ever let a one man get away with one bit of disrespect to you, or to me through you.

Never every argue with me or banter with me in front of people I know or don't know.

Do your very best to make everything as simple as possible.

Do not participate in anything beyond the entirety of OUR practice unless I ask you too.

Convince me that you are or are not desperately down for me and love me and want me. Because all you really do is go back and forth, or split the difference, so I am always in a fence and never in or out, and yet want that so badly that I sit here like a bitch and it is not a good use of my time.

Despite the way this email reads, there is more love and respect in it than you have had in your entire life.

I love you babe, there is only one of you. But you are double edged sword. And you can ride with me or for me and that is entirely your call. And you are making it every day.

Either way you do a great job at protecting the base, but there is so much more that you don't see or don't want to. I will take the base, but the other 93% of me has a great of traveling ahead of him. You are welcome to stay at the front desk, or in the OR, or on call when leave town for some reason. If that is what you want. Just be clear with me. My heart is so beat to death it barely works and you step all over it.

Do not reply to this.

C

April 20, 2012

Baylor Regional Medical Center at Plano
4700 Alliance Blvd.
Plano, Texas 75093
Medical Staff Services
Patti Sproles
Delivery via email pattis@baylorhealth.edu

RE: Resignation at Baylor Regional Medical Center at Plano

Dear Ms. Sproles:

I am in the process of moving my practice to a different location, and as a result I have decided to resign my position as a member of the medical staff and my clinical privileges at Baylor Medical Center at Plano, effective immediately.

Signed,

Christopher Duntsch, MD, PhD

BAYLOR
Regional Medical Center
at Plano

PRIVILEGE
Tex. Rev. Civ. Stat. Ann. Art. 4495b and 5.06
Tex. Health & Safety Code Chp. 161.032
Medical Staff Committee Document

April 20, 2012

Christopher Duntsch, MD
4708 Alliance Blvd.
Pavilion I – Suite 830
Plano, Texas 75093

Dear Dr. Duntsch:

On behalf of the Medical Executive Committee of the Medical Staff of Baylor Regional Medical Center at Plano, I am authorized to notify you of the following:

All investigations with respect to any areas of concern regarding Christopher D. Duntsch, M.D. have been closed.

As of this date, there have been no summary or administrative restrictions or suspensions of Dr. Duntsch's Medical Staff membership or clinical privileges during the time he has practiced at Baylor Reg. Medical Center at Plano.

Yours Very Truly

Patricia Sproles

Patricia Sproles, CPCS
Director, Medical Staff Services

ST. LUKE'S EPISCOPAL HOSP. v. AGBOR, 952 S.W.2d 503 (Tex. 1997)

952 S.W.2d 503, 40 Tex. Sup.Ct. J. 712

ST. LUKE'S EPISCOPAL HOSPITAL, Petitioner, v. Comfort and Kingsley AGBOR, Respondents.

No. 96-0085.

Supreme Court of Texas.

Argued October 2, 1996.

Decided June 20, 1997.

Rehearing Overruled October 30, 1997.

Appeal from 129th District Court, Harris County, Greg Abbott, J.

Page 504

Solace H. Kirkland, Michael O. Connelly, Houston, for Petitioner.

Phillip A. Pfeifer, Houston, for Respondents.

GONZALEZ, Justice, delivered the opinion of the Court, in which HECHT, ENOCH, OWEN and BAKER, Justices, join.

This is an appeal from a summary judgment. The sole issue in this case is whether the Texas Medical Practice Act ("the Texas Act") applies to a patient's cause of action against a hospital for its credentialing activities. We hold that it does, and reverse the judgment of the court of appeals.

I

Dr. Suzanne Rothchild delivered Dikeh Agbor at St. Luke's Episcopal Hospital in Houston. During birth, the baby suffered an injury that permanently disabled his left arm. The baby's parents, Comfort and Kingsley Agbor, sued Dr. Rothchild for medical malpractice, and St. Luke's for negligent and grossly negligent credentialing. The Agbors allege that the hospital should not have renewed Dr. Rothchild's staff privileges because she had been the subject of many medical malpractice cases, some involving St. Luke's, she was not a Texas resident, and was not properly insured for medical malpractice. St. Luke's moved for summary judgment asserting that the Texas Act, TEX.REV.CIV. STAT. ANN. art. 4495b, §§ 1.01-6.13, provides immunity for credentialing decisions by health care entities absent a showing of malice. The trial court granted the

hospital's motion and severed this action against St. Luke's from the action against Dr. Rothchild.
Page 505

The court of appeals, with one justice dissenting, reversed and held that the trial court incorrectly interpreted the Texas Act to require a showing of malice in credentialing actions brought by patients. 912 S.W.2d 354.

II

The Texas Act provides, in pertinent part, as follows:

> (*l*) A cause of action does not accrue against the members, agents, or employees of a medical peer review committee or against the health-care entity from any act, statement, determination or recommendation made, or act reported, **without malice**, in the course of peer review as defined by this Act.
>
> (m) A person, health-care entity, or medical peer review committee, that, **without malice**, participates in medical peer review activity or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from such an act.

TEX.REV.CIV. STAT. ANN. art. 4495b, § 5.06(*l*), (m) (emphasis added). "Medical peer review committee" means "a committee of a health-care entity . . . authorized to evaluate the quality of medical and health-care services or the competence of physicians." *Id.* § 1.03(a)(6). "Medical peer review" means "the evaluation of medical and health-care services, including evaluation of the qualifications of professional health-care practitioners and of patient care rendered by those practitioners." *Id.* § 1.03(a)(9). The definitions of "medical peer review committee" and "medical peer review" clearly contemplate, among other things, the process known as "credentialing" — the granting or retention of a doctor's hospital privileges.

St. Luke's argues that the plain language of section 5.06(*l*) and (m) bars an action based on a hospital's credentialing decision made without malice, regardless of whether the plaintiff is a doctor who was the subject of the decision, or a patient who was injured by a doctor who allegedly should not have been credentialed. The Agbors argue that section 5.06 should be construed narrowly to protect peer review participants from suits by physicians and not from patients' negligent credentialing actions.

When a statute is clear and unambiguous, courts need not resort to rules of construction or extrinsic aids to construe it, but should give the statute its common meaning. *Bridgestone/Firestone, Inc. v. Glyn-Jones,* 878 S.W.2d 132,

133 (Tex. 1994); *One 1985 Chevrolet v. State,* 852 S.W.2d 932, 935 (Tex. 1993). The Legislature's intent is determined from the plain and common meaning of the words used. *Monsanto Co. v. Cornerstones Mun. Util. Dist.,* 865 S.W.2d 937, 939 (Tex. 1993); *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 352 (Tex. 1990). This Court has reiterated these principles many times. In *RepublicBank Dallas, N.A. v. Interkal, Inc.,* 691 S.W.2d 605, 607 (Tex. 1985), we stated:

> Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language and not elsewhere. . . . They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.

Id. (quoting *Simmons v. Arnim,* 110 Tex. 309, 220 S.W. 66, 70 (1920)). The court of appeals held that the Texas Act does not unambiguously state that a hospital is immune from liability in all cases for credentialing decisions absent a showing of malice. 912 S.W.2d at 357. We disagree.

The Texas Act expressly provides that "[a] cause of action does not accrue . . . against the health-care entity from any . . . determination or recommendation made . . . without malice, in the course of peer review as defined by this Act"; and "[a] . . . health-care entity . . . that, without malice, participates in medical peer review activity . . . is immune

from any civil liability arising from such an act." TEX.REV.CIV. STAT. ANN. art. 4495b, § 5.06(*l*), (m). The statute defines "medical peer review" to include "evaluation of the qualifications of professional health-care practitioners. . . ." *Id.* § 1.03(a)(9). Thus, the plain meaning of the words used provides immunity from civil liability to a health-care entity for actions in the course of peer review, when such actions are done without malice.

The Agbors argue that because the statute only allows a lawsuit for acts committed with malice, the Legislature did not intend it to apply to patients' suits. They contend that malice requires proof of "spite, ill will, or intent to injure," which must be directed toward a known individual. The argument is that a plaintiff could never prove that a credentialing body acted with malice toward a specific patient. However, the Texas Act states that "[a]ny term, word, word of art, or phrase that is used in this Act and not otherwise defined in this Act has the meaning as is consistent with the

common law." TEX.REV.CIV. STAT. ANN. art. 4495b, § 1.03(b). Under the common law, proof of malice does not necessarily require conduct directed toward a specific person. *See Shannon v. Jones,* 76 Tex. 141, 13 S.W. 477, 478 (1890) (defining malice as a reckless disregard for the rights of others).

In fact, the Legislature itself has recently defined "malice" for the purpose of recovery of exemplary damages, and that definition does not require an act directed toward a specific person. In the Civil Practice and Remedies Code, the Legislature defines "malice" as:

> (A) a specific intent by the defendant to cause substantial injury to the claimant; **or**
>
> (B) an act or omission:
>
> (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM.CODE § 41.001(7) (emphasis added). Considering the Legislature's pronouncement that "malice" need not be directed toward a specific individual in the context of exemplary damages, it does not follow that in the context of peer review, the committee must necessarily act with malice toward a specific patient for that patient to prove his or her case. Therefore, the fact that the Legislature chose to allow suits only for malicious conduct in no way dictates that the statute does not apply to patients' claims.

The Agbors further contend that the Texas Act does not compel the result we reach because when the Legislature enacted the Act, it incorporated the Health Care Quality Improvement Act of 1986 ("the Federal Act"), 42 U.S.C. § 11101-52, and such an interpretation would render the Acts inconsistent with each other. The Federal Act states as follows:

> Nothing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of Federal or State Law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defense or immunities available to any physician, health care practitioner, or health care entity.

Id. § 11115(d). The Agbors contend that because

the Federal Act is incorporated into the Texas Act, section 11115(d) dictates that neither Act affects patients' suits, including suits for negligent credentialing. They argue such a suit is one for "negligent treatment or care by . . . [a] health care entity," *id.,* which the Federal Act expressly does not affect. Under the Agbors' view, if the Texas Act provides immunity absent malice in credentialing decisions, it will directly conflict with the Federal Act. This argument fails to persuade us.

First, it is debatable whether a hospital's alleged acts in credentialing physicians are themselves part of the "treatment and care" of patients. *See* Richard L. Griffith & Jordan

M. Parker, *With Malice Toward None: The Metamorphosis of Statutory and Common Law Protection for Physicians and Hospitals in Negligent Credentialing Litigation,* 22 TEX. TECH L.REV. 157, 183 n. 146 (1991) (stating that credentialing impacts, but is not an actual part of, "treatment and care"). We note that the court of appeals' interpretation of section 11115(d) is based on an improperly broad reading. The court stated that the Federal Act "provides that it does not affect the rights and remedies available to a patient for the negligence of a physician, health-care provider or health-care entity." 912 S.W.2d at 358. This reading ignores the limitation that the patients' suits unaffected by the Federal Act are those for "negligent **treatment or care**," not merely negligence in general, which undoubtedly would include negligent credentialing. 42 U.S.C. § 11115(d) (emphasis added).

> Second, the Federal Act also provides:
> Except as specifically provided in this subchapter, nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this subchapter.

