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OPINIONS AND ORDERS

REHEARING ORDER

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JUDGMENT OF THE SUPREME COURT OF TEXAS (APRIL 16, 2021)

IN THE SUPREME COURT OF TEXAS

RAMONA ROGERS, M. D., MODESTO ZAMORANO, STEPHANIE CUMPIAN, ROLANDO FLORES, HECTOR ONTIVEROS, PRISCILLA NIETO, SONIA HERNANDEZ-KEEBLE, BLAS ORTIZ, JR., DAVID MORON, M. D., JAIME FLORES AND RIO GRANDE STATE CENTER,

Petitioners,

v.

DAVID SAXON BAGLEY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JEREMIAH RAY BAGLEY,

Respondent.

No. 19-0634

On Petition for Review from the Court of Appeals for the Thirteenth District of Texas

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petitions for review from the Court of Appeals for the Thirteenth District, and having considered the appellate record, briefs, and

counsel's argument, concludes that the court of appeals' judgment should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The court of appeals' judgment is reversed;

2) The cause is remanded to the trial court for further proceedings consistent with the Court's opinion; and

3) Each party shall bear its own costs incurred in this Court and the court of appeals.

Copies of this Court's judgment and opinion are certified to the Court of Appeals for the Thirteenth District and to the 444th District Court of Cameron County, Texas, for observance.

Opinion of the Court delivered by Justice Huddle.
April 16, 2021

OPINION OF THE SUPREME COURT OF TEXAS (APRIL 16, 2021)

IN THE SUPREME COURT OF TEXAS

RAMONA ROGERS, M. D., MODESTO ZAMORANO, STEPHANIE CUMPIAN, ROLANDO FLORES, HECTOR ONTIVEROS, PRISCILLA NIETO, SONIA HERNANDEZ-KEEBLE, BLAS ORTIZ, JR., DAVID MORON, M. D., JAIME FLORES AND RIO GRANDE STATE CENTER,

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Respondent.

No. 19-0634

On Petition for Review from the Court of Appeals for the Thirteenth District of Texas

Argued February 2, 2021

Before: Rebeca A. HUDDLE, Justice.

JUSTICE HUDDLE delivered the opinion of the Court.

The questions before us are (1) whether claims asserted against a state mental health facility and

its employees arising from the death of a patient, pleaded as claims under 42 U.S.C. § 1983, are health care liability claims under the Texas Medical Liability Act (TMLA); and (2) if so, whether section 1983 preempts the TMLA's requirement to timely serve an expert report. We hold that the claims are health care liability claims subject to the TMLA and that section 1983 does not preempt the TMLA's expert-report requirement. We therefore reverse the court of appeals' judgment and remand the case to the trial court for proceedings consistent with this opinion.

I. Background

David Bagley sued Rio Grande State Center (RGSC) and several of its employees after the death of his thirty-seven-year-old son, Jeremiah Bagley. Jeremiah, who had a history of mental illness, was committed to RGSC, a state mental health facility. While there, Jeremiah was involved in multiple altercations with other patients. After one such altercation, Jeremiah was assigned one-to-one supervision. The incident that led to Jeremiah's death began when Jeremiah physically struck his one-to-one monitor. Five psychiatric nurse assistants (PNAs) intervened to restrain him and administer injectable anti-psychotic and sedative drugs, Olanzapine and Diphenhydramine.

After Jeremiah calmed, he walked to his room, but he soon became agitated, disoriented, pale, and incoherent. Minutes later, Jeremiah went into cardiac arrest. RGSC staff performed CPR and called EMS. When EMS arrived, they administered CPR using an automated chest compression device. EMS transported Jeremiah to a hospital, where he was pronounced dead.

An autopsy revealed Jeremiah had several fractured vertebrae, cracked ribs, a lacerated spleen, and contusions on his head, shoulders, back, and chest. The stated cause of death was "excited delirium due to psychosis with restraint-associated blunt force trauma."

David Bagley sued individually and as the representative of Jeremiah's estate. He named RGSC itself, along with ten individual defendants: the five PNAs involved in the incident, four RGSC supervisors, and Jeremiah's treating doctor.[1] As to RGSC, Bagley alleged negligence under the Texas Tort Claims Act for "dispens[ing] and/or administer[ing] various drugs proximately causing [Jeremiah's] personal injury and death." Against the individual defendants, Bagley asserted claims under 42 U.S.C. § 1983, alleging (1) excessive force in violation of the Fourth Amendment against the PNAs, (2) deliberate indifference by the supervisors in their training and supervision of the PNAs, and (3) deliberate indifference as to Bagley's medical care against Dr. Ramona Rogers.

