RECENT DEVELOPMENT

DEFINING A HEALTH CARE LIABILITY CLAIM IN THE POST-*TEXAS WEST OAKS* ERA

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I. INTRODUCTION TO THE TEXAS MEDICAL LIABILITY ACT

Since 1977, health care liability claims (HCLCs) have been governed statutorily in the State of Texas.[1] The original 1977 act was the Medical Liability and Insurance Improvement Act (MLIIA), commonly referred to as "4590i."[2] In 2003, the Texas Legislature passed an updated version of

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1. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(a)(1)–(5), 1977 Tex. Gen. Laws 2039, 2039–40 (repealed 2003) (indicating the bill was enacted in 1977 to address an insurance crisis).

2. *See id.* (noting that the MLIIA was codified as section 4590i).

the MLIIA, titled the Texas Medical Liability Act (TMLA).[3] The TMLA is codified in Chapter 74 of the Texas Civil Practice and Remedies Code.[4] Since the initial passage of 4590i, trial lawyers have attempted to avoid the strictures of the Act by pleading their cases in such a way that they are not classified as HCLCs.[5] The trend of attempting to artfully plead around the requirements and limitations of the MLIIA persists under the TMLA.[6] As such, what constitutes an HCLC subject to the TMLA is a question of great importance to plaintiffs and defendants alike. Possibly the most significant reason the definition of an HCLC subject to the TMLA is important is the expert-report requirement found in Section 74.351 of the Texas Civil Practice and Remedies Code.[7] Section 74.351 requires the plaintiff to provide an expert report to the defendant no later than 120 days after filing suit.[8] Failure to comply with this requirement results in dismissal of the suit with prejudice and an award of reasonable attorney's fees to the defendant.[9] This seemingly harsh consequence of the TMLA greatly elevates the importance of a clear definition of an HCLC that would be subject to the TMLA.

Two changes to the definition of HCLC in the TMLA have significantly impacted the scope of the Act. The first change opened the door for non-patient claims to be HCLCs by substituting the word "claimant" for "patient" in the statutory definition of HCLC.[10] The second change inserted the phrase "or professional or administrative services directly related to healthcare" into the definition.[11] Although seemingly

3. *See* Jonathan D. Nowlin, Comment, *Scalpel, Please: Why the Definition of "Health Care Liability Claim" in Chapter 74 of the Civil Practice and Remedies Code Is Not as Clean-Cut as It Could Be*, 43 TEX. TECH L. REV. 1247, 1253–57 (2011) (providing a historical look at the progression leading up to the TMLA).

4. TEX. CIV. PRAC. & REM. CODE. ANN. §§ 74.001–.507 (West 2014).

5. Glen M. Wilkerson et al., *Analysis of Recent Attempts to Assert Medical Negligence Claims "Outside" Texas's Article 4590i*, 20 REV. LITIG. 657, 664 (2001) (explaining the reasoning behind numerous attempts to circumvent 4590i).

6. *See, e.g.*, Yamada v. Friend, 335 S.W.3d 192, 193–94 (Tex. 2010) (holding against the plaintiff's attempts to artfully plead around TMLA).

7. *See* CIV. PRAC. & REM. § 74.351 (setting forth the initial expert-report requirements for HCLCs).

8. *See id.* § 74.351(a) (stating the timeframe in which a plaintiff in an HCLC must serve defendants with an expert report).

9. *See id.* § 74.351(b) (noting defendant's remedy in the event plaintiff does not comply with the expert-report requirements).

10. *See id.* § 74.001(a)(13) (defining HCLC); Tex. W. Oaks Hosp. v. Williams, 371 S.W.3d 171, 178 (Tex. 2012) (discussing the legislatures replacement of the "term 'patient' with 'claimant' in the definition of and HCLC" and the resulting expansion of the "breadth of HCLCs beyond the patient population").

11. *See* CIV. PRAC. & REM. § 74.001(a)(13).

innocuous, the insertion of this phrase has been the subject of much litigation and resulted in a split amongst the courts of appeals regarding the definition of an HCLC. Specifically, a split has developed regarding claims related to the provision of safety by health care providers or physicians.