42 U.S.C. § 11115(a). Therefore, even if the Federal Act does not apply to negligent credentialing as the Agbors argue, this provision specifically allows states to implement their own initiatives to provide greater immunities in professional review actions than those the Federal Act provides. No provision of the Federal Act overrides or preempts a state's efforts in this area. Texas has clearly done what section 11115(a) allows and has provided extra "immunities, or protection for those engaged in a professional review action." *Id.* By these express terms, no conflict arises between the two acts; thus, the existence of the Federal Act does not compel a departure from the plain meaning of the Texas Act.

The Agbors also rely on this Court's decision in *Bridgestone/Firestone,* which stands for the principle

that a statutory provision must be construed in the context of the entire statute of which it is a part. *Bridgestone/Firestone,* 878 S.W.2d at 133. The statutory provision in that case stated, "Use or nonuse of a safety belt is not admissible evidence in a civil trial." TEX.REV.CIV. STAT. ANN. art. 6701d, § 107C(j), *repealed by* Acts 1995, 74th Leg., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1870, 1871 (current version at TEX. TRANSP. CODE § 545.413(g)). This provision was part of the Uniform Act Regulating Traffic on Highways. It was intended to clarify that the sole legal sanction for failure to wear a seat belt is the criminal penalty provided by the statute, and that such a failure could not be used against the injured person in a civil trial. *Bridgestone/Firestone,* 878 S.W.2d at 134. The defendants in the case argued that the provision should also be read to abolish crashworthiness actions against seat belt manufacturers. The Court disagreed, holding that the meaning of the provision became clear if read consistently with the context of the entire statute. The Court concluded that the Legislature simply could not have intended to create a wholesale exemption from suit in a subsection of a traffic regulation. *Id.*

The provisions creating peer review immunity are consistent with the rest of the statute in which they are found. In contrast to the traffic statute in *Bridgestone/Firestone,* which had no apparent application to a products liability suit for defective seat belts, the statute in the present case is part of the "Medical Practice Act," which deals broadly with "regulating the practice of medicine." TEX.REV.CIV. STAT. ANN. art. 4495b, ss 1.01, 1.02(4). The Texas Act directly concerns immunity from suit for those participating in medical peer review activity. *Id.* § 5.06(*l*), (m). The context of the statute as a whole involves precisely the situation in this suit — regulating the practice of medicine, including "evaluation of the qualifications of professional health-care practitioners." *Id.* § 1.03(a)(9). In such a case, we give the statute's words their common meaning, and the Agbors' reliance on *Bridgestone/Firestone* is misplaced.

III

In the court of appeals, the Agbors also complained that affording hospitals immunity

from negligent credentialing actions absent malice violates the Open Courts Provision of the Texas Constitution. *See* TEX. CONST. art. I, § 13. Because it disposed of the Agbors' claims solely on statutory construction, the court of appeals expressly reserved this issue. In this Court, both parties have briefed the issue, and for the sake of judicial economy, we consider the question instead of remanding it for the court of appeals' consideration. *See First Baptist Church v. Bexar County*

Appraisal Review Bd., 833 S.W.2d 108, 111 (Tex. 1992).

The Open Courts Provision of the Texas Constitution provides, in pertinent part: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. To demonstrate that a statute violates this constitutional guarantee, a litigant must show 1) that the statute restricts a well-recognized common law cause of action, and 2) that the restriction is unreasonable or arbitrary when balanced against the purpose of the statute. *Baptist Mem'l Hosp. Sys. v. Arredondo,* 922 S.W.2d 120, 121 (Tex. 1996); *Moreno v. Sterling Drug, Inc.,* 787 S.W.2d 348, 355 (Tex. 1990). This Court has consistently held that the Open Courts Provision protects only well-defined common law causes of action from legislative restriction. *See Moreno,* 787 S.W.2d at 356-57.

We have never dealt with the question of whether a common-law cause of action exists for negligent credentialing. In 1987, when the Legislature enacted the Texas Act's immunity provisions, only two Texas courts had considered the question, reaching opposite results. *See Park North Gen. Hosp. v. Hickman,* 703 S.W.2d 262, 264-66 (Tex.App. — San Antonio 1985, writ ref'd n.r.e.); *Jeffcoat v. Phillips,* 534 S.W.2d 168, 172-74 (Tex.Civ.App. — Houston [14th Dist.] 1976, writ ref'd n.r.e.). *Park North* upheld a cause of action for negligent credentialing and determined that a hospital has a duty to a patient to exercise reasonable care in the selection of its medical staff and in granting privileges to them. *Park North,* 703 S.W.2d at 266. On the other hand, *Jeffcoat* held that absent an employer-employee, principal-agent, partnership, or joint venture relationship between a hospital and physician, a hospital is not liable for its credentialing decisions where the patient chooses the physician. *Jeffcoat,* 534 S.W.2d at 173.

In short, when the Legislature enacted the Texas Act's immunity provisions, the lower courts were split on the existence of a cause of action for negligent credentialing, and we had not considered the question. Therefore, we cannot conclude that negligent credentialing was a well-recognized common law cause of action. Thus, the Agbors have failed to show an open courts violation. Because it is not necessary to our disposition of this case, we reserve for another day whether we recognize a common-law cause of action for negligent credentialing.

The dissenting Justices refer to a number of other jurisdictions that recognize in varying degrees a duty to exercise care in credentialing activities. However, their opinions do not indicate whether those negligent credentialing causes of action are based on the common law, or whether they involve restrictions identical, or even similar, to the statutory language that limits our decision. As Chief Justice Phillips acknowledges, at least one court has held that a

similar statute enacted to encourage hospitals to actively engage in peer review barred a claim against a medical care facility under a corporate negligence theory for its credentialing decisions involving an independent contractor physician. *See Lemuz v. Fieser,* 261 Kan. 936, 933 P.2d 134, 140, 145 (1997); *McVay v. Rich,* 255 Kan. 371, 874 P.2d 641, 645 (1994). The Kansas statute provides:

> There shall be no liability on the part of . . . any licensed medical care facility because of the rendering of or failure to render professional services within such medical care facility by a person licensed to practice medicine and surgery if such person is not an employee or agent of such medical care facility.

KAN. STAT. ANN. § 65-442(b) (1995). The Kansas Supreme Court concluded that regardless of the reasons favoring liability under a corporate negligence theory, it simply cannot reach the question because the clear, unambiguous language of the statute bars a
Page 509
patient's claims against a hospital for credentialing or recredentialing activities. *See McVay,* 874 P.2d at 645. The same is true in our case. The Legislature is free to set a course for Texas jurisprudence different from other states'. Once the Legislature announces its decision on policy matters, we are bound to follow it within constitutional bounds.

Accordingly, we hold that the Texas Act's immunity provisions prescribe a threshold standard of malice to state a cause of action against a hospital for its credentialing activities.[fn1] Further, this standard does not violate the Open Courts Provision of the Texas Constitution.

For the above reasons, we reverse the judgment of the court of appeals and render judgment that the Agbors take nothing from St. Luke's Hospital.

ABBOTT, Justice, not sitting.

[fn1] To the extent other decisions conflict with this opinion, they are disapproved. *See Lopez v. Central Plains Reg'l Hosp.,* 859 S.W.2d 600, 602 n. 2 (Tex.App. — Amarillo 1993, no writ); *Smith v. Baptist Mem'l Hosp. Sys.,* 720 S.W.2d 618 (Tex.App. — San Antonio 1986, writ ref'd n.r.e.); *Park North Gen. Hosp. v. Hickman,* 703 S.W.2d 262 (Tex.App. — San Antonio 1985, writ ref'd n.r.e.).

PHILLIPS, Chief Justice, delivered a dissenting opinion, joined by SPECTOR, Justice.

The issue before us is whether a patient has a cause of action against a hospital for negligent credentialing. Because

I conclude that the common law of Texas recognizes such a cause of action and that nothing in the Texas Medical Practice Act ("TMPA") or any other statute takes it away, I respectfully dissent.

I

A hospital's duty to exercise care in the treatment of patients, including its credentialing activities, was first recognized in this state in *Park North Gen. Hosp. v. Hickman,* 703 S.W.2d 262 (Tex.App. — San Antonio 1985, writ ref'd n.r.e.). This cause of action was also recognized in *Lopez v. Central Plains Reg. Hosp.,* 859 S.W.2d 600 (Tex.App. — Amarillo 1993, no writ) (holding that a material issue of fact about whether a hospital negligently credentialed a doctor precluded summary judgment). *See also Smith v. Baptist Mem. Hosp. Sys.,* 720 S.W.2d 618, 626 n. 2 (Tex.App. — San Antonio 1986, writ ref'd n.r.e.) (a hospital "clearly may have a duty to prevent a physician's malpractice at least to the extent that it establishes procedures for the granting of staff privileges and for the review of these privileges.").

The duty is separate from a hospital's vicarious or respondeat superior liability.[fn1] *See generally Smith,* 720 S.W.2d at 626. It includes the duty to exercise care in its recredentialing functions. *See Park North,* 703 S.W.2d at 266. Twenty-seven other jurisdictions have recognized the duty in varying degrees. *See, e.g., Humana Med. Corp. v. Traffanstedt,* 597 So.2d 667 (Ala. 1992) (recognizing duty but finding no liability under particular facts); *Storrs v. Lutheran Hosps. & Homes Soc. of America, Inc.,* 661 P.2d 632 (Alaska 1983); *Fridena v. Evans,* 127 Ariz. 516, 622 P.2d 463 (1981); *Elam v. College Park Hosp.,* 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982); *Kitto v. Gilbert,* 39 Colo. App. 374, 570 P.2d 544 (1977); *Insinga v. LaBella,* 543 So.2d 209 (Fla. 1989); *Mitchell County Hosp. Auth. v. Joiner,* 229 Ga. 140, 189 S.E.2d 412 (1972); *Darling v. Charleston Community Mem. Hosp.,* 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Leanhart v. Humana Inc.,* 933 S.W.2d 820 (Ky. 1996) (allowing patient access to documents placed in doctor's peer review file for a corporate negligence cause of action); *Ferguson v. Gonyaw,* 64 Mich. App. 685, 236 N.W.2d 543 (1975); *Gridley v. Johnson,* 476 S.W.2d 475

(Mo. 1972); *Hull v. North Valley Hosp.,* 159 Mont. 375, 498 P.2d 136 (1972); *Rule v. Lutheran Hosps. & Homes Soc.,* 835 F.2d 1250 (8th Cir. 1987) (applying Nebraska law); *Oehler v. Humana Hosp.,* 105 Nev. 348, 775 P.2d 1271 (1989); *Corleto v. Shore Mem. Hosp.,* 138 N.J. Super. 302, 350 A.2d 534 (Law Div. 1975); *Cooper v. Curry,* 92 N.M. 417, 589 P.2d 201 (App.), *cert. quashed,* 92 N.M. 353, 588 P.2d 554 (1978); *Raschel v. Rish,* 110 A.D.2d 1067, 488 N.Y.S.2d 923 (N.Y.App. Div. 198 5); *Blanton v. Moses H. Cone Mem. Hosp.,* 319 N.C. 372, 354 S.E.2d 455 (1987); *Benedict v. St. Luke's*

Hosp., 365 N.W.2d 499 (N.D. 1985); *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 553 N.E.2d 1038 (1990) (noting requirements for recovery in negligent credentialing cause of action), *overruled in part by Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 628 N.E.2d 46 (1994); *Strubhart v. Perry Mem. Hosp.*, 903 P.2d 263 (Okla. 1995); *Huffaker v. Bailey*, 273 Or. 273, 540 P.2d 1398 (1975); *Thompson v. Nason*, 527 Pa. 330, 591 A.2d 703 (1991); *Rodrigues v. Miriam Hosp.*, 623 A.2d 456 (R.I. 1993);*Wheeler v. Central Vt. Med. Ctr.*, 155 Vt. 85, 582 A.2d 165 (1990); *Pedroza v. Bryant*, 101 Wn.2d 226, 677 P.2d 166 (1984); *Utter v. United Hosp. Ctr.*, 160 W. Va. 703, 236 S.E.2d 213 (1977); *Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 301 N.W.2d 156 (1981); *Sharsmith v. Hill*, 764 P.2d 667 (Wy. 1988).[fn2] I would follow *Park North* and *Lopez* and recognize such a duty under the common law of Texas.