In their respective original answers, the defendants all referenced "the provisions of Chapter 74 of the Texas Civil Practice and Remedies Code." Chapter 74 is the Texas Medical Liability Act, which governs health care liability claims (HCLCs) and requires that the plaintiff, to avoid dismissal, serve an expert report addressing liability and causation as to each

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[1] The individual defendants in the trial court are Hector Ontiveros, Modesto Zamorano, Stephanie Cumpian, Rolando Flores, and Priscilla Nieto (the PNAs); Sonia Hernandez-Keeble, Blas Ortiz, Jr., David Moron, M.D., and Jaime Flores (the RGSC supervisors); and Ramona Rogers, M.D. (Bagley's treating physician).

defendant within 120 days after the defendant files an original answer. Tex. Civ. Prac. & Rem. Code § 74.351(a). Bagley served no such expert report.

After the 120-day deadline passed, RGSC amended its answer to state: "Plaintiff's claims against Defendant RGSC are health care liability claims subject to the substantive and procedural requirements of the Texas Medical Liability Act ('TMLA'), set forth in Chapter 74 Texas Civil Practice and Remedies Code." The individual defendants made analogous amendments.

All defendants jointly moved to dismiss Bagley's claims for failure to serve an expert report under section 74.351(b).[2] In response, Bagley argued that his claims are not HCLCs and, even if they were, the TMLA's expert-report requirement is preempted by section 1983. Bagley later supplemented his response with a copy of the autopsy and the Inspector General's report of the incident, arguing the defendants "wholly failed to show that TMLA has any application to Plaintiff's case."

At the hearing on the motion to dismiss, Bagley announced his nonsuit of the negligence claim against RGSC. The trial court denied the motion to dismiss, and all defendants (including nonsuited RGSC) filed

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[2] Section 74.351(b) provides that, when a plaintiff fails to serve an expert report by the 120-day deadline, on the defendant's motion the court "shall" enter an order that (1) "awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider," and (2) "dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim." Tex. Civ. Prac. & Rem. Code § 74.351(b).

an interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(9).

The court of appeals first held that RGSC was a proper party to the appeal despite being nonsuited because its motion to dismiss with prejudice and for attorney's fees and costs was pending at the time of the nonsuit. 581 S.W.3d 362, 367 (Tex. App.—Corpus Christi–Edinburg 2019). The court concluded that all of Bagley's claims were HCLCs, but it held that the expert-report requirement of the TMLA was preempted by section 1983. *Id.* at 369, 374. Both Bagley and the defendants petitioned for review.

II. Analysis

In the 1970s, the Texas Legislature found that health care liability claims were increasing "inordinately," adversely affecting the availability and affordability of adequate medical malpractice insurance and driving up the costs of medical care for patients. *See* Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, § 1.02(a)(1), (4), (8), 1977 Tex. Gen. Laws 2039. In response to this "medical malpractice insurance crisis," the Legislature enacted the predecessor to the TMLA, the Medical Liability and Insurance Improvement Act (MLIIA). *Scoresby v. Santillan*, 346 S.W.3d 546, 552 (Tex. 2011) (citing MLIIA § 1.02(a)(5)–(6)). The legislation sought to "reduce [the] excessive frequency and severity of health care liability claims . . . in a manner that [would] not unduly restrict a claimant's rights any more than necessary to deal with the crisis." MLIIA § 1.02(b)(1)–(3).

In 2003, the Legislature replaced the MLIIA with the TMLA, repeating its findings and statements of

purpose. *Scoresby*, 346 S.W.3d at 552 (citing Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.09, 10.11, 2003 Tex. Gen. Laws 847, 864–82, 884–85). The TMLA effectuates the Legislature's goal of "deter[ring] frivolous lawsuits by requiring a claimant early in litigation to produce the opinion of a suitable expert that his claim has merit." *Id.*; *see* Tex. Civ. Prac. & Rem. CODE § 74.351(a).