The Civil Practice and Remedies Code defines HCLC as:

> [A] cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standard of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.[12]

As defined, HCLCs are separated into "claimed departure from accepted standards of": 1) medical care, 2) health care, 3) safety, or 4) "administrative services directly related to health care."[13]

II. THE STARTING POINT: *TEXAS WEST OAKS HOSPITAL V. WILLIAMS*

Texas West Oaks Hospital v. Williams,[14] decided by the Texas Supreme Court in June 2012, is the seminal case wherein the effects of the changes made by the TMLA were examined.[15] In *Texas West Oaks*, the court was called upon to determine if a mental health hospital employee's claims against his employer qualified as HCLCs under the TMLA.[16] While working as "a psychiatric technician and professional caregiver," Patrick Williams was injured when a patient with a history of "paranoid schizophrenia, including manic outbursts and violent behavior," assaulted him.[17] Williams, believing his claims were not HCLCs subject to the TMLA, did not comply with the expert-report requirements of Section 74.351.[18] West Oaks moved to dismiss the case on the grounds that Williams's claims were HCLCs subject to the TMLA, and Williams's failure to provide an expert report warranted dismissal.[19] The trial court

12. *Id.* § 74.001(a)(13) (explaining HCLC).

13. *Id.* (outlining the available types of claim that may be brought as an HCLC).

14. Tex. W. Oaks Hosp. v. Williams, 371 S.W.3d 171 (Tex. 2012).

15. *See generally id.* at 177–92 (examining the statutory construction of the definition of HCLC under the TMLA).

16. *See id.* at 174–75 (providing background of the appeal).

17. *See id.* at 175 (setting forth the factual circumstances that lead to Williams's claims).

18. *See id.* at 175–76 (noting Williams's failure to serve the defendant with an expert report within 120 days after filing the suit); CIV. PRAC. & REM. § 74.351 (outlining the expert-report requirements in an HCLC).

19. *See Tex. W. Oaks*, 371 S.W.3d at 175–76 (providing procedural history of the case).

denied the motion, and the court of appeals affirmed their decision.[20] The Texas Supreme Court ultimately reversed the decision of the lower courts, holding Williams's claims were in fact "[HCLCs] based on claimed departures from accepted standards of health care and safety."[21] In reaching their conclusion, the supreme court examined the two aforementioned changes to the definition of an HCLC under the TMLA.

In response to Williams's claim that he was not a claimant subject to the TMLA because he lacked a physician–patient relationship, the court examined what the legislature intended when they substituted the word "claimant" for "patient" in the definition of HCLC.[22] The court concluded based upon a plain reading of the statute that a "claimant," for purposes of the TMLA, need not be a patient.[23] The court held it was not required for a claimant to be a patient for claims not alleging a "departure from accepted standards of medical care, or health care."[24] However, the court noted, for HCLCs regarding "departure[s] from accepted standards of medical care, or health care" it is necessary for the claimant to be a patient.[25] Further, the court acknowledged that although under the MLIIA Williams "likely would not have been a 'patient,'" he was a "claimant" as defined under the TMLA.[26] This holding opened the door for the TMLA to apply to non-patient claimants.

The *Texas West Oaks* court also examined whether Williams's claims could be brought under the TMLA under the "safety" prong of the statute.[27] The court initially noted it had not yet "decided whether safety claims must be 'directly related to health care.'"[28] While the dissenting opinion argued that the phrase "directly related to health care" added to the definition of HCLC and modified "safety," the majority of the court disagreed, holding that the phrase was only intended to modify claims

20. *Id.* at 176.

21. *Id.* at 193.

22. *See id.* at 177–79 (determining whether Williams is a claimant as defined by the TMLA).

23. *See id.* at 178 ("Changing the term 'patient' to 'claimant' and defining 'claimant' as a 'person' expands the breadth of HCLCs beyond the patient population.").

24. *See* Tex. W. Oaks Hosp. v. Williams, 371 S.W.3d 171, 178 (Tex. 2012) (indicating that while other HCLCs do not require the claimant to be a patient, those regarding "medical care" or "health care" would).

25. *Id.*

26. *See id.* at 179 (indicating that the changes made by the TMLA bring Williams under the statute).

27. *See id.* at 183–86 (analyzing Section 74.001(a)(13) to determine whether Williams's claims can be characterized as HCLCs related to "safety").