On the summary judgment record before us, the Agbors have raised a fact issue that the Hospital breached this duty. The evidence most favorable to them under the summary judgment proof is that the Hospital violated its own rules by failing to suspend Dr. Rothchild's privileges when she moved her permanent residence from Texas to Massachusetts in April 1990, by renewing her privileges in the summer of 1990 without carrying out any recredentialing activities, and by not suspending her privileges when she failed to carry insurance between 1988 and 1990.

II

The Court does not reach the issue of whether such a cause of action exists. Instead, it holds that sections 5.06(*l*) and (m) of the TMPA, providing immunity for peer review activities against doctor and patient suits, bar any such claims that might exist. I disagree.

The provisions on which the Court relies state:

> A cause of action does not accrue against the members, agents, or employees of a medical peer review committee or against the health-care entity from any act, statement, determination or recommendation made, or act reported, without malice, in the course of peer review as defined by this Act.

TEX.REV.CIV. STAT. article 4495b, § 5.06(*l*).

> A person, health-care entity, or medical peer review committee, that, without malice, participates in medical peer review activity or furnishes records, information, or assistance to a medical peer review committee or the board is immune from any civil liability arising from such

an act.

TEX.REV.CIV. STAT. article 4495b, § 5.06(m).

Read literally, these provisions do bar the Agbors' claims. To apply law properly, however, we must consider the entire act, its nature and object, and the consequences that would follow from a proposed construction. *Sharp v. House of Lloyd, Inc.,* 815 S.W.2d 245, 249 (Tex. 1991); *Sayre v. Mullins,* 681 S.W.2d 25, 27 (Tex. 1984). The Legislature has declared that when construing a statute courts may consider the object sought to be attained, the circumstances under which the
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statute was enacted, the legislative history, common law, and the consequences of a particular construction. TEX. GOV'T CODE § 311.023. As we recently noted:

> Here . . . we are not presented with the statute as a whole, but a mere provision of the statute. Words in a vacuum mean nothing. Only in the context of the remainder of the statute can the true meaning of a single provision be made clear.

Bridgestone/Firestone, Inc. v. Glyn-Jones, 878 S.W.2d 132, 133 (Tex. 1994). Or as Justice Hecht put it: "[I]n some circumstances, words, no matter how plain, will not be construed to cause a result the Legislature almost certainly could not have intended." *Bridgestone,* 878 S.W.2d at 135 (Hecht, J. concurring).

The meaning of a word in a statute depends on its context, and an essential part of the context of every statute is its purpose. HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1124 (William Eskridge & Philip Frickey eds., 5th ed. 1994). Once a court has ascertained that purpose, the court should enforce it, even if that application seems inconsistent with the statute's strict letter. *See State v. Terrell,* 588 S.W.2d 784, 786 (Tex. 1979); *see also* 2A SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1992) ("[e]ach part or section should be construed in connection with every other part or section so as to produce a harmonious whole."). Thus, we have held that "when the intent and purpose of the Legislature is manifest from a consideration of a statute as a whole, words will be restricted or enlarged in order to give the statute the meaning which was intended by the lawmakers." *Bridgestone,* 878 S.W.2d at 134 (quoting *Lunsford v. City of Bryan,* 156 Tex. 520, 297 S.W.2d 115, 117 (1957)).

Applying these principles, I conclude that the Legislature did not intend to apply the heightened immunity provisions to patient suits against hospitals. The Legislature explained its purpose in section 1.02(1) of the TMPA:

> [T]he practice of medicine is a privilege and not a

> natural right of individuals and as a matter of policy it is considered necessary to protect the public interest through the specific formulation of this Act to regulate the granting of that privilege and its subsequent use and control.

Legislative regulation of credentialing is thus to protect patients and the public, not to insulate those who suffered bodily injury through a medical entity's negligence from legal redress.

Almost all of the TMPA manifests this purpose by addressing physician/hospital relationships. Subchapter B deals with the Board of Medical Examiners; Subchapter C deals with licensing; Subchapter D addresses disciplinary action. Most of Subchapter E as well focuses on peer review and physician and hospital rights. Sections 5.06(b)-(d), for example, set out the peer review committee's reporting requirements. Section 5.06(g) describes a doctor's right to privileged information if he files either an antitrust or § 1983 claim. Section 5.06(i) provides that if a peer review committee decides to take action against a doctor, he is entitled to a written copy of the committee's decision and recommendation. Section 5.06(q) provides a cause of action for health care entity employees if the hospital discharges or discriminates against them for complying with Section 5.06's reporting requirements. None of these sections curtails a patient's right to sue for negligent treatment or care by a medical facility.

Because there are no provisions in the statute that regulate physician/patient or hospital/patient relationships or that discuss patient care liability, a reading consistent with the purpose of the statute would limit the malice requirement in sections (*l*) and (m) to physicians' suits.

III

Moreover, nothing in the legislative history suggests that the Legislature intended to provide heightened immunity from patients' suits. The legislative debate focused on the same objectives envisioned in the federal statute — providing immunity for participants in peer review committees from retaliatory claims filed by disciplined doctors. During the discussion of the bill, Senator Chet

Brooks stated that the bill required reporting of improper actions of doctors and was accompanied by a liability shield for participants in peer review committees:

> We want the health care facilities that take adverse action against a physician's privileges to practice at that facility — to report that action to the Board of Medical Examiners so that the Board of Medical Examiners will have at least an alert there that they need to check into this and see what the basis for the removal of those privileges would be, and whether or not there ought

> to be some board follow-up on it. We also mandate peer review committees to report their findings that have to do with questionable practices to the board. And we also mandate physicians to report what they consider to be a threat to the patients and to the practice of medicine. Now to get this mandatory reporting we have also accompanied it in an even-handed way, with a liability shield — that as long as those reports are made in good faith and without malice or some illegal intent, that there would be no liability against them.

Debate on Tex. S.B. 171 on the Floor of the Senate, 70th Leg. (April 24, 1987) (tape available from Senate Staff Services Office).

Representative Mike McKinney explained that the House version of the bill strengthened the corresponding federal statute which itself was enacted to improve the quality of medical care by identifying incompetent physicians. The bill "provid[ed] some immunity for civil suits, for retaliatory suits, if you participate in peer review activities." Hearing on Tex. H.B. 283 before the House Public Health Comm., 70th Leg. (February 23, 1987) (tape available from the House Committee Coordinator's Office).

IV

The Court counters that its reading of the statute is not really unfair because such suits, if they are allowed in Texas, may prevail upon a showing of malice. I find it difficult to conceive that a hospital would credential its doctors with either the intent to harm patients or with such reckless disregard for their welfare as to establish malice. Even if such a case were to exist, however, a plaintiff would not be able to prove it because another part of the TMPA prevents discovery of the peer review committee's records. Article 4495b, section 5.06(s) provides that in civil suits:

> (s)(1) Reports, information, or records received and maintained by the board [Texas State Board of Medical Examiners] pursuant to this section and Section 5.05 of this Act, including any material received or developed by the board during an investigation or hearing, are strictly confidential. . . .
>
> * * * * * *
>
> (3) In no event may records and reports disclosed pursuant to this article by the board to others, or reports and records received, maintained, or developed by the board, by a medical peer review committee, or by a member of such a committee, or by a health-care entity be available for discovery or court subpoena or introduced into evidence in a

> medical professional liability suit arising out of the provision of or failure to rovide medical or health-care services, or in any other action for damages.

Thus, such a claim, no matter how meritorious, would be virtually impossible to prove. I would not give a statute so drastic a reading unless the words are clear and unmistakable. These are not.

This is one of those very rare instances where the literal words of a statute seem clearly beyond its actual intent. Nothing in the purpose, the statutory scheme, or the legislative history indicates that health care entities should be immune absent malice for any causes of action other than physicians' retaliatory claims. Therefore, I would not read the Act to do so. Instead, I would affirm the judgment of the Court of Appeals.

[fn1] The Court relies on *Jeffcoat v. Phillips,* 534 S.W.2d 168 (Tex.Civ.App. — Houston [14th Dist.] 1976, writ ref'd n.r.e.) to argue that the courts of appeals are split on the issue of whether a common law cause of action exists. However, *Jeffcoat* was a summary judgment case in which the plaintiff failed to show that the hospital was required by law or obligated by its own rules to screen physicians to whom it granted privileges or review their work. *Jeffcoat* held only that a hospital was not liable in respondeat superior for granting privileges to a independent contractor doctor. *Jeffcoat* distinguished its facts from the case where a hospital had a duty based on its bylaws and regulations. *Id.* at 172-173.

[fn2] Of the other jurisdictions that have addressed corporate negligence, three have held that the charitable immunity doctrine bars a patient's recovery. *See Rhoda v. Aroostook Gen. Hosp.,* 226 A.2d 530 (Me. 1967); *Hill v. Leigh Mem. Hosp.,* 204 Va. 501, 132 S.E.2d 411 (1963); *Grant v. Touro Infirmary,* 254 La. 204, 223 So.2d 148 (1969). One court held that a hospital was not liable for failing to withdraw a doctor's privileges in the absence of apparent authority. *See Strickland v. Madden,* 448 S.E.2d 581 (S.C.Ct.App. 1994). One court, as a matter of statutory interpretation has held that a hospital was not liable for an independent contractor physician's negligence. *See Lemuz v. Fieser,* 261 Kan. 936, 933 P.2d 134 (1997); *McVay v. Rich,* 255 Kan. 371, 874 P.2d 641 (1994).

CORNYN, Justice, dissenting, joined by SPECTOR, Justice.

It is as clear as such things get that by enacting the Texas Medical Practice Act (TMPA) the Legislature did not intend to lower then prevailing standards of patient care by insulating hospitals from their own

negligence in credentialing physicians. But the Court's irregular construction of the TMPA does exactly that. The legislative history of the Act makes plain that the Legislature's sole concern was to elevate standards of patient care by encouraging physicians to deny hospital privileges to incompetent physicians. And while I join Chief Justice Phillips' dissenting opinion, I write separately to emphasize my concern with the way the Court summarily dispatches the Agbors' claim. In so doing, the Court violates a fundamental axiom of Texas law that

> if a statute . . . deprives a person of a common law right, the statute will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview.

Smith v. Sewell, 858 S.W.2d 350, 354 (Tex. 1993); *Dutcher v. Owens,* 647 S.W.2d 948, 951 (Tex. 1983); *Satterfield v. Satterfield,* 448 S.W.2d 456, 459 (Tex. 1969).