In this case, Bagley argues that his claims are outside the scope of the TMLA—and he was thus not required to serve an expert report—because he pleaded them under 42 U.S.C. § 1983.[3] He further argues that even if his claims are within the TMLA's scope, section 1983 preempts the TMLA because the two conflict and, under the Supremacy Clause of the United States Constitution,[4] the state law gives way to the federal. RGSC and the individual defendants assert the TMLA applies, an expert report was required because Bagley's claims are HCLCs under the TMLA, and section 1983 does not preempt the TMLA's expert-report requirement. We agree with RGSC and the individual defendants.

A. Bagley's claims are health care liability claims.

Our threshold question is whether Bagley's claims are HCLCs subject to the TMLA, including the expert-

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[3] 42 U.S.C. § 1983 provides individuals with a cause of action against state actors for violations of the United States Constitution under color of state law. 42 U.S.C. § 1983; *see Nieves v. Bartlett*, 139 S. Ct. 1715, 1721 (2019) (stating that section 1983 "provides a cause of action for state deprivations of federal rights").

[4] U.S. Const. art. VI, cl. 2.

report requirement in section 74.351. HCLCs have three elements: (1) the defendant is a health care provider[5] or physician; (2) the claimant's cause of action is for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's alleged departure from accepted standards proximately caused the claimant's injury or death. *Loaisiga v. Cerda*, 379 S.W.3d 248, 255 (Tex. 2012) (citing Tex. Civ. Prac. & Rem. Code § 74.001 (a)(13)). Bagley does not dispute the first element: each defendant meets the definition of a health care provider or physician under the statute. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(12). As to the third element, Bagley alleges that each defendant's conduct proximately caused Jeremiah's death.

Whether Bagley's claims are HCLCs therefore turns on the second element—whether Bagley's section 1983 claims allege a cause of action "for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care." *See id.* § 74.001(a)(13). The TMLA defines "health care" as "any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider

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[5] "'Health care provider' means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including . . . an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship." Tex. Civ. Prac. & Rem. Code § 74.001(a)(12).

for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." *Id.* § 74.001 (a)(10). The TMLA does not define "safety," but this Court has defined it as "the condition of being 'untouched by danger; not exposed to danger; secure from danger, harm or loss.'" *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 184 (Tex. 2012) (quoting *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 855 (Tex. 2005)).

The language of the statute and this Court's precedents demonstrate that the TMLA casts a wide net. *See Loaisiga*, 379 S.W.3d at 256 ("The broad language of the TMLA evidences legislative intent for the statute to have expansive application."). In *Loaisiga*, we held that the breadth of the TMLA "creates a rebuttable presumption that a patient's claims against a physician or health care provider based on facts implicating the defendant's conduct during the patient's care, treatment, or confinement are HCLCs." Id. at 252.

Loaisiga also teaches that when considering whether claims are HCLCs, we focus not on how the plaintiff pleaded or labeled his claims but, rather, on whether the facts underlying the claim could support an HCLC. *Id.* at 255. "[C]laims premised on facts that *could* support claims against a physician or health care provider for departures from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care are HCLCs, regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards." *Id.* (emphasis in original).

Here, Bagley's section 1983 claims are based on the following allegations: (1) the PNAs improperly

restrained Jeremiah for ten minutes with force that was objectively unreasonable and excessive to the need and forcibly injected him with medications to calm him; (2) the RGSC administrators were deliberately indifferent for failing to train and supervise the PNAs to use proper restraint techniques; and (3) Dr. Rogers, Jeremiah's treating physician, was deliberately indifferent for ignoring Jeremiah's "serious medical needs."

We agree with the court of appeals that these allegations constitute claims based on the departure from accepted standards of health care and therefore fall within the TMLA's scope. With respect to the PNAs, Bagley alleges that the PNAs "went far beyond any form of acceptable restraint." He claims that the Inspector General's report "determined the restraint administered was not proper in any way." He alleges that "[f]ive nurses never should have been involved in the restraint, nor should a nurse attempt a restraint from the side." Finally, he alleges the PNAs "improperly restrained" Jeremiah's legs and held him down by the waist while an injection was administered. Thus, the gravamen of Bagley's claims against the PNAs is that they improperly restrained him while administering an injection.

With respect to the four supervisors, Bagley alleges they each "either failed to supervise or train" the PNAs. He alleges that the supervisors "were responsible to ensure the RGSC staff . . . were properly trained in restraints and other necessary skills for dealing with patients at the facility." And Bagley alleges that his treating physician failed to address his serious medical needs.