28. *Id.* at 183.

related to "professional or administrative services."[29] In reaching this conclusion the court applied basic rules of statutory interpretation and grammar.[30] Furthermore, the court found guidance from the opinions issued in *Marks v. St. Luke's Episcopal Hospital*[31] and *Diversicare General Partners, Inc. v. Rubio*.[32] Specifically, the court noted Justice Johnson's statement in his concurrence in *Marks*, reasoning "that making safety contingent on a direct connection between it and health care would 'effectively read safety out of the statute instead of properly giving it meaning as an additional category of claims.'"[33] Additionally, the court noted Chief Justice Jefferson's opinion in *Marks* wherein he reasoned that "a reasonable construction of 'safety' is to give the term its 'common meaning,' which could therefore encompass premises liability claims."[34] Upon this reasoning, the Supreme Court of Texas concluded "the safety component of [HCLCs] need not be directly related to the provision of health care," and therefore Williams's claims fell under the safety prong of the TMLA.[35] This holding, as evidenced by subsequent courts of appeals decisions, expanded the scope of claims falling under the TMLA as HCLCs related to safety.

III. TMLA SAFETY CLAIMS AFTER *TEXAS WEST OAKS*

Following the decision in *Texas West Oaks*, the issue of whether a claim involving a slip-and-fall type injury occurring on a health care provider's premises was subject to the TMLA became the subject of extensive litigation. In deciding cases of this nature, a split developed amongst the courts of appeals.[36] The Sixth, Twelfth, and Fourteenth Courts of

29. *See id.* at 184 (stating the court's conclusion that "directly related to health care" does not modify claims based upon safety).

30. *See id.* at 184–85 (citing WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE R. 30 (4th ed. 2000)).

31. Marks v. St. Luke's Episcopal Hosp., 319 S.W.3d 658 (Tex. 2010).

32. Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842 (Tex. 2005).

33. *See Tex. W. Oaks*, 371 S.W.3d at 185–86 (relying on Justice Johnson's concurring and dissenting opinion in *Marks*).

34. *See id.* at 186 (quoting *Marks*, 319 S.W.3d at 674 (Jefferson, C.J., concurring and dissenting)).

35. *Id.*

36. *See* CHCA W. Hous., LP v. Shelley, 438 S.W.3d 149, 150 (Tex. App.—Houston [14th Dist.] 2014, pet. filed) (holding employee slip-and-fall claim to be an HCLC); E. Tex. Med. Ctr. Reg'l Health Care Sys. v. Reddic, 426 S.W.3d 343, 345 (Tex. App.—Tyler 2014, pet. filed) (holding patient slip-and-fall claim to be an HCLC); Ross v. St. Luke's Episcopal Hosp., No. 14-12-00885-CV, 2013 WL 1136613, at *1 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013) (holding non-patient slip-and-fall claim to be an HCLC), *rev'd* Ross v. St. Luke's Episcopal Hospital, No. 13-0439, 2015 WL 2009744 (Tex. May 1, 2015). *But see* Williams v. Riverside Gen. Hosp., No. 01-13-00335-CV, 2014

Appeals have chosen to interpret *Texas West Oaks* broadly,[37] whereas the First, Second, Fourth, Fifth, Ninth, and Thirteenth Courts of Appeals have chosen to interpret *Texas West Oaks* narrowly.[38] The division amongst the courts of appeals led to the Texas Supreme Court granting petition for review in *Ross v. St. Luke's Episcopal Hospital*,[39] which was argued before the court and submitted on November 5, 2014.[40]

A. Texas West Oaks *Applied Narrowly*

The following decisions by the courts of appeals narrowly interpret the holding of *Texas West Oaks* regarding safety claims. In August 2013, the Thirteenth Court of Appeals issued their opinion in *Doctors Hospital at Renaissance v. Mejia*,[41] wherein they held the plaintiff's underlying claims related to a slip-and-fall in the hospital as a non-patient visitor were not HCLCs under the TMLA and *Texas West Oaks*.[42] In doing so, the court read the Texas Supreme Court's holding in *Texas West Oaks* as recognizing HCLCs "*indirectly* related to health care."[43] The appellate court explicitly