In the 1960's, American jurisprudence began to acknowledge the hospital's emerging role as more than just a place where physicians treat patients. The modern hospital itself was becoming a direct and indirect provider of patient care. In the landmark case of *Darling v. Charleston Community Memorial Hospital,* 33 Ill.2d 326, 211 N.E.2d 253, 256-57 (1965), *cert. denied,* 383 U.S. 946, 86 S.Ct. 1204, 16 L.Ed.2d 209 (1966), the Supreme Court of Illinois held that a hospital owes a duty of ordinary care in the selection of its medical staff and in granting specialized privileges. Texas first embraced this duty in *Park North General Hospital v. Hickman,* 703 S.W.2d 262, 264-66 (Tex.App. — San Antonio 1985, writ ref'd n.r.e.) (citing *Darling,* 33 Ill.2d 326, 211 N.E.2d 253). Currently, as Chief Justice Phillips points out, twenty-seven jurisdictions have recognized this duty. Such a duty is but a particularized application of the more general duty articulated by RESTATEMENT (SECOND) OF TORTS § 323 (1965):

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Thus a cause of action for negligent credentialing was available to patients at the time the Legislature amended section 5.06 of the TMPA in 1987 to incorporate the provisions of the Health Care Quality Improvement Act of 1986.[fn1] "It

is now incontrovertible that hospitals owe a duty to their patients to properly investigate and evaluate physicians who apply for or who are permitted to provide professional medical services within the hospital." Torin A. Dorros & T. Howard Stone, *Implications of Negligent Selection and Retention of Physicians in the Age of ERISA,* 21 AM. J.L. & MED. 383, 408 (1995). This being the case, we are bound to apply the TMPA only to those cases that the Legislature clearly intended to cover. *See Smith v. Sewell,* 858 S.W.2d at 354.

Ignoring this rule of construction, the Court purports to rely on the "plain meaning" of the Act to justify its position that hospitals are not accountable for their negligence in selecting and retaining physicians. Used thus, as one commentator has expressed it, the plain-meaning rule at best states a tautology, and at worst severs language from its context. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation,* 67 NONPUBLIC. REV. 921, 932 (citing Reed Dickerson, THE INTERPRETATION AND APPLICATION OF STATUTES 229-233 (1975)). Such use of the plain-meaning rule also directly conflicts with the principle that a single provision of a statute must be read in the context of the remainder of the statute. *See Bridgestone/Firestone, Inc. v. Glyn-Jones,* 878 S.W.2d 132, 133 (Tex. 1994).
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Looking at the language of the statute, we are to consider not just the disputed parts, but the statute as a whole. *See Taylor v. Firemen's & Policemen's Civil Serv. Comm'n,* 616 S.W.2d 187, 190 (Tex. 1981); *State v. Terrell,* 588 S.W.2d 784, 786 (Tex. 1979).

As the Chief Justice notes, the Legislature's focus in the TMPA is on the physician-hospital relationship — not the patient-hospital relationship. The larger legislative landscape also bears this out.

Before Congress enacted the Health Care Quality Improvement Act of 1986 (HCQIA), incompetent physicians who had lost their privileges at one hospital were often able to move freely to another hospital. *See* Richard L. Griffith & Jordan M. Parker, *With Malice Toward None: The Metamorphosis of Statutory and Common Law Protections for Physicians and Hospitals in Negligent Credentialing Litigation,* 22 TEX. TECH. L. REV . 156, 180 n. 136 (1991) (citing H.R.REP. NO. 99-903, at 2-3 (1986), *reprinted in* 1986 U.S.S.C.A.N. 6384, 6385). Fearing litigation, some hospitals would trade their silence about a physician's reasons for leaving for the physician's voluntary resignation, leaving the physician free to continue to practice medicine despite a record of incompetence. *Id.* at 180.

These fears were well-founded. In the period leading up to the passage of the HCQIA, physicians denied hospital privileges filed federal antitrust suits, exposing hospitals to the possibility of treble damages. *See, e.g., Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83

(1988); *Marrese v. Interqual, Inc.*, 748 F.2d 373 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3501, 87 L.Ed.2d 632 (1985); *Posner v. Lankenau Hosp.*, 645 F. Supp. 1102 (E.D.Pa. 1986); *Quinn v. Kent Gen. Hosp., Inc.*, 617 F. Supp. 1226 (D.Del. 1985). They also filed civil rights claims. *See, e.g., Doe v. St. Joseph's Hosp.*, 788 F.2d 411 (7th Cir. 1986); *Quinn*, 617 F. Supp. 1226. State courts saw their share of physician suits as well in the form of wrongful revocation of hospital privileges and defamation of character. *See, e.g., Dworkin v. St. Francis Hosp., Inc.*, 517 A.2d 302 (Del.Super.Ct. 1986) (wrongful suspension and termination); *Holly v. Auld*, 450 So.2d 217 (Fla. 1984) (defamation); *Feldman v. Glucroft*, 488 So.2d 574 (Fla.Dist.Ct.App. 1986) (defamation), *cert. denied*, 503 U.S. 960, 112 S.Ct. 1560, 118 L.Ed.2d 208 (1992); *Atkins v. Walker*, 3 Ohio App.3d 427, 445 N.E.2d 1132 (1981) (defamation); *Guntheroth v. Rodaway*, 107 Wn.2d 170, 727 P.2d 982 (1986) (defamation).

In response, Congress passed the HCQIA. 42 U.S.C. § 11101 et seq. The purpose of the federal act was to "`improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent or who engage in unprofessional behavior.'" Griffith & Parker, 22 TEX. TECH. L.REV. at 180 (quoting H.R. REP. NO. 99-903 at 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6384, 6384); *see also* 42 U.S.C. § 11101(1) & (3). To facilitate this result, Congress established the National Practitioner Data Bank, the national reporting system that tracks doctors' practice history and competency. To encourage physicians to report malpractice, the HCQIA confers both a privilege from discovery of the information provided in good faith in peer review activities and immunity from suits arising out of the peer review process. Griffith & Parker, 22 TEX. TECH. L.REV. at 181-82.

Texas doctors participating in peer review faced similar retaliatory suits. *See, e.g., Mayfield v. Gleichert*, 484 S.W.2d 619 (Tex.Civ.App. — Tyler 1972, no writ) (involving a libel suit brought by a doctor against the defendant-doctor for remarks made in a report the defendant-doctor prepared at the request of the hospital medical staff). Thus it is no surprise that Texas was quick to opt in to the HCQIA's coverage at an early effective date. *See* TEX.REV.CIV. STAT. art. 4495b § 5.06(a); *Memorial Hosp. — The Woodlands v. McCown*, 927 S.W.2d 1, 4 (Tex. 1996). By enacting the TMPA, the Legislature was attempting to improve the quality of health care by establishing a system that encourages effective peer review. *See* TEX.REV.CIV. STAT. art. 4495b § 1.02(1). To protect against physician retaliatory suits, the TMPA followed the HCQIA by establishing immunity from suit, absent malice, and a privilege from discovery of all communications

made to a medical peer review committee.

Construing the TMPA to insulate health care providers from patient suits runs directly contrary to the Legislature's desire to improve the quality of health care. Patients do not have access to the same information that hospitals have through the National Practitioner Data Bank. Patients may only access the Data Bank after they have filed a medical malpractice suit and there is evidence that the hospital failed to query the Data Bank about a physician named in the suit. Elisabeth Ryzen, M.D., *The National Practitioner Data Bank: Problems and Proposed Reforms,* 13 J. LEGAL MED. 409, 419 (1992). Thus, for the most part, patients must rely on hospitals to verify the competency of physicians. To make hospitals virtually immune from patient suits does nothing to ensure that hospitals will diligently monitor physician competency. Instead, the Court's construction allows hospitals to negligently credential doctors and remain entirely immune from suit. This defeats the entire purpose of the Act.

For these reasons, I would hold that the malice standard set forth in article 4495b, sections 5.06(*l*) and (m) does not apply to patient claims for negligent credentialing. I would affirm the judgment of the court of appeals and remand this case for trial.

[fn1] Ironically, the Court purports to leave for another day the question of whether it recognizes a commonlaw cause of action for negligent credentialing. *See* 952 S.W.2d at 508. Under the Court's interpretation of the Act, however, that day will never come.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

ROBERT "LEE" LEROY PASSMORE, III, INDIVIDUALLY AND AS NEXT FRIEND OF MADELINE PASSMORE AND ABIGAIL PASSMORE, MINORS; AND KELLY PASSMORE;	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO._____
BAYLOR HEALTH CARE SYSTEM D/B/A BAYLOR MEDICAL CENTER OF PLANO; BAYLOR REGIONAL MEDICAL CENTER OF PLANO; AND KIMBERLY MORGAN, APN	§	DEMAND FOR JURY TRIAL
Defendants.	§	

PLAINTIFFS' ORIGINAL COMPLAINT

TO THE HONORABLE COURT:

COME NOW Plaintiffs complaining against the Defendants, and alleging the following:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction and venue is proper because one or more acts or omissions forming the basis for liability occurred in Dallas County, Texas, the Defendants are corporate entities located in Dallas County, Texas, and this lawsuit may affect the outcome of a pending bankruptcy proceeding. [*See* 28 USC 1334(b)].

2. The bankruptcy proceeding mentioned above is Case No. 1:13-bk-20510 *In Re Christopher Daniel Duntsch*, filed in the United States Bankruptcy Court, District of Colorado.

II.

PARTIES

3. Plaintiffs are individuals residing at 15690 Buffalo Creek Drive, Frisco TX 75035. Leroy Passmore is the patient involved in this claim. Kelly Passmore is his spouse. Madeline and Abigail are their minor children.

4. Defendant Baylor Health Care System is a corporation with its Registered Office at 1999 Bryan Street, Suite 900, Dallas TX 75201-3136. It may be served with process by serving its registered agent CT Corporation System at 350 N. St. Paul Street, Suite 2900, Dallas TX 75201-4234.

5. Defendant Baylor Regional Medical Center of Plano is a corporation with its Principal Office and its Registered Office at 350 N. St. Paul Street, Suite 2900, Dallas TX 75201-4234. This defendant may be served with process by serving its registered agent, CT Corporation System, at that address.

6. Defendants Baylor Health Care System d/b/a Baylor Regional Medical Center of Plano and Defendant Baylor Regional Medical Center of Plano will be referred to collectively in this Complaint as "the corporate Defendants" or simply "Baylor."

7. Defendant Kimberly Morgan, APN, is an individual who can be served with process at 5111 Cimmaron Circle, Allen, TX 75002.

III.

PRE- SUIT STATUTORY COMPLIANCE

8. Plaintiffs have complied with the pre-suit notice requirements of Texas Civil Practice and Remedies Code, Chapter 74.

IV.

FACTUAL BACKGROUND

9. Research studies show that from 1-in-10 physicians up to 1-in-6 physicians are impaired by drugs and/or alcohol. As a result, hospitals such as the corporate Defendants are required to have a patient safety system in place to identify them as well as those physicians who are obviously incompetent or impaired by drugs or alcohol.

10. In the Summer of 2011, the corporate Defendants entered into a joint venture with another corporate entity, MISI ASC DALLAS LC, to hire a spinal surgeon named Christopher Duntsch to perform spinal surgeries at the corporate Defendants' facility in Plano, TX. As part of that venture, the corporate Defendants paid MISI a large sum of money up-front to bring Duntsch to its facility and they also provided marketing efforts related to patient recruitment for Duntsch/Baylor Plano/MISI. Baylor/MISI/Duntsch finalized their venture and Duntsch came to town. Upon Duntsch's arrival, MISI President Michael Rimlawi, MD put Duntsch up in temporary housing at the W Hotel.