"[A] claim alleges a departure from accepted standards of health care if the act or omission complained of is an inseparable or integral part of the rendition of health care." *Tex. W. Oaks Hosp.*, 371 S.W.3d at 180 (citing *Diversicare*, 185 S.W.3d at 850). Regardless of how Bagley characterizes them, at their core, his claims turn on whether the defendants adhered to the appropriate standards of care for restraining a psychiatric patient, supervising and training those who would restrain a psychiatric patient, and properly treating and administering medication to a psychiatric patient. As we have previously recognized, physical restraint, training and staffing policies, and supervision behind the use of restraint are integral components of the rendition of health care services to potentially violent psychiatric patients. *See Psychiatric Sols., Inc. v. Palit*, 414 S.W.3d 724, 725–26 (Tex. 2013) (holding that an employee's claim for injuries received while physically restraining a psychiatric patient involved acts or omissions that constitute "health care" under the TMLA); *Tex. W. Oaks Hosp.*, 371 S.W.3d at 175, 180–82 (holding that a hospital employee's claim for injuries arising from a physical altercation with a violent psychiatric patient involved acts or treatment that were integral to a patient's medical care, treatment, or confinement, and therefore constitute "health care" under the TMLA); *see also Diversicare*, 185 S.W.3d at 845, 850 (holding that a nursing home resident's claim for sexual assault by another patient was an HCLC because the facility's "training and staffing policies and supervision and protection of [the patient] and other residents are integral components of [the facility]'s rendition of health care services").

Bagley's allegations regarding Jeremiah's restraint also constitute complaints that the defendants departed from *safety* standards and should be classified as HCLCs for that independent reason. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) (HCLCs include "departure[s] from accepted standards of . . . safety"). In *Texas West Oaks Hospital*, we held that claims "predicated upon the monitoring and restraint of violent, schizophrenic patients[] implicate the safety, as commonly understood, of employees and patients." *Tex. W. Oaks Hosp.*, 371 S.W.3d at 183–84. Again, Bagley's allegation that the restraint in this case was improper necessarily implies it did not comport with accepted standards of safety.

Bagley's claims are HCLCs for a third reason: their proof requires expert testimony. We held in *Texas West Oaks Hospital* that a claim is an HCLC "if expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider." *Id.* at 182. There, we held that a hospital employee's claim against the hospital for injuries arising from a physical altercation with a patient necessarily required expert testimony. *Id.* at 175, 182. We reasoned that the claims would "require evidence on proper training, supervision, and protocols to prevent, control, and defuse aggressive behavior and altercations in a mental hospital between psychiatric patients and employed professional counselors who treat and supervise them." *Id.* at 182. We further stated that "[i]t would blink reality to conclude that no professional mental health judgment [was] required to decide what those should be, and whether they were in place at the time" of the injury. *Id.* Bagley's claims similarly will require expert opin-

ion testimony on acceptable standards for restraining a psychiatric patient.

Bagley asserts that expert testimony "may not be necessary" to prove a claim for excessive force because "[t]he jury can rely on their common sense based on the evidence." But the excessive-force claims in this case arise in the specific context of the method used to restrain a potentially violent psychiatric patient in a mental health care facility. The Fifth Circuit has expressly recognized that in cases under section 1983, expert testimony regarding use of force and proper arrest techniques and training is not within the common knowledge of jurors. *See Johnson v. Thibodaux City*, 887 F.3d 726, 737 (5th Cir. 2018) (affirming trial court's admission of expert opinions regarding arrest techniques and use of force over objection that testimony was within jury's province). Here, like in *Texas West Oaks Hospital*, the need for expert testimony independently supports our conclusion that Bagley's claims are HCLCs.

Despite the broad scope of the TMLA, Bagley argues it was not intended to apply to constitutional civil rights claims. In support of this argument, Bagley points out that the TMLA states that a cause of action is an HCLC "whether the claimant's claim or cause of action sounds in tort or contract." Tex. Civ. Prac. & Rem. Code § 74.001(a)(13). Bagley reasons that this phrase limits the scope of the TMLA to exclude constitutional claims, which Bagley contends are neither torts nor contract claims.