WL 4259889, at *8 (Tex. App.—Houston [1st Dist.] Aug. 28, 2014, no pet. h.) (holding employee slip-and-fall claim not to be an HCLC); Columbia Med. Ctr. of Denton Subsidiary, LP v. Braudrick, No. 02-13-00399-CV, 2014 WL 2144877, at *3 (Tex. App.—Fort Worth May 22, 2014, pet. filed) (holding non-patient slip-and-fall claim to not be an HCLC); Methodist Hosp. of Dall. v. Garcia, No. 05-13-01307-CV, 2014 WL 2003121, at *1 (Tex. App.—Dallas May 14, 2014, no pet. h.) (holding non-patient slip-and-fall claim to not be an HCLC); Methodist Healthcare Sys. of San Antonio Ltd. v. Dewey, 423 S.W.3d 516, 520 (Tex. App.—San Antonio 2014, pet. filed) (holding non-patient slip-and-fall claim to not be an HCLC); Christus St. Elizabeth Hosp. v. Guillory, 415 S.W.3d 900, 901 (Tex. App.—Beaumont 2013, pet. filed) (holding non-patient slip-and-fall claim to not be an HCLC); Drs. Hosp. at Renaissance Ltd. v. Mejia, No. 13-12-00602-CV, 2013 WL 4859592, at *4 (Tex. App.—Corpus Christi Aug. 1, 2013, pet. filed) (holding non-patient slip-and-fall claim to not be an HCLC).

37. *See Shelley*, 438 S.W.3d at 150 (holding employee slip-and-fall claim to be an HCLC); *Reddic*, 426 S.W.3d at 343 (holding patient slip-and-fall claim to be an HCLC); *Ross*, 2013 WL 1136613, at *1 (holding non-patient slip-and-fall claim as an HCLC).

38. *See Williams*, 2014 WL 4259889, at *23 (holding employee slip-and-fall claim as not an HCLC); *Braudrick*, 2014 WL 2144877, at *3 (holding non-patient slip-and-fall claim to not be an HCLC); *Garcia*, 2014 WL 2003121, at *1 (holding non-patient slip-and-fall claim to not be an HCLC); *Dewey*, 423 S.W.3d at 520 (holding non-patient slip-and-fall claim to not be an HCLC); *Guillory*, 415 S.W.3d at 901 (holding non-patient slip-and-fall claim to not be an HCLC); *Mejia*, 2013 WL 4859592, at *5 (holding non-patient slip-and-fall claim to not be an HCLC).

39. Ross v. St. Luke's Episcopal Hosp., No. 14-12-00885-CV, 2013 WL 1136613 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013), *rev'd*, Ross v. St. Luke's Episcopal Hosp., No. 13-0439, 2015 WL 2009744 (Tex. May 1, 2015).

40. *See id.* at *1 (advancing a non-patient slip-and-fall claim as an HCLC).

41. Drs. Hosp. at Renaissance Ltd. v. Mejia, No. 13-12-00602-CV, 2013 WL 4859592 (Tex. App.—Corpus Christi Aug. 1, 2013, pet. filed).

42. *See id.* at *8–9 (holding plaintiff's non-patient slip-and-fall claims were not HCLCs).

43. *See id.* at *2 (stating the Thirteenth Court of Appeals' interpretation of *Texas West Oaks* as it pertains to claims related to safety).

stated that they "apply *West Oaks* narrowly to govern cases that involve safety claims that are indirectly related to health care."[44]

In *Christus St. Elizabeth Hospital v. Guillory*,[45] the Beaumont Court of Appeals likewise held the plaintiff's slip-and-fall occurring in the intensive care unit hallway did not constitute an HCLC.[46] In reaching this holding, the court stated that "no nexus exist[ed] between the claims . . . and the hospital's duties of providing healthcare."[47] The appellate court's belief that a "nexus" between the claims alleged and the provision of healthcare was required was based upon their interpretation of the Texas Supreme Court's decision in *Psychiatric Solutions, Inc. v. Pailt*,[48] where the court held that because the plaintiff's claims implicated a standard of care requiring expert testimony, they were HCLCs.[49]

The San Antonio Court of Appeals, in *Methodist Healthcare System of San Antonio, Ltd. v. Dewey*,[50] held that a non-patient injury caused by the entry doors of the hospital was not an HCLC.[51] In reaching their holding, the court followed the reasoning of the *Mejia* court, finding the plaintiff's claims were not indirectly related to the provision of healthcare as required by a narrow interpretation of *Texas West Oaks*, and thus, the TMLA did not apply.[52]

Methodist Hospital of Dallas v. Garcia,[53] a decision by the Dallas Court of Appeals, held a non-patient's claims related to an injury caused by an elevator malfunction were not HCLCs.[54] The *Garcia* court interpreted *Texas West Oaks* similarly to the aforementioned cases, citing *Mejia* for the proposition that "an indirect relationship with health care is required" for

44. *See id.* (framing the Texas Supreme Court's interpretation of *Texas West Oaks* as narrow).