11. Duntsch's background, which at the time was known or knowable to the corporate Defendants through compliance with standards, included a long history of alcohol abuse, recreational drug use, including use of cocaine proximate to his treatment of patients. He also had a history of evading drug screen testing. For example, in Duntsch's residency program, he was reported for having used cocaine hours before participating in a surgery. He evaded drug testing for a number of days following that incident but ultimately tested positive for illicit substances. He was placed into an impaired physician treatment program. This was known or was knowable to the corporate Defendants through compliance with applicable standards.

12. The corporate Defendants failed to have Duntsch drug-tested prior to giving him privileges as

required by applicable standards.

13. Within weeks of arriving in Dallas, Duntsch's behavior was so erratic that he was deemed a danger to patients by MISI and the business venture was terminated by MISI. For example, Duntsch performed a surgery at the corporate Defendants' facility in Plano and then Duntsch went to Las Vegas without telling the hospital or MISI. The abandonment of this patient was not realized for about three days when the hospital staff called Rimlawi – who went to cover the patient. Rimlawi reported Duntsch's erratic behavior to Baylor and informed Baylor that Duntsch was not fit emotionally to be a surgeon but instead acted like a sociopath, a drug or alcohol abuser, or similar. This, along with other erratic behavior by Duntsch, was known or knowable by the corporate Defendants.

14. When the business venture between Baylor/MISI was terminated, Baylor chose to hire Duntsch as its agent or employee. Baylor had spent a lot of money on Duntsch and wanted it back. Therefore, Baylor reached an agreement with Duntsch that Baylor would provide Duntsch a location in an office building owned by Baylor Health Care System or one of its affiliated entities to use as his doctor's office and would give Duntsch a title, an additional stipend, and income guarantees.

15. Duntsch kept a gallon bottle of vodka under his desk at his office. He also kept drug paraphernalia in his desk. He was also abusing prescription medication. This was known or knowable to Baylor at the time through compliance with applicable standards.

16. At this time, Baylor requested Duntsch undergo testing for illicit drugs. Duntsch did not undergo the requested drug testing. Baylor ignored the adverse information it had regarding Duntsch and instead allowed him to perform surgeries at Baylor's Plano facility.

17. In the Fall of 2011, Duntsch's erratic and disorganized behavior continued. For example, he

did not follow proper procedures to get surgeries scheduled because he did not fill out the request forms properly. This resulted in surgeries having to be re-scheduled.

18. During this time, the corporate Defendants were actively promoting patient referrals to Duntsch.

19. During the Fall of 2011, Baylor employees and other staff participating in the surgeries witnessed a startling lack of surgical skill by Duntsch resulting in high blood loss or other complications. Duntsch also had other alarming behaviors such as repeatedly urinating on the floor in the bathrooms and taking an unusually high number of bathroom breaks during surgeries. There was also an incident in which a bag of what appeared to be cocaine was found in Duntsch's bathroom. This was known or was knowable by the corporate Defendants.

20. On December 30, 2011, Duntsch performed surgery on Plaintiff Leroy Passmore at one of the corporate Defendants' hospital facilities. During the surgery, a surgeon present in the operating room saw that Duntsch was doing things that were unusual and, soon, alarming. Duntsch was causing a lot of bleeding [750 ml when the blood loss should only have been 50 ml], requiring two suction devices rather than one. Duntsch was operating near Passmore's spinal cord without having a clear view and the other surgeon objected to that vocally. Duntsch began to remove a certain anatomical structure in Passmore's spine – the other surgeon objected to that as well. The other surgeon, at one point, grabbed Duntsch's hands/surgical instruments and told him to stop. Duntsch misplaced the surgical hardware in Passmore's spine – and stripped one of the placement screws which prevented the hardware from being removed and placed properly. The other surgeon told Duntsch that Duntsch was dangerous and he would never operate with Duntsch again. This altercation was witnessed by the OR staff, including Baylor employees and Defendant Morgan.

21. None of the Baylor employees reported the altercation up the chain of command as required by nursing standards of care. None of them reported the altercation to the patient as required by nursing standards of care. In the alternative, if the altercation was reported up the chain of command, the corporate Defendants failed to inform the patient as required by applicable standards of care. The corporate Defendants similarly failed to immediately interview the witnesses. Had the witnesses been interviewed, the surgeon who had the altercation with Duntsch would have informed the corporate Defendants that Duntsch is "the most careless, clueless, and dangerous spine surgeon he had ever seen," and that Duntsch was going to "kill or maim" someone if allowed to continue. Such interviews would in a natural and continuous sequence have prevented the second Duntsch surgery on Passmore. More likely than not had Passmore been informed as required by applicable standards, Duntsch would have been removed from his case.

22. Had the altercation been reported to the patient as required, the second surgery would not have occurred.

23. Defendant Morgan did not report the altercation to the patient as required by nursing standards of care. Had such disclosure been made the second surgery by Duntsch on Passmore would have been prevented.

24. Had the altercation been reported, increased surveillance of Passmore would have resulted, more likely than not, and a competent spinal surgeon would have corrected Duntsch's mistakes timely salvaging Passmore's spine function and significantly reducing or completely eliminating his damages herein.

25. On January 6, 2012, Duntsch performed a second surgery on Passmore causing further harm. Passmore would not have consented to this surgery had he known of the altercation mentioned

above but would have brought in a competent spinal surgeon for corrective surgery.

26. Had the operating room nurses and Defendant Morgan reported the altercation of December 30 to the patient and the hospital chain of command timely, even superficial observation of Duntsch to evaluate his competence and skill would have resulted in his being removed from Passmore's case and most likely the surgery service at Baylor Plano. As proof of this, Plaintiffs offer the following events:

27. Plano on January 11, 2012, Duntsch performed surgery at the corporate Defendants' hospital in Plano resulting in serious injury to another patient. Surgeons who witnessed that surgery describe Duntsch as "an impaired physician, a sociopath [who] must be stopped from practicing medicine." They said his performance "was pathetic on what should have been an easy case – he had trouble from the start with getting the disc out, bleeding issues, poor visualization of the operative field and seemed to be struggling getting the interbody device into position – he was functioning at a first to second year neurosurgical resident level but had no apparent insight into how bad his technique was."

28. As further proof of his profound level of incompetence, Duntsch performed surgery on another patient on February 2, 2012 resulting in that patient's quadriplegia. Physicians involved with that case state that Duntsch caused excessive blood loss, needlessly cut a vertebral artery, caused an excessive delay in addressing neurological complications, ignored protests by anesthesia personnel to help the patient, and caused a catastrophic compression of the patient's spinal cord with bone and disc material. This patient reported to the nursing staff that the night before surgery he had used cocaine with Duntsch. The corporate Defendants took Duntsch off of the case and suspended him. Inexplicably, the corporate Defendants later allowed Duntsch to operate on other patients.

29. On March 12, 2012, Duntsch went on to perform surgery on yet another patient causing her death from needless vascular injury resulting from "horribly poor and clueless surgical technique," according to other surgeons.

30. Baylor Regional Medical Center of Plano suspended Duntsch's privileges. While under suspension, Duntsch resigned from Baylor Regional Medical Center of Plano. Baylor Regional Medical Center of Plano did not report the resignation to the National Practitioner Data Bank or to any other hospital as required by applicable standards.

31. Despite all of the foregoing, the corporate Defendants sent a letter of recommendation for Duntsch to Dallas Medical Center stating there were no adverse concerns, adverse events, or adverse issues associated with Duntsch.

32. When Duntsch got to Dallas Medical Center, he operated on a lady named Floella Brown and caused her death by a needless vascular injury resulting from what other surgeons have described as "horrendous surgical technique."

33. On yet another patient at Dallas Medical Center, Duntsch surgically removed one or more of the patient's spinal nerve roots and installed hardware intended for use in the bony structures of the spine into the muscles adjacent to the spine. This surgery was so poor one surgeon contacted Duntsch's training program to see if Duntsch was an imposter.

34. On June 10, 2013 Duntsch performed a surgery so horribly that the scrub nurses stopped him from operating further and the entire operating room staff ended up restraining Duntsch in the operating room.

35. On June 26, 2013, the Texas Medical Board suspended Duntschs's medical license on an emergency basis finding that Duntsch engaged in a pattern of improper preoperative planning, creation of and failure to recognize and treat complications, and he placed his patients at

significant risk of harm or death killing at least two patients. The Board also found Duntsch to be unable to practice safely due to impairment from drugs and alcohol finding him to be "an imminent peril to public health, safety, and welfare."

36. The foregoing paragraphs are probative evidence that had the corporate Defendants, the operating room nurses and Defendant Morgan acted in accordance with the nursing standards of care on December 30, 2011 the participating surgeon's opinion that Duntsch was the most careless, clueless and dangerous surgeon he had ever seen would have been validated and not only would Passmore not have been injured by the January 6 surgery, but likely the other patients described above would not have been maimed or killed.

37. The letter of recommendation Baylor sent to Dallas Medical Center is probative of Baylor's bad mental state and intent to harm.

V.

AGENCY

38. At all times, the nurses in the operating room on December 30, 2011 were acting, not only in their individual capacities, but also as agents, representatives, and/or employees of the corporate Defendants and acting within the scope of such agency/employment. Under the doctrines of agency and *respondeat superior*, the corporate Defendants are liable for the acts and omissions of these nurses.

39. The corporate Defendants are also responsible for the negligence of Christopher Duntsch as Duntsch was their actual or apparent agent or employee and/or by virtue of the joint venture relationship they had established with Duntsch in which they funded his work and his office practice, reached an agreement with him which included giving Duntsch a "Chief of …" title and actively marketed his services to referring physicians and the public, among other things.

40. The corporate Defendants also had a non-delegable duty to Leroy Passmore by virtue of their participation in the Medicare program. By so participating, the corporate Defendants voluntarily assumed the obligations of non-delegable duty set-out in 42 CFR § 482.12(e) and 42 CFR § 482.23. These obligations were violated when Baylor failed to provide safe surgical services to Passmore.

VI.

CAUSES OF ACTION

41. The corporate Defendants, acting through persons who were their actual, apparent, ostensible, or by estoppel agents or employees, committed acts and/or omissions in their healthcare treatment care of Leroy Passmore, which constituted negligence and/or which constituted violations of the applicable standards of care. These acts and/or omissions include the following:

a. Failure to follow appropriate nursing practices and responsibilities including being patient advocates directly to the patient as well as toward the institution;

b. Failing to properly and timely use the chain of command to report the altercation between Duntsch and that certain other surgeon on December 30, 2011;

c. Failing to inform Passmore about the altercation between Duntsch and the other surgeon on December 30, 2011;

d. Failing to timely interview the witnesses to the altercation in the operating room on December 30, 2011 and respond to that information properly;

e. Failing to prevent Duntsch from performing surgery on Passmore on January 6, 2012 without informing Passmore of the altercation that took place in the operating room on December 30, 2011;

f. Failure to follow proper credentialing standards prior to allowing Duntsch to perform surgery at the corporate Defendants' facilities and thereafter.