Contrary to Bagley's assertion, we do not read this phrase as a limitation. In analyzing the language of the statute, we "presume the Legislature 'chooses a statute's language with care, including each word

chosen for a purpose, while purposefully omitting words not chosen.'" *Cadena Comercial USA Corp. v. TABC*, 518 S.W.3d 318, 325–26 (Tex. 2017) (quoting *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011)). We aim to discern the Legislature's intent by looking first to the "plain and common meaning of the statute's words." *Tex. W. Oaks Hosp.*, 371 S.W.3d at 177 (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)). The conjunction "whether," by its common definition, means "alternative conditions or *possibilities*."[6] The Legislature's use of "whether" does not mean that claims *must* sound in either tort or contract to qualify as HCLCs; it merely illustrates that the claims *can* sound in tort or contract. In any event, even if we were inclined to read the phrase as a limitation, Bagley's claims would qualify. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) ("[T]here can be no doubt that claims brought pursuant to § 1983 sound in tort.").

Bagley advances the following additional arguments for why he contends the TMLA was not intended to apply to section 1983 claims: (1) the objective of the TMLA was to overhaul Texas malpractice law, not to regulate section 1983 claims; (2) nothing in the TMLA's legislative history indicates an intent to curtail a federal remedy under section 1983; and (3) the elements of a federal civil rights claim do not overlap with the elements of an HCLC. None of these arguments has merit.

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[6] *Whether*, MERRIAM-WEBSTER, https://www merriam-webster.com/dictionary/whether (emphasis added) (last visited April 6, 2021).

Bagley's reliance on legislative history to establish the Legislature's supposed intent is misplaced. To determine whether the Legislature intended for the TMLA to apply to a particular claim, we focus on the text of the statute, particularly its definition of "health care liability claim." Tex. Civ. Prac. & Rem. Code § 74.001(a)(13). In the absence of "clear statutory language to the contrary," we presume that when the Legislature chooses broad language, "the Legislature intended it to have equally broad applicability." *Cadena Comercial USA Corp.*, 518 S.W.3d at 327. Also, as noted above, the elements of the cause of action as pleaded by Bagley do not control whether that cause of action is a health care liability claim under the statute. *See Loaisiga*, 379 S.W.3d at 255 ("Analysis of the second element—the cause of action—focuses on the facts underlying the claim, not the form of, or artfully-phrased language in, the plaintiff's pleadings describing the facts or legal theories asserted.").

All of Bagley's claims allege a departure from accepted standards of health care or safety. Therefore, we hold they are all "health care liability claims" under the TMLA. *See* Tex. Civ. Prac. & REM. Code § 74.001(a)(13).

B. Section 1983 does not preempt section 74.351 of the TMLA.

The Supremacy Clause of the United States Constitution dictates that the "Constitution, and the Laws of the United States" are "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. When federal law and state law conflict, the inconsistent state law necessarily gives way to the federal law. *See Free v.*

Bland, 369 U.S. 663, 666 (1962) ("[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.") (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 3 (1824)).

Whether an inconsistent state law is preempted when a plaintiff brings a federal cause of action in state court depends, generally, on whether the state law is procedural or substantive in nature. *See Felder v. Casey*, 487 U.S. 131, 138 (1988). The Supreme Court of the United States has said that, while "[s]tates may establish the rules of procedure governing litigation in their own courts[,] . . . where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Id.* (quoting *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949)).

Bagley relies primarily on *Felder* to support his preemption argument. *Felder* involved a Wisconsin statute that required written notice of a claim against a state governmental subdivision, agency, or officer to be provided to the government within 120 days of the alleged injury. *Id.* at 136. The statute further required the claimant to submit an itemized statement of the relief sought. *Id.* at 136–37. The governmental subdivision, agency, or officer then had 120 days to either grant or deny the requested relief. *Id.* at 137. If the claim was denied, the claimant was required to bring suit within six months of receiving notice of the denial. *Id.*

The Supreme Court held the Wisconsin statute was preempted because it undermined the "uniquely federal remedy" provided under section 1983. *Id.* at 141. The Court reasoned that the Wisconsin statute

erected a hurdle to recovery that was not "a neutral and uniformly applicable rule of procedure; rather, it [was] a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority." *Id.* In this sense, the Court found the Wisconsin statute discriminated against section 1983 claims. *Id.* Whereas Wisconsin law ordinarily afforded victims of intentional torts two years to file their claims, the statute gave section 1983 claimants only four months. *Id.* at 141–42. Finally, the Court observed that the Wisconsin statute operated as an exhaustion requirement by forcing claimants to first seek redress directly from the governmental actor before filing suit. *Id.* at 142. The Court reasoned that "Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." *Id.* For all these reasons, *Felder* held section 1983 was inconsistent with—and therefore preempted—the Wisconsin statute.