45. Christus St. Elizabeth Hosp. v. Guillory, 415 S.W.3d 900 (Tex. App.—Beaumont 2013, pet. filed).

46. *See id.* at 901 (affirming the trial court's order denying the hospital's motion to dismiss for failure to provide expert report as required in an HCLC).

47. *See id.* at 902 ("In our opinion, no nexus exists between the claims Guillory asserts in her Second Amended Original Petition and the hospital's duties of providing health care.").

48. Psychiatric Solutions, Inc. v. Palit, 414 S.W.3d 724 (Tex. 2013).

49. *See id.* at 901 (indicating that a "nexus" must exist between the claims alleged and the provision of health care in order for the TMLA to apply).

50. Methodist Healthcare Sys. of San Antonio, Ltd. v. Dewey, 423 S.W.3d 516 (Tex. App.—San Antonio 2014, pet. filed).

51. *See id.* at 516, 520 (setting forth the background of the claim and the court's holding).

52. *See id.* at 519 (stating plaintiff's claims were not indirectly related to the provision of health care as required by *Texas West Oaks* and therefore not HCLCs).

53. Methodist Hosp. of Dall. v. Garcia, No. 05-13-01307-CV, 2014 WL 2003121 (Tex. App.—Dallas May 14, 2014, no pet. h.).

54. *See id.* at *1 (affirming the trial court's order denying the hospital's motion to dismiss for failure to provide an expert report).

safety claims to fall under the TMLA.[55]

Following similar reasoning, the Fort Worth Court of Appeals in *Columbia Medical Center of Denton Subsidiary, LP v. Braudrick*[56] affirmed the trial court's order denying Columbia Medical Center's motion to dismiss for failure to provide an expert report, holding the non-patient plaintiff's slip-and-fall claims were not HCLCs under the TMLA.[57] The court found that because the plaintiff's safety claims did not have an indirect connection to healthcare, they were not HCLCs as defined by the TMLA.[58]

In *Williams v. Riverside General Hospital*,[59] a case involving an employee slip-and-fall claim, the First Court of Appeals in Houston held the claims were not HCLCs under the TMLA.[60] Interpreting the *Texas West Oaks* decision narrowly, the court stated that "although safety claims do not need to be *directly* related to health care . . . there must, nevertheless, be some *indirect*, reasonable relationship between claims and the provision of health care."[61] These cases represent one position the courts of appeals have taken in interpreting *Texas West Oaks*, electing to narrowly interpret the holding and require at least an indirect connection to the provision of health care for safety claims to constitute HCLCs under the TMLA.

B. Texas West Oaks *Applied Broadly*

Contrary to the previous cases, the following cases interpret the holding of *Texas West Oaks* broadly as it pertains to safety claims under the TMLA. In *Memorial Hermann Hospital System v. Galvan*,[62] the Fourteenth Court of Appeals in Houston held a non-patient slip-and-fall claim qualified as an HCLC.[63] In this case, the plaintiff slipped and fell after stepping in a puddle of water in the hospital hallway.[64] The court analyzed the Texas

55. *See id.* at *2 (requiring an indirect relationship with health care in order for safety claims to be HCLCs under the TMLA).

56. Columbia Med. Ctr. of Denton Subsidiary, LP v. Braudrick, No. 02-13-00399-CV, 2014 WL 2144877 (Tex. App.—Fort Worth May 22, 2014, pet. filed).

57. *See id.* at *2 (affirming trial court's order denying motion to dismiss because claims were not HCLCs under the TMLA).

58. *See id.* (interpreting*Texas West Oaks* as requiring an indirect connection to health care in order for claims to constitute HCLCs under the TMLA).

59. Williams v. Riverside Gen. Hosp., No. 01-13-00335-CV, 2014 WL 4259889 (Tex. App.—Houston [1st Dist.] Aug. 28, 2014, no pet. h.).

60. *Id.* at *8.

61. *Id.* at *7.

62. Mem'l Hermann Hosp. Sys. v. Galvan, 434 S.W.3d 176 (Tex. App.—Houston [14th Dist.] 2014, pet. filed).

63. *Id.* at 178.