42. In addition to the foregoing, the corporate Defendants are liable for the acts or omissions and injuries caused by Duntsch pursuant to the joint venture they created with Duntsch. Each of them had an express or implied agreement for Duntsch to perform spinal surgeries at the corporate Defendants' facility in Plano for the common purpose of recruiting patients and performing spinal surgery on them in return for money for each participant in the venture. They had a community of pecuniary interest in the common purpose with the corporate Defendants putting in up-front cash to get the venture started, and they each had an equal voice in the direction of the enterprise. Thus, they are each liable to Plaintiffs for all injuries caused by the surgeries Duntsch performed pursuant to the joint venture arrangement with Baylor. Duntsch performed negligently in both surgeries causing injuries to Passmore by causing excessive blood loss and trauma to his spine, spinal cord and ligaments and by placing the interbody device improperly.

43. Defendant Morgan fell below applicable standards of nursing care by failing to inform Leroy Passmore of the altercation between Duntsch and the other surgeon on December 30, 2011, proximately causing harm to Passmore.

44. Each of such acts and omissions, singularly or in combination with others, was/were a proximate cause of injury to Passmore and damages to the other Plaintiffs for which Plaintiffs pray for judgment in an amount in excess of the minimum jurisdictional limits of the Court.

45. In addition to the foregoing, and pleading in the alternative, the conduct of the corporate Defendants in allowing Duntsch to perform surgery on Passmore was with malice as that term was defined at common law; to wit, Baylor acted with reckless disregard for the rights of others thus injuring Passmore. [*See Shannon v. Jones*, 76 Tex. 141, 13 S.W. 477, 478 (1890)(defining malice as a reckless disregard for the rights of others).]

46. In addition, and pleading in the alternative, if Texas Civil Practice and Remedies Code § 41.001(7) is deemed to require proof that the corporate Defendants had actual subjective intent to harm Passmore on the occasion in question before liability attaches, then Plaintiffs say that the legislature's act of deleting 41.001(7)(B) of the definition of "malice" (that allowed proof of gross negligence) violated the "Open Courts" provision of the Texas Constitution by eliminating a common law right arbitrarily in light of the purposes of the statute leaving only an impossible condition before liability will attach. [*See* Tex. Const. Art. I § 13]. In the past, § 41.001(7) passed constitutional muster because section (B) was included. [*See St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 506 (Tex. 1997)("Considering the Legislature's pronouncement that "malice" need not be directed toward a specific individual in the context of exemplary damages, it does not follow that in the context of peer review, the committee must necessarily act with malice toward a specific patient for that patient to prove his or her case.)] With the elimination of section (B) in 2003, Plaintiffs say the statute now violates the Texas Constitution if it requires an actual subjective intent to harm or injure the specific patient involved before liability attaches.

47. In addition to the foregoing, and pleading in the alternative, the conduct of the corporate Defendants in allowing Duntsch to perform surgery on Passmore was with malice as that term is defined in Texas Civil Practice and Remedies Code, § 41.001; to wit Baylor's conduct rises to the level of intent to harm.

48. In addition to the foregoing, and pleading in the alternative, the conduct of the corporate Defendants in allowing Duntsch to perform surgery on Passmore was with malice as that term is defined in Texas Civil Practice and Remedies Code, § 41.001; to wit Baylor's conduct rises to the level of specific intent to harm Leroy Passmore.

VII.

DAMAGES

49. As a proximate result of the acts or omissions described above, singularly and collectively, Leroy Passmore suffered severe and permanent damage to his spine and can no longer work. He is in constant pain and requires life-long medical care for the pain and disability. This has disrupted his relationships with his spouse and children, as well. Plaintiffs are entitled to and seek compensatory damages and exemplary damages. Plaintiffs seek past and future damages for physical pain and mental anguish, physical impairment, disfigurement, medical expenses, loss of consortium, lost earnings, and loss of earnings capacity.

VIII.

JURY DEMAND

50. Plaintiffs demand a trial by jury.

FOR THESE REASONS, respectfully pray that the Defendants be cited to appear and answer herein, and that upon a final hearing of the cause, judgment be entered for the Plaintiffs against Defendants, jointly and severally, for damages in an amount within the jurisdictional limits of this Court; exemplary damages, excluding interest, and as allowed by Tex.Civ.Prac.& Rem. Code § 41.008, together with pre-judgment interest (from the date of injury through the date of judgment) at

the maximum rate allowed by law; post-judgment interest at the maximum legal rate, costs of court; and such further relief to which Plaintiffs are justly entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
May 19, 2016

Lyle W. Cayce
Clerk

No. 15-10358

ROBERT LEROY PASSMORE, III, Individually and as Next Friend of M. P. and A. P., minors; KELLY PASSMORE,

Plaintiffs - Appellants

v.

BAYLOR HEALTH CARE SYSTEM, doing business as Baylor Medical Center of Plano; BAYLOR REGIONAL MEDICAL CENTER OF PLANO; KIMBERLY MORGAN, APN,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before DAVIS, BARKSDALE, and DENNIS, Circuit Judges.

JAMES L. DENNIS, Circuit Judge:

Section 74.351 of the Texas Civil Practice and Remedies Code requires plaintiffs in health care liability cases to serve an expert report within 120 days after the filing of a defendant's original answer. Robert Passmore and his wife brought this health care liability suit against Baylor Health Care System, Baylor Regional Medical Center of Plano, and nurse Kimberly Morgan to recover damages for injuries that Mr. Passmore suffered as a result of undergoing two back surgeries at Baylor Regional Medical Center. The Passmores filed their suit in federal court under the court's bankruptcy

jurisdiction. Following limited discovery, the defendants moved to dismiss because the Passmores had failed to serve an expert report in accordance with section 74.351's requirements, and the district court ultimately accepted their position and dismissed the case with prejudice. The main issue on appeal is whether section 74.351 applies in federal court. We hold that it does not and therefore reverse and remand.

I

A

Section 74.351 of the Texas Civil Practice and Remedies Code requires a plaintiff who has brought a "health care liability claim" to serve on each defendant "not later than the 120th day after the date each defendant's original answer is filed . . . one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted."[1] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

According to the Supreme Court of Texas, a section 74.351 threshold expert report serves two functions: (1) to "inform the defendant of the specific conduct the plaintiff has called into question"; and (2) to "provide a basis for the trial court to conclude that the claims have merit." *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex. 2013) (citation and internal quotation marks omitted). Two additional provisions of the Texas statute allow defendants to enforce its expert report requirement and to avoid incurring litigation costs in connection with frivolous claims. First, the statute mandates the stay of most discovery in the case pending the filing of the required expert report.

[1] This report must provide "a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6).

§ 74.351(s), (u).[2] Second, upon a defendant's motion, if the plaintiff fails to timely serve the required expert report, the statute instructs courts to dismiss the claim with prejudice and award attorney's fees and costs to the defendant. § 74.351(b).

No binding precedent deals with section 74.351's applicability in a federal court applying substantive state law. In one, unpublished opinion, this court has applied section 74.351 as an alternative ground for affirming the district court's dismissal of a medical malpractice suit, but the court did not analyze whether the statute applies in federal court. *See Chapman v. United States*, 353 F. App'x 911, 913-14 (5th Cir. 2009). Of the numerous district courts in this circuit to have considered this issue, an overwhelming majority has held that section 74.351 is procedural state law that does not apply in federal court.[3] These courts have generally found that section 74.351 conflicts

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[2] Section 74.351(s) limits pre-expert report discovery to the claimant's acquisition of information related to the patient's health care through: (1) written discovery, (2) depositions on written questions, and (3) discovery from nonparties. Section 74.351(u) further restricts the number of depositions available under subsection (s) to no more than two. *In re Huag*, 175 S.W.3d 449, 456 (Tex. App. 2005). Section 74.351's stay of discovery is one major addition to the mandates of its predecessor, former article 4590i, section 13.01 of Texas Revised Civil Statutes, which did not entitle defendants to a stay of discovery. *See* TEX. REV. CIV. STAT. 4590i §13.01 (repealed 2003).

[3] *Compare Bunch v. Mollabashy*, No. 3:13-CV-1075-G BH, 2015 WL 1378698, at *9 (N.D. Tex. Mar. 26, 2015); *Milligan v. Nueces Cty., Tex.*, No. CIV. A. C-08-118, 2010 WL 2352060, at *3 (S.D. Tex. June 9, 2010); *Garcia v. LCS Corr. Servs., Inc.*, No. CIV. A. C-09-334, 2010 WL 2163284, at *5 (S.D. Tex. May 24, 2010); *Basco v. Spiegel*, No. CIV. A. 08-0468, 2009 WL 3055319, at *1-2 (W.D. La. Sept. 21, 2009); *Guzman v. Mem'l Hermann Hosp. Sys.*, No. CIV. A. H-07-3973, 2008 WL 5273713, at *14-15 (S.D. Tex. Dec. 17, 2008); *Mason v. United States*, 486 F. Supp. 2d 621, 625 (W.D. Tex. 2007); *Toler v. Sunrise Senior Living Servs., Inc.*, No. CIV. A. SA-06-CV-0887-XR, 2007 WL 869581, at *4 (W.D. Tex. Mar. 21, 2007); *Hawkins v. Wadley Reg'l Med. Ctr.*, No. 5:05-CV-154, 2006 WL 5111117, at *1 (E.D. Tex. May 18, 2006); *Hall v. Trisun*, No. CIV. A. SA-05-CA-0984 OG NN, 2006 WL 1788192, at *3-4 (W.D. Tex. June 23, 2006) *report and recommendation adopted*, No. SA 05 CA 984 OG, 2006 WL 2329418 (W.D. Tex. Aug. 1, 2006); *Beam v. Nexion Health Mgmt., Inc.*, No. 206 CV 231, 2006 WL 2844907, at *1-3 (E.D. Tex. Oct. 2, 2006); *Garza v. Scott & White Mem'l Hosp.*, 234 F.R.D. 617, 621-23 (W.D. Tex. 2005); *Brown v. Brooks Cty. Det. Ctr.*, No. C.A. C-04-329, 2005 WL 1515466, at *2 (S.D. Tex. June 23, 2005); *Redden v. Senior Living Properties, L.L.C.*, No. CIV. A. 104-CV-125-C, 2004 WL 1932861, at *3 (N.D. Tex. Aug. 27, 2004);

with Federal Rules of Civil Procedure 26 and 37 because its application would interfere with the federal discovery scheme and deprive the courts of discretion in their control of timing and sanctions for noncompliance. *See*, *e.g.*, *Bunch v. Mollabashy*, No. 3:13-CV-1075-G BH, 2015 WL 1378698, at *9 (N.D. Tex. Mar. 26, 2015); *Beam v. Nexion Health Mgmt., Inc.*, No. 206 CV 231, 2006 WL 2844907, at *1-3 (E.D. Tex. Oct. 2, 2006).

B

In late 2011 and early 2012, Robert Passmore underwent two back surgeries at Baylor Regional Medical Center in Plano, Texas. The Passmores contend that the two surgeries caused permanent damage to Mr. Passmore's spine, rendering him completely disabled.

The Passmores sued the Baylor entities and Morgan in federal district court under theories of direct negligence and vicarious liability. Christopher Duntsch, the doctor who performed the two surgeries, had filed for bankruptcy protection and was not made a party to the suit.[4] The Passmores asserted that the outcome of the suit may affect the resolution of Duntsch's bankruptcy proceeding and thus that the district court had "related-to" bankruptcy jurisdiction pursuant to 28 U.S.C. § 1334(b).