While Bagley argues *Felder* is controlling, RGSC and the individual defendants argue this case is more like *In re GlobalSanteFe Corp.*, 275 S.W.3d 477 (Tex. 2008). In that case, the plaintiff sued in state court under the Jones Act[7] for alleged injuries from exposure to silica while working aboard a maritime vessel. Like the expert-report requirement here, Chapter 90 of the Civil Practice and Remedies Code requires a claimant alleging silica-related injuries to

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[7] The Jones Act is a federal statute that provides a cause of action to seamen injured in the course of their employment. 46 U.S.C. § 30104.

serve an expert report in the early stages of the litigation. Tex. Civ. Prac. & Rem. Code § 90.004. The plaintiff failed to serve an expert report and argued that the expert-report requirement was preempted by the Jones Act. *GlobalSanteFe*, 275 S.W.3d at 482.

We concluded that the expert-report requirement was procedural—and therefore not preempted—because it did not require anything different from plaintiffs than what would have been required of them in federal court.[8] *Id.* at 486–87. In so holding, we noted that "[n]othing in the Jones Act exempts a seaman claiming a silica-related disease from establishing, through reliable medical proof, that he in fact suffers from such a disease." *Id.* at 486. We reasoned that because reliable expert testimony would be required in both state and federal court, the state expert-report requirement was not an extra substantive burden on plaintiffs in state courts. *Id.* at 486–87. We said that "[w]e see no basis for holding that Texas law generally governing the admission of expert testimony, which draws so heavily from federal law, is preempted by the Jones Act." *Id.* at 487. And we concluded that "Texas courts are not expected to abandon all their regular rules of practice and proce-

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[8] We did, however, conclude that a different provision of Chapter 90, which required claimants to prove a minimal level of physical impairment to prevail, was substantive in nature. *GlobalSanteFe*, 275 S.W.3d at 489; *see* Tex. Civ. Prac. & Rem. CODE § 90.004(b)(2). Because the Jones Act did not have a similar injury threshold, we held that the minimal-impairment requirement of Chapter 90 was preempted by the Jones Act and should not be applied in Jones Act cases. *GlobalSanteFe*, 275 S.W.3d at 489–90.

dure and to adopt federal rules in a case simply because a Jones Act claim is alleged." *Id.* at 489.

We find the TMLA's expert-report requirement more similar to the expert-report requirement in *GlobalSanteFe* than the statutory exhaustion procedure in *Felder*. Here, as in *GlobalSanteFe*, Texas law requires service of an expert report in the preliminary stage of the litigation. *Compare* TEX. CIV. PRAC. & REM. CODE § 74.351, *with GlobalSanteFe*, 275 S.W.3d at 480–81 (citing TEX. CIV. PRAC. & REM. CODE §§ 90.004, .006). And like the Jones Act plaintiff in *GlobalSanteFe*, Bagley ultimately would have to establish the substance of what is required in the report whether he filed his claims in federal court or state court. In other words, the TMLA's expert-report requirement merely requires an advance summary of the same evidence Bagley would have to present to prevail at trial, regardless of whether he sued in federal or state court. Guided by *GlobalSanteFe*, we conclude that requiring Bagley to serve a report providing a fair summary of an expert's opinions on a standard of care, its breach, and causation does not create an additional substantive hurdle—it is a mere procedural requirement that affects only the timing in which the proof must be disclosed. *See Passmore v. Baylor Health Care Sys.*, 823 F.3d 292, 296–98 (5th Cir. 2016) (characterizing section 74.351 as a procedural requirement and, per the *Erie* doctrine, rejecting its applicability in federal court in favor of federal procedural rules).

The TMLA's expert-report requirement is also different from the Wisconsin scheme at issue in *Felder* in important respects. Unlike the Wisconsin statute, which burdened only individuals seeking redress from

governmental defendants, section 74.351 applies generally to all health care liability claims, regardless of whether the defendant is a government actor. *Compare* TEX. CIV. PRAC. & REM. CODE § 74.351, *with Felder*, 487 U.S. at 141–42. Additionally, section 74.351 does not alter the statute of limitations or erect an exhaustion requirement before one can file a section 1983 claim—section 74.351 applies only after suit has been filed.