64. *See id.* (stating the basis for the plaintiff's claims).

Supreme Court's decision in *Texas West Oaks* in order to reach their holding that the plaintiff's claims were HCLCs.[65] In their analysis, the court of appeals specifically noted Chief Justice Jefferson's concurring and dissenting opinion in *Marks*, cited in *Texas West Oaks*, wherein he stated "'safety' [claims] could encompass premises liability claims."[66] The *Galvan* court held that the statements made by the Texas Supreme Court in *Texas West Oaks* regarding health care were binding judicial dicta.[67]

The Tyler Court of Appeals in *East Texas Medical Center Regional Health Care System v. Reddic*,[68] likewise held a non-patient slip-and-fall claim was an HCLC under the TMLA.[69] In doing so, the *Reddic* court analyzed the *Texas West Oaks* decision broadly, again noting the Supreme Court's holding that safety claims "need not be directly related to the provision of health care."[70] In a more recent opinion, *CHCA West Houston v. Shelley*,[71] the Fourteenth Court of Appeals held a non-patient slip-and-fall claim to be an HCLC under the TMLA in light of the Texas Supreme Court's holding in *Texas West Oaks*.[72] The *Shelley* court reiterated their holding from *Galvan* that claims related to departures from accepted standards of safety "need not involve an alleged departure from standards that involve health care or are directly or indirectly related to health care."[73] The broader interpretation of *Texas West Oaks* as it pertains to safety claims represents the second manner in which the courts of appeals have analyzed the Texas Supreme Court's holding in the case.

IV. AN OPPORTUNITY FOR CLARIFICATION

Ross v. St. Luke's Episcopal Hospital was decided by the Fourteenth Court of Appeals in Houston in accord with the court's other cases concerning

65. *See id.* at 180–82 (analyzing the Texas Supreme Court's decision in *Texas West Oaks* regarding safety claims under the TMLA).

66. *See id.* at 181 (examining the statements made by Chief Justice Jefferson in *Marks* and discussed in *Texas West Oaks*).

67. *See id.* at 184 ("[C]laims based upon alleged departures from accepted safety standards . . . need not . . . [be] directly or indirectly related to health care.").

68. E. Tex. Med. Ctr. Reg'l Health Care Sys. v. Reddic, 426 S.W.3d 343 (Tex. App—Tyler 2014, pet. filed).

69. *See id.* at 345 (reversing the trial court's denial of ETMC's motion to dismiss because Plaintiff's claims were HCLCs).

70. *See id.* at 347 (quoting the language in *Texas West Oaks* regarding claims related to safety).

71. CHCA W. Hous., LP v. Shelley, 438 S.W.3d 149 (Tex. App.—Houston [14th Dist.] 2014, pet. filed).

72. *Id.*

73. *See id.* at 152 (setting forth the court's determined standard for HCLCs relating to safety).

safety claims under the TMLA.[74] In *Ross*, the appellate court affirmed the trial court's order dismissing the plaintiff's claim for failure to provide an expert report.[75] The plaintiff in the *Ross* case "slipped and fell in the lobby of St. Luke's Episcopal Hospital after visiting a patient."[76] After the plaintiff failed to provide an expert report within 120 days as required by Section 74.351, the hospital filed a motion to dismiss, which the trial court granted.[77] The appellate court affirmed the decision, citing to *Texas West Oaks* and recognizing the holdings therein pertaining to safety claims under the TMLA as "binding precedent" which the court was without authority to ignore.[78] The plaintiff petitioned the Texas Supreme Court for review, which was granted on June 27, 2014.

The case was argued before the Texas Supreme Court and submitted for opinion on November 5, 2014. During oral arguments, counsel for St. Luke's Episcopal Hospital argued that because the events giving rise to injury occurred in the "patient environment," Mrs. Ross's claims were properly classified as HCLCs.[79] Counsel for Mrs. Ross argued that because her claims were not related in any way to a function of the hospital "unique and inseparable" from the delivery of health care, they were garden-variety premises liability claims.[80] By accepting petition for review, the Texas Supreme Court has evidenced an intent to settle the split amongst the courts of appeals regarding what constitutes an HCLC under the TMLA.

