

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

**Robert Leroy Passmore III et al.,**

Plaintiffs,

v.

**Baylor Health Care System et al.,**

Defendants.

Civil Action No. 3:13-cv-05016-P

**THE STATE OF TEXAS'S MOTION TO INTERVENE**

Pursuant to 28 U.S.C. § 2403(b), Federal Rule of Civil Procedure 24(a), and Local Rule 7.1, the Attorney General of Texas, on behalf of the State of Texas (“the State”), moves to intervene to defend the constitutionality of a state statute. The State seeks to intervene for that sole purpose and does not waive its sovereign immunity. Neither the plaintiffs nor the defendants oppose the State’s intervention.

**ARGUMENT IN SUPPORT OF INTERVENTION**

**A. The Court Should Grant Intervention as of Right.**

The Court should grant the State’s motion to intervene under Rule 24(a) because the State has a statutory right to intervene when the constitutionality of a State statute is at issue. Rule 24(a) provides that, upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United State confers an unconditional right to intervene; or (2) when the person seeking to intervene claims an interest relating to the action and is so situated that the disposition of the action may impair that person’s ability to protect that interest, unless existing parties adequately represent the applicant’s interest. Both subsections support the State’s right to intervene.

This is a healthcare-liability suit in which the plaintiffs allege that the defendants are liable for the actions and omissions of Dr. Christopher Duntsch, a neurosurgeon who allegedly performed surgeries on plaintiff Robert Passmore. Compl. ¶¶ 20, 25, 41. Among other things, the plaintiffs complain that the defendants acted with malice in allowing Dr. Duntsch to operate on Mr. Passmore. Compl. ¶¶ 45–48.

The State seeks to intervene to defend the constitutionality of a provision of House Bill 4, an omnibus tort-reform bill passed in 2003. Specifically, the plaintiffs challenge section 13.02, which removed gross negligence from the definition of malice in Chapter 41 of the Texas Civil Practice and Remedies Code. *See* Act of June 2, 2003, 78th Leg., R.S., Ch. 204, § 13.02, 2003 Tex. Gen. Laws 847, 887; TEX. CIV. PRAC. & REM. CODE § 41.001(7) (defining “malice” as “a specific intent by the defendant to cause substantial injury or harm to the claimant”). The plaintiffs argue “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.” Compl. ¶ 46; TEX. CONST. art. I, § 13 (“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.”).

Section 2403(b) provides:

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. § 2403(b); *see, e.g., Nash v. Chandler*, 848 F.2d 567, 572 (5th Cir. 1988) (discussing State’s intervention under section 2403(b)). The constitutionality of Texas’s statutory definition of “malice” unquestionably affects the public interest because a number of Texas statutes condition a defendant’s liability on a finding of malice. *See, e.g., TEX. CIV. PRAC. & REM. CODE* § 41.005(c); *TEX. OCC. CODE* §§ 261.101(a), .102. Because the State’s motion is timely and section 2403(b) gives the State “an unconditional right to intervene,” *FED. R. CIV. P. 24(a)(1)*, the State’s motion to intervene should be granted.

Moreover, a State has a unique interest in defending the constitutionality of its statutes, as section 24013(b) and Federal Rules of Civil Procedure recognize. *FED. R. CIV. P. 5.1(c)*; *see, e.g., Freedom from Religion Found. v. Geithner*, 644 F.3d 836, 842 (9th Cir. 2011) (The state government . . . has the burden of defending state laws from constitutional challenges.”). No private litigant can discharge the State’s duty or adequately represent its interest in defending the constitutionality of its statutes. Accordingly, the State has a right to intervene under Rule 24(a)(2) as well.

**B. In the Alternative, the Court Should Permit the State To Intervene.**

Even if the Court finds that the State lacks a right to intervene under Rule 24(a), it should still permit the State to intervene under Rule 24(b). Rule 24(b) authorizes permissive intervention for one who has either a conditional right to intervene under a federal statute or a defense that shares with the main action a common question of law or fact. *FED. R. CIV. P. 24(b)(1)*. Section 2403(b) gives the State an unconditional right to intervene in this case; but even if that right is not unconditional, it is at least conditional. Moreover, the constitutionality of section 13.02 of HB 4 is a question of law shared in common with the main action. Further, the State’s intervention will neither unduly delay nor prejudice the adjudication of the original parties’ rights, as evidenced by their non-opposition to the State’s motion.

**C. Constitutional Defense for Which Intervention Is Sought.**

Rule 24 requires that a motion to intervene “be accompanied by a pleading that sets out the claim or defense for which intervention is sought.” At this point, it is unclear exactly how the plaintiffs will argue that the Legislature violated the Open Courts provision by amending the statutory definition of “malice” to omit gross negligence. Without limiting its defense, the State anticipates that its arguments may include the following: (1) it is the plaintiffs’ burden to prove the statute unconstitutional, and that burden has not been met; (2) the plaintiffs have not identified a well-established common-law cause of action that was abrogated by the Legislature’s amendment of the statutory definition of malice, *see St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 508 (Tex. 1997) (recognizing that negligent medical credentialing was not a well-established cause of action at common law); and (3) the plaintiffs have not shown that any such abrogation was not “a reasonable exercise of the police power in the interest of the general welfare.” *Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 286 (Tex. 2010) (quoting *Lebohm v. City of Galveston*, 275 S.W.2d 951, 955 (Tex. 1955) (op. on reh’g)).

**CONCLUSION**

The Court should grant the State's unopposed motion to intervene.

Respectfully submitted.

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Dated: March 24, 2014

**CERTIFICATE OF SERVICE**

I certify that on March 24, 2014, I electronically filed this motion with the clerk of the court using the CM/ECF system, which will send notice to case participants registered for electronic notice. I further certify that I have served all case participants not registered for electronic notice by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Jonathan F. Mitchell  
JONATHAN F. MITCHELL  
Solicitor General

**CERTIFICATE OF CONFERENCE**

I certify that on March 21, 2014, I conferred by telephone with James Girards, counsel for the plaintiff, and John Scully, counsel for defendants Baylor Health Care System and Baylor Regional Medical Center of Plano; and on March 24, 2014, I conferred by telephone with Kevin Oliver, counsel for defendant Kimberly Morgan. Mr. Girards, Mr. Scully, and Mr. Oliver all stated that they do not oppose the State's motion to intervene in this action.

/s/ Joseph D. Hughes  
JOSEPH D. HUGHES  
Assistant Solicitor General