On January 23, 2014, the defendants filed their answers, and the parties subsequently engaged in limited discovery. On June 17, 2014, 145 days after they had filed their answers, the defendants filed motions to dismiss, claiming

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McDaniel v. United States, No. CIV. A. SA-04-CA-0314-, 2004 WL 2616305, at *6-8 (W.D. Tex. Nov. 16, 2004); *Poindexter v. Bonsukan*, 145 F. Supp. 2d 800, 803-10 (E.D. Tex. 2001) (discussing predecessor to section 74.351), *with Privett v. United States*, No. 5:13-CV-79, 2014 WL 174596, at *1-2 (E.D. Tex. Jan. 7, 2014) (applying section 74.351 without conducting an *Erie* analysis); *Prentice v. United States*, 980 F. Supp. 2d 748, 752 (N.D. Tex. 2013); *Cruz v. Chang*, 400 F. Supp. 2d 906, 911-15 (W.D. Tex. 2005) (holding that predecessor to section 74.351 did apply in federal cases).

[4] The bankruptcy proceeding in Duntsch's matter is still pending. *See In re Duntsch*, No. 1:13-bk-30510 (Bankr. D. Colo.).

that the Passmores failed to serve an expert report within 120 days after the defendants' answers and therefore failed to comply with section 74.351.

The Passmores objected to the application of section 74.351 in federal court, asserting that it directly collides with the Federal Rules of Civil Procedure, but the district court rejected their objection, held that section 74.351 is substantive state law that applies in federal court, and dismissed the suit with prejudice. This appeal followed.

II

Before we reach the main issue on appeal, we must satisfy ourselves that that the district court had jurisdiction to decide the case and that this court has jurisdiction to consider the appeal. *See Union Planters Bank Nat'l Ass'n v. Salih*, 369 F.3d 457, 460 (5th Cir. 2004) ("[F]ederal courts are duty-bound to examine the basis of subject matter jurisdiction sua sponte, even on appeal."). 28 U.S.C. § 1334(b) grants district courts jurisdiction to decide cases that are "related to" a case under Title 11 of the United States Code, i.e., cases "related to" bankruptcy. "A proceeding is 'related to' a bankruptcy if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999) (citations and some internal quotation marks omitted).

The Passmores filed their lawsuit in federal district court, asserting that the court had "related-to" bankruptcy jurisdiction pursuant to 28 U.S.C. § 1334(b) because the outcome of their suit may affect the resolution of Duntsch's bankruptcy proceeding. Although the district court did not expressly address this issue, a finding that it had subject matter jurisdiction is implicit in its dismissal of the Passmores' suit based on Texas law. *See Cadle Co. v. Neubauer*, 562 F.3d 369, 371 (5th Cir. 2009) (district court's denial of motions to vacate was implicit finding of subject matter jurisdiction). This

finding is a legal determination that we review de novo. *See In re Canion*, 196 F.3d 579, 584 (5th Cir. 1999).

The Passmores did not explain in either their complaint or their briefs on appeal how the outcome of their suit may affect the resolution of Duntsch's bankruptcy proceeding. However, if the Passmores ultimately prevailed in their suit, on a theory of either direct negligence or vicarious liability, the defendants may have contribution or indemnity claims against Duntsch under Texas law. *See In re Martin*, 147 S.W.3d 453, 459 (Tex. App. 2004) (liable defendant may bring post-judgment contribution claim against joint tortfeasor that was not party to the primary lawsuit); *St. Anthony's Hosp. v. Whitfield*, 946 S.W.2d 174, 177-78 (Tex. App. 1997) (vicariously liable principal may bring indemnity action against tortfeasor agent). Thus, the outcome of the Passmores' lawsuit could conceivably have an effect on Duntsch's estate, and the action is therefore sufficiently "related to" bankruptcy to provide both the district court and this court with subject matter jurisdiction. *See* 28 U.S.C. § 1334(b); *Bass*, 171 F.3d at 1022.

III

We turn now to the primary issue on appeal: whether section 74.351 applies in federal court. We review a district court's decision on the application of state law in federal court de novo. *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 395 (5th Cir. 2003). A federal court entertaining state law claims cannot apply a state law or rule if (1) the state law or rule "direct[ly] colli[des]" with a Federal Rule of Civil Procedure and (2) the Federal Rule "represents a valid exercise of Congress' rulemaking authority." *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987).

A

A state law directly collides with a Federal Rule if it provides a different answer to the question in dispute. *See Shady Grove Orthopedic Assocs., P.A.*

v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) (majority opinion) (citing *Burlington*, 480 U.S. at 4-5). Here, the question in dispute is whether the Passmores' failure to serve an expert report within 120 days of the defendants' answers mandates the dismissal of their suit. Federal Rules of Civil Procedure 26 and 37 provide an answer to this question.

Rule 26(a) governs pretrial disclosures and discovery, including the disclosure of expert reports, and it provides that parties must generally disclose required expert reports "at the times and in the sequence that the court orders." FED. R. CIV. P. 26(a)(2)(D). Clearly, Rule 26 does not require plaintiffs to serve expert reports on defendants within 120 days of the defendants' answers as section 74.351 would require.

Rule 37(c) provides the consequences for a party's failure to comply with Rule 26(a) requirements. In addition to other available sanctions, Rule 37(c) permits federal courts to dismiss a non-complying plaintiff's action. FED. R. CIV. P. 37(b)(2)(A)(v), (c)(1). Thus, Rule 37 grants federal courts broad discretion in deciding whether to dismiss the action of a plaintiff who fails to comply with disclosure and discovery requirements. *See Moore v. CITGO Ref. & Chems. Co., L.P.*, 735 F.3d 309, 315 (5th Cir. 2013). By contrast, section 74.351(b) mandates the dismissal of a non-complying plaintiff upon a defendant's motion; it therefore conflicts with Rule 37's discretionary sanctions scheme. *See Burlington*, 480 U.S. at 7-8 (where a federal law's "discretionary mode of operation" conflicts with a nondiscretionary provision of state law, federal law applies).

Thus, under Rules 26 and 37, the Passmores need not have served an expert report within 120 days of the defendants' answers and, in any case, their failure to do so would not have resulted in mandatory dismissal of their suit. The combined operation of Rules 26 and 37 therefore answers the disputed

question differently than section 74.351 does. Section 74.351 therefore directly collides with these Federal Rules.

In challenging this conclusion, the defendants argue that section 74.351 differs from Rules 26 and 37 in its purpose and scope. As to the purpose of the Texas statute, the defendants assert that it is meant to ensure that only meritorious lawsuits proceed, unlike the Federal Rules, which serve to regulate discovery. As to section 74.351's scope, the defendants point out that Rules 26 and 37 govern all cases generally and that Rule 26 requires disclosure of expert reports containing a "complete statement of all opinions to be expressed," FED. R. CIV. P. 26(a)(2)(B)(i), whereas the Texas statute governs only health care liability cases and requires only an expert report discussing a single theory of liability, *Potts*, 392 S.W.3d at 630.

To preclude the application of a state law, however, the relevant Federal Rule need not be identical in purpose or scope. Rather, the inquiry is whether the scope of the Federal Rule is "sufficiently broad . . . to control the issue before the court," *Burlington*, 480 U.S. at 4-5 (citation and internal quotation marks omitted), such that it "answer[s] the same question" as the state law, *Shady Grove*, 559 U.S. at 399. As explained above, the Texas statute answers the same question as Rules 26 and 37: whether a plaintiff's failure to serve an expert report within 120 days of the defendant's answer mandates the dismissal of the action. Section 74.351 therefore cannot be applied in federal court. *Cf. id.* at 400-401 (rejecting the argument that a New York law concerned a subject separate from the subject of Rule 23, because they both answered the disputed question of whether a given class action may proceed).

Moreover, section 74.351 undeniably regulates discovery, contrary to the defendants' attempt to portray the Texas statute as completely divorced from such issues. As noted above, one of the functions of a section 74.351 expert report is to "inform the defendant of the specific conduct the plaintiff has called

into question." *Potts*, 392 S.W.3d at 630 (citation and internal quotation marks omitted). In that respect, the Texas statute serves a similar function to that of Rule 26. *See Sheek v. Asia Badger, Inc.*, 235 F.3d 687, 693-94 (1st Cir. 2000) (noting that Rule 26 expert testimony disclosure requirements promote "the broader purpose of discovery, which is the narrowing of issues and the elimination of surprise") (citation and internal quotation marks omitted)). Importantly, section 74.351 provides for a mandatory stay of most discovery until the plaintiff has filed the requisite expert report. § 74.351(s), (u). As one district court noted, "[t]his aspect of the statute is in direct and unambiguous conflict with the [F]ederal [R]ules, which plainly tie the opening of discovery to the timing of the Rule 26(f) conference." *Garza v. Scott & White Mem'l Hosp.*, 234 F.R.D. 617, 623 (W.D. Tex. 2005); *accord* FED. R. CIV. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)."). And, although section 74.351 generally prohibits the parties from using expert reports produced pursuant to this statute at trial, *see* § 74.351(k), the parties are free to use these reports at trial once the plaintiff uses them in any substantive way, *see* § 74.351(t); *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 254 (Tex. 2010).

If applied in federal court, section 74.351 would therefore significantly interfere with federal control of discovery, an area governed exclusively by federal law. *See Univ. of Tex. at Austin v. Vratil*, 96 F.3d 1337, 1340 n.3 (10th Cir. 1996) ("[D]iscovery is a procedural matter, which is governed [in federal court] by the Federal Rules of Civil Procedure.") (citation and internal quotation marks omitted); *Dixon v. 80 Pine St. Corp.*, 516 F.2d 1278, 1280 (2d Cir. 1975) (discovery procedure is governed by federal law); *see also* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2005 (4th ed.) (except for matters of privilege and Rule 69 discovery in aid of execution, it is "wholly settled that discovery in a federal court is governed only by [the

Federal Rules of Civil Procedure] and that state discovery practices are irrelevant").

In a final attempt to defend section 74.351's application in federal court, the defendants point to "certificate-of-merit" and "affidavit-of-merit" cases. These cases involved state laws requiring that a plaintiff's complaint be accompanied by an affidavit or certificate in which an attorney or an expert witness states that the claim meets certain threshold requirements relating to the defendant's alleged wrongdoing and the strength of the allegations. In the cases cited by the defendants, courts have held that state law certificate- and affidavit-of-merit requirements applied in federal courts.[5]

However, these cases are plainly distinguishable from the instant case. Section 74.351's expert report rule is a special post-filing requirement. Yet, the cases cited by the defendants all deal with pre-suit requirements. Unlike section 74.351, the state laws involved in those cases did not affect discovery and therefore did not implicate Rules 26 and 37. Section 74.351's regulation of discovery and discovery-related sanctions sets it apart from the pre-suit requirements in the cases cited by the defendants and brings it into direct collision with Rules 26 and 37. The Texas statute therefore cannot apply in federal court unless Rules 26 and 37 exceed Congress' rulemaking authority. We turn briefly to that question.