V. *ROSS V. ST. LUKE'S EPISCOPAL HOSPITAL*

Since the *Texas West Oaks* decision was published in June of 2012, the definition of a "safety" claim against a health care provider has been the source of substantial litigation resulting in a split amongst the courts of appeals. Of the nine cases discussed above, seven have petitioned the supreme court for review.[81] The sheer number of cases seeking review

74. *See generally* Ross v. St. Luke's Episcopal Hosp., No. 14-12-00885-CV, 2013 WL 1136613 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013) (holding non-patient slip-and-fall claim was an HCLC under the TMLA based upon a broad interpretation of *Texas West Oaks*), *rev'd*, No. 13-0439, 2015 WL 2009744 (Tex. May 1, 2015).

75. *Id.* at *1.

76. *Id.*

77. *Id.* at *1–2.

78. *Id.* at *2.

79. Transcript of Oral Argument at 8–15, *Ross*, No. 13-0439, 2013 WL 1136613 (indicating the Plaintiff's understanding of the standard demanded by the TMLA).

80. *Id.* at *2–3.

81. *See* CHCA W. Hous., LP v. Shelley, 438 S.W.3d 149, 150 (Tex. App.—Houston [14th Dist.] 2014, pet. filed); E. Tex. Med. Ctr. Reg'l Health Care Sys. v. Reddic, 426 S.W.3d 343, 348 (Tex.

and clarification on the question of what constitutes an HCLC under the TMLA placed the issue squarely before the supreme court for resolution.

On May 1, 2015 the Texas Supreme Court issued their ruling and opinion in *Ross*, reversing the appellate court and remanding the case to the trial court for further proceedings.[82] The court found Mrs. Ross' claim was not an HCLC because there was no relationship between the provision of health care and the alleged breach of a safety standard.[83] In reaching this conclusion, the court analyzed the two positions taken by St. Luke's Episcopal Hospital in support of their contention the case was an HCLC.

The court first addressed St. Luke's Episcopal Hospital's assertion that a slip and fall taking place within a "hospital is directly related to health care because it necessarily is related to the safety of patients."[84] Citing to *Loaisiga v. Cerda*,[85] a 2012 Texas Supreme Court decision, the court made clear that simply being on the premises of a health care facility, or the fact the defendant is a health care provider, does not make a claim an HCLC.[86]

The second contention by St. Luke's Episcopal Hospital addressed by the court was the assertion that Mrs. Ross' claim was related to health care because the standards of safety she alleged the hospital breached are "applicable to maintaining a safe environment for patients."[87] In rejecting this contention, the court stated "[t]he pivotal issue in a safety standards-based claim is whether the standards on which the claim is based implicate the defendant's duties as a health care provider, including its duties to provide for patient safety."[88] The court noted the record in this case was devoid of any claim or showing the allegedly breached standards of safety

App.—Tyler 2014, pet. filed); *Ross*, 2013 WL 1136613, at *1; Columbia Med. Ctr. of Denton Subsidiary, LP v. Braudrick, No. 02-13-00399-CV, 2014 WL 2144877, at *2–3 (Tex. App.—Fort Worth May 22, 2014, pet. filed); Methodist Healthcare Sys. of San Antonio Ltd. v. Dewey, 423 S.W.3d 516, 520 (Tex. App.—San Antonio 2014, pet. filed); Christus St. Elizabeth Hosp. v. Guillory, 415 S.W.3d 900, 900–01 (Tex. App.—Beaumont 2013, pet. filed); Doctors Hosp. at Renaissance Ltd. v. Mejia, No. 13-12-00602-CV, 2013 WL 4859592, at *8–9 (Tex. App.—Corpus Christi Aug. 1, 2013, pet. filed).

82. Ross v. St. Luke's Episcopal Hospital, No. 13-0439, 2015 WL 2009744 (Tex. May 1, 2015).

83. *See id.* at *1 (holding claim not an HCLC).

84. *See id.* at *5 (setting forth the hospital's supporting assertions).

85. Loaisiga v. Cerda, 379 S.W.3d 248 (Tex. 2012).

86. *See Ross*, 2015 WL 2009744, at *4–5 (citing *Loaisiga*, 379 S.W.3d at 257) (dismissing the hospital's first assertion in support of their assertion the claim was an HCLC).