B

A Federal Rule is invalid if it exceeds either constitutional constraints or the constraints of the Rules Enabling Act, 28 U.S.C. § 2072. *See Burlington*, 480 U.S. at 5. A Rule is constitutionally valid if it is regulates matters that

[5] *See, e.g., Hahn v. Walsh*, 762 F.3d 617, 629 (7th Cir. 2014) (Illinois affidavit-of-merit requirement does not conflict with Federal Rules 8 and 11); *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 265 (3d Cir. 2011) (Pennsylvania affidavit-of-merit statute applied in federal courts).

"are rationally capable of classification" as procedural. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). And, a Rule is valid under the Rules Enabling Act if it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

Rules 26 and 37 regulate discovery, a matter that is certainly capable of classification as procedural. These Rules therefore satisfy the constitutional standard. As to whether these Rules "really regulate[ ] procedure," *id.* at 14, in *Shady Grove*, the Supreme Court indicated that rules governing pretrial discovery are procedural, *see* 559 U.S. at 404 (majority opinion) (rules governing pretrial discovery are rules "addressed to procedure"); *accord Houben v. Telular Corp.*, 309 F.3d 1028, 1033 (7th Cir. 2002) (Rules 26-37 are "obvious rules of procedure"). It therefore follows that Rules 26 and 37 are valid under the Rules Enabling Act. *Cf. Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (relying on *Shady Grove* to hold that Rules 12 and 56 are valid under the Rules Enabling Act).

In sum, section 74.351 answers the same question as Rules 26 and 37, and these Rules represent a valid exercise of Congress' rulemaking authority. Accordingly, a federal court entertaining state law claims may not apply section 74.351.

IV

For these reasons, we REVERSE the district court's judgment dismissing the Passmores' action and REMAND for further proceedings.

Print Form

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BILL OF COSTS

NOTE: The Bill of Costs is due in this office *within 14 days from the date of the opinion, See* FED. R. APP. P. & 5TH CIR. R. 39. Untimely bills of costs must be accompanied by a separate motion to file out of time, which the court may deny.

_____ **v.** _____ **No.** _____

The Clerk is requested to tax the following costs against: _____

COSTS TAXABLE UNDER Fed. R. App. P. & 5th Cir. R. 39	REQUESTED				ALLOWED (If different from amount requested)			
	No. of Copies	Pages Per Copy	Cost per Page*	Total Cost	No. of Documents	Pages per Document	Cost per Page*	Total Cost
Docket Fee ($500.00)								
Appendix or Record Excerpts								
Appellant's Brief								
Appellee's Brief								
Appellant's Reply Brief								
Other:								
			Total $				Costs are taxed in the amount of $	

Costs are hereby taxed in the amount of $ _____ **this** _____ **day of** _____, _____.

LYLE W. CAYCE, CLERK

State of
County of _____

By _____
Deputy Clerk

I _____, **do hereby swear under penalty of perjury that the services for which fees have been charged were incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this Bill of Costs was this day mailed to opposing counsel, with postage fully prepaid thereon. This** _____ **day of** _____, _____.

_____
(Signature)

***SEE REVERSE SIDE FOR RULES GOVERNING TAXATION OF COSTS**

Attorney for _____

FIFTH CIRCUIT RULE 39

39.1 Taxable Rates. *The cost of reproducing necessary copies of the brief, appendices, or record excerpts shall be taxed at a rate not higher than $0.15 per page, including cover, index, and internal pages, for any for of reproduction costs. The cost of the binding required by 5TH CIR. R. 32.2.3that mandates that briefs must lie reasonably flat when open shall be a taxable cost but not limited to the foregoing rate. This rate is intended to approximate the current cost of the most economical acceptable method of reproduction generally available; and the clerk shall, at reasonable intervals, examine and review it to reflect current rates. Taxable costs will be authorized for up to 15 copies for a brief and 10 copies of an appendix or record excerpts, unless the clerk gives advance approval for additional copies.*

39.2 Nonrecovery of Mailing and Commercial Delivery Service Costs. *Mailing and commercial delivery fees incurred in transmitting briefs are not recoverable as taxable costs.*

39.3 Time for Filing Bills of Costs. *The clerk must receive bills of costs and any objections within the times set forth in FED. R. APP. P. 39(D). See 5TH CIR. R. 26.1.*

FED. R. APP. P. 39. COSTS

(a) ***Against Whom Assessed.*** The following rules apply unless the law provides or the court orders otherwise;

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) ***Costs For and Against the United States.*** Costs for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law.

©) ***Costs of Copies*** Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) ***Bill of costs: Objections; Insertion in Mandate.***

(1) A party who wants costs taxed must – within 14 days after entry of judgment – file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 14 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must – upon the circuit clerk's request – add the statement of costs, or any amendment of it, to the mandate.

(e) ***Costs of Appeal Taxable in the District Court.*** The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 19, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 15-10358 Robert Passmore, III, et al v. Baylor Health Care System, et al
USDC No. 3:13-CV-5016

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH CIR. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that defendants-appellees pay to plaintiffs-appellants the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Jamei R. Schaeffer, Deputy Clerk

Enclosure(s)

Mrs. Diana L. Faust
Mr. James E. Girards
Mr. Kevin Edward Oliver
Ms. Michelle Elaine Robberson
Mr. Brent M. Rosenthal
Mr. John Anthony Scully

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-10358

ROBERT LEROY PASSMORE, III, Individually and as Next Friend of M. P. and A. P., minors; KELLY PASSMORE,

Plaintiffs - Appellants

v.

BAYLOR HEALTH CARE SYSTEM, doing business as Baylor Medical Center of Plano; BAYLOR REGIONAL MEDICAL CENTER OF PLANO; KIMBERLY MORGAN, APN,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before DAVIS, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor, rehearing en banc is DENIED. In the en banc poll, 7 judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, Higginbotham, and Costa), and 8 judges voted against rehearing (Chief Judge Stewart and Judges Davis, Dennis, Prado, Elrod, Southwick, Haynes, and Graves). Upon the filing of this order, the Clerk shall issue the mandate forthwith. *See* FED. R. APP. P. 41(b).

JONES, Circuit Judge, joined by SMITH, CLEMENT, and OWEN, dissenting from Denial of Rehearing En Banc,

With all due respect to the panel, this court is bound by Texas law to apply the same restrictions on the maintenance of medical malpractice suits that the state legislature prescribes for such suits filed in state courts. The panel's decision to the contrary does not apply *Erie*-related concepts accurately and is in tension with our court's recent en banc decision in *Flagg v. Stryker Corp.*, which faithfully applied *Erie* rules to analogous Louisiana medical malpractice restrictions.[1] This court held in *Flagg* that a plaintiff in a medical malpractice case must, under Louisiana law, exhaust procedures under the Louisiana Medical Malpractice Act.[2]

The panel held in this case that a Texas statute, § 74.351 of the Texas Civil Practices and Remedies Code, requiring a claimant in a health care liability case to file an expert affidavit within a certain time after suit is filed, is procedural and does not apply in federal court proceedings.

Respectfully, the panel here was mistaken in concluding that the requirement of the initial expert report under Texas law is procedural. Various federal courts have subjected affidavit-of-merit statutes to *Erie* analysis and concluded that such requirements are substantive.[3] For example, in *Liggon-*

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[1] 819 F.3d 132 (5th Cir. 2016).

[2] *Id.* at 137–40.

[3] In assessing whether a law is procedural or substantive under *Erie*, the Supreme Court has instructed courts to look to the twin aims of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). The Court has also suggested that courts might also consider *inter alia* whether a state rule is bound up with state-secured substantive rights and obligations. *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535–38 (1958).

Redding v. Estate of Sugarman, the Third Circuit concluded that a state law requirement that a document similar to the § 74.351 expert report be filed within sixty days of filing a professional negligence claim was a substantive requirement, because (1) failure to file the report necessitated dismissal, making the rule outcome-determinative; (2) failing to apply the state rule would encourage forum-shopping in the case of plaintiffs who could not secure expert support; and (3) failing to apply the state rule would lead to the inequitable administration of the laws, because "a non-diverse plaintiff in state court would be required to comply with the rule, while a plaintiff in federal court could avoid the certificate of merit requirement simply because he or she is a citizen of a different state."[4]

Similarly, in *Trierweiler v. Croxton and Trench Holding Corp.*, the Tenth Circuit examined a state statute that required "plaintiffs' attorneys in professional negligence cases to certify, within sixty days of filing the complaint, that an expert has examined their clients' claims and found them to have substantial justification" and concluded that the statute was "bound up with the substantive right embodied in the state cause of action for professional negligence."[5]

The logic of these cases applies equally here: the Texas expert report requirement applies to a particular subset of tort claims and mandates

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[4] 659 F.3d 258, 264 (3d Cir. 2011).

[5] 90 F.3d 1523, 1537–38, 1541 (10th Cir. 1996) (internal quotation marks omitted); *see also Chamberlain v. Giampapa*, 210 F.3d 154, 161 (3d Cir. 2000) ("By requiring dismissal for failure to adhere to the statute [requiring the filing of an affidavit of merit within sixty days], the New Jersey legislature clearly intended to influence substantive outcomes. It sought early dismissal of meritless lawsuits, not merely to apply a new procedural rule. Clearly, failure to apply the statute in a federal diversity action where no affidavit of merit has been filed would produce a different outcome than that mandated in a state proceeding.").

dismissal where a plaintiff is unable to adequately substantiate his or her claims. Although the rule concerns "procedure" insofar as it mandates that a particular type of document be served within a particular time period, "[t]he aspects . . . that are arguably procedural are plainly 'bound up' with 'state-created rights and obligations.'"[6]

The Supreme Court of Texas has stated that "a section 74.351 threshold expert report has a unique purpose separate and apart from the procedural rules relating to discovery and typical expert reports. The legislature created the threshold report requirement as a substantive hurdle for frivolous medical liability suits before litigation gets underway."[7]

At the very least, the plaintiffs' noncompliance with Texas law should be admissible and debatable in federal court.

Because this case concerns the intersection of state and federal law, and the opinion, as presently issued, cannot be reconciled with *Flagg* and creates a very real distinction between health care liability cases brought in federal court and those filed in state court, I respectfully dissent from the denial of rehearing en banc.

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[6] *All Plaintiffs v. All Defendants*, 645 F.3d 329, 337 (5th Cir. 2011) (quoting *Byrd*, 356 U.S. at 535).

[7] *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 253 (Tex. 2010); *but see Camacho v. Texas Workforce Comm'n,* 445 F.3d 407, 412 n.2 (5th Cir. 2006) ("[W]hen courts divide substance from procedure under *Erie*, they should not ordinarily rest on state court opinions characterizing statutes as 'procedural' or 'substantive' in cases unrelated to the *Erie* doctrine.").

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

August 23, 2016

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 15-10358 Robert Passmore, III, et al v. Baylor Health Care System, et al
USDC No. 3:13-CV-5016

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk
Jamei R. Schaeffer
By: _____
Jamei R. Schaeffer, Deputy Clerk

Mrs. Diana L. Faust
Mr. James E. Girards
Ms. Karen S. Mitchell
Mr. Kevin Edward Oliver
Ms. Michelle Elaine Robberson
Mr. Brent M. Rosenthal
Mr. John Anthony Scully

CORRECTED August 24, 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
August 23, 2016

Lyle W. Cayce
Clerk

No. 15-10358

ROBERT LEROY PASSMORE, III, Individually and as Next Friend of M. P. and A. P., minors; KELLY PASSMORE,

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v.

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Before DAVIS, BARKSDALE, and DENNIS, Circuit Judges.

PER CURIAM:

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