87. *Id.*

88. *Id.* at *6 (setting forth the standard for determination of whether a safety claim is an HCLC).

related to the provision of health care.[89]

The standard for a "safety" based HCLC set forth by the Texas Supreme Court requires "a substantive nexus between the safety standards allegedly violated and the provision of health care."[90] The court further explained the relationship must be more than a simple "but for" relationship.[91] This standard appears to directly conflict with the court's prior holding in *Texas West Oaks* that the phrase "directly related to health care" found in the definition of an HCLC did not modify the word safety.[92] In order to reach this conclusion, the court applied the doctrine of *ejusdem generis*—a doctrine of statutory construction providing that when specific items in a list are followed by a "catchall" the "latter must be limited to things like the former."[93] The court further explained that in the definition of HCLC, the catchall phrase "other," to which the doctrine is to be applied, "refers to standards of 'medical care' or 'health care' or 'safety.'"[94] Meaning, based upon the courts application of the doctrine, "safety" claims must be related to alleged breaches of standards that have a "substantive relationship with the providing of medical or health care."[95]

Recognizing the line is often unclear as to what qualifies as an HCLC based on a "safety" claim under a standard requiring a substantive relationship between the provision of health care or medical care and the alleged breach, the court attempted to offer guidance in making such a determination.[96] In doing so, the court offered a non-exhaustive list of seven "considerations" to be utilized:

> 1. Did the alleged negligence of the defendant occur in the course of the defendant's performing tasks with the purpose of protecting patients from harm;
> 2. Did the injuries occur in a place where patients might be during the time

89. *See id.* at *5 (noting the allegedly breached standards regarding floor maintenance could be the same standards required of businesses generally and were not specific to the provision of health care).

90. *Id.* at *6.

91. *See id.* ("[T]he fact that Ross, a visitor and not a patient, would not have been injured but for her falling inside the hospital is not a sufficient relationship between the standards Ross alleges the hospital violated and the hospital's health care activities for the claim to be an HCLC.").

92. *See* Texas West Oaks Hosp., LP, v. Williams, 371 S.W.3d 171, 185 (Tex. 2012) (stating the phrase "directly related to health care" does not modify the word safety in the definition of an HCLC).

93. *See Ross*, 2015 WL 2009744, at *5 (explaining the doctrine of *ejusdem generis*).

94. *Id.*

95. *See id.* ("[W]e conclude that the safety standards referred to in the definition are those that have a substantive relationship with the providing of medical or health care.").

96. *See id.* at *6 (recognizing the fact the line between what is and is not an HCLC as it pertains to safety claims is unclear).

> they were receiving care, so that the obligation of the provider to protect persons who require special, medical care was implicated;
> 3. At the time of the injury was the claimant in the process of seeking or receiving health care;
> 4. At the time of the injury was the claimant providing or assisting in providing health care;
> 5. Is the alleged negligence based on safety standards arising from professional duties owed by the health care provider;
> 6. If an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care; or
> 7. Did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?[97]

While the considerations provided by the court will undoubtedly offer guidance and clarity in determining whether a "safety" claim is properly classified as an HCLC, they do not establish a bright line for plaintiffs to follow in advancing their claims. Although the standard set forth by the court regarding "safety" claims under the TMLA—"a substantive nexus between the safety standards allegedly violated and the provision of health care"—is clear, what remains unclear under the newly announced standard is precisely what constitutes a "substantive nexus."[98]

Most notably, the court provides no framework for completing the analysis they suggest be undertaken using the factors provided. In *Ross*, each of the seven suggested considerations is answered in the negative, leading to the conclusion the claim is not properly classified as an HCLC.[99] However, the list of considerations provided is non-exhaustive, and other considerations may be at play in future cases. Further, there is no indication whether an affirmative response to any one of the seven considerations employed by the court in the *Ross* case would have resulted in a different outcome.[100] Arguably, if the answer to one of the suggested considerations is "yes" the claim is properly classified as an HCLC. However, based upon opinion issued by the court this may prove to be a continued battleground between plaintiffs and defendants hoping to bring the claim under the TMLA or pursue it outside the strictures of the TMLA. Despite the clarity the court's opinion provides, the effective result of the decision will likely be to simply shift the battle. The split

97. *See id.*
98. *Id.*
99. *See id.* (answering each of the suggested considerations in the negative).
100. *See id.* (providing no framework by which considerations are to be analyzed).

amongst the circuits over whether a connection with the provision of health is required will no longer remain. However, exactly what constitutes a "substantial nexus" as required by the Texas Supreme Court under the newly announced standard may prove to be just as difficult for courts to determine.