The court of appeals held that the TMLA's expert-report requirement is preempted because it "burdens a state court § 1983 claimant in a manner that can be dispositive." 581 S.W.3d at 374. But asking whether a state-court procedure that is inapplicable in federal court *may* in some circumstances be dispositive is not the right inquiry. *See Robertson v. Wegmann*, 436 U.S. 584, 593 (1978) ("A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation."). The inquiry, instead, is whether the state statute would "frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court." *Felder*, 487 U.S. at 138. The expert-report requirement in section 74.351 would not.

Bagley argues that section 74.351, like the statute in *Felder*, would limit claimants' recoveries against the government. Section 1983 provides a cause of action for the deprivation of federal civil rights by those wielding state authority. *Felder*, 487 U.S. at 139. Section 74.351—the purpose of which is to deter frivolous claims—does not prevent claimants from asserting that cause of action. *See Scoresby*, 346 S.W.3d at 554; *see also Loaisiga*, 379 S.W.3d at 263

(noting that review of the claimant's expert report for adequacy is "a preliminary determination designed to expeditiously weed out claims that have no merit"). It merely provides that, if the claim falls within the statutory definition of an HCLC, after the claim is filed, and without regard to whether the claim is against a government defendant, the plaintiff must serve an expert report to demonstrate in the early stages of the litigation that he can meet the basic substantive proof requirements the claimant would be required to prove at trial. For these reasons, we reject Bagley's proposition that section 74.351 obstructs section 1983 claims.

We also conclude that enforcement of section 74.351 will not "frequently and predictably" produce a different outcome depending on whether a section 1983 claim is brought in state or federal court. *See Felder*, 487 U.S. at 138. Section 74.351 defines the required expert report as a written report that "provides 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). Any claimant asserting a health care liability claim, even one arising under section 1983, would need to present evidence of these same elements to prevail at trial, regardless of whether he chooses to sue in federal or state court. For example, Bagley's excessive-force claim will require evidence regarding the applicable standard of care—what amount of force is considered objectively reasonable within the context of restraining a psychiatric patient with Jeremiah's

history. *See Bush v. Strain*, 513 F.3d 492, 500 01 (5th Cir. 2008) (stating that an excessive-force claim under section 1983 requires proof that the use of force was "excessive to the need" and "objectively unreasonable"); *see also Tex. W. Oaks Hosp.*, 371 S.W.3d at 180 (holding that physical restraint of a psychiatric patient is an integral part of health care). Bagley's claim will require evidence that the PNAs failed to meet that standard by using excessive force (force greater than that which is objectively reasonable) when they restrained Jeremiah. And Bagley's claim will require evidence that the PNAs' alleged departure from the standard of care (their use of excessive force) caused Jeremiah's injuries and death. The same proof would be required at trial regardless of whether section 74.351 applied.

Because the TMLA's expert-report requirement is procedural in nature and would not cause reliably different outcomes in section 1983 cases brought in state and federal court, we hold that section 74.351 is not preempted by section 1983.[9]

C. RGSC is a proper party to the appeal.

Bagley contends RGSC is not a proper party to this appeal because Bagley nonsuited his claims against RGSC before the trial court ruled on its motion to dismiss. Bagley's petition asserted a negligence claim against RGSC under the Texas Tort Claims

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[9] Because the question before us is limited to whether the expert-report requirement in section 74.351 is preempted, our analysis and holding also are limited to that section. We express no opinion regarding whether any other section of the TMLA is preempted by section 1983, nor whether any other section of the TMLA is procedural or substantive.

Act, and RGSC joined the individual defendants in filing a motion to dismiss Bagley's claims for failure to serve an expert report. Section 74.351(b) provides that, in the absence of a timely served expert report, and on the defendant's motion, the court "shall" enter an order that (1) "awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider," and (2) dismisses the claim "with prejudice to the refiling of the claim." Tex. Civ. Prac. & Rem. Code § 74.351(b).

During the hearing on the defendants' motion to dismiss, Bagley's counsel announced that Bagley was "nonsuiting the claim against RGSC." Later the same day, Bagley filed an amended petition that deleted his claim against RGSC.

Texas Rule of Civil Procedure 162 provides that a plaintiff may take a nonsuit at any time before introducing all of plaintiff's evidence. Tex. R. Civ. P. 162. However, Rule 162 states that a nonsuit "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal, as determined by the court." *Id.*

At the time Bagley nonsuited his claims against RGSC, RGSC had a pending motion to dismiss Bagley's claims for failure to serve an expert report under section 74.351. Section 74.351(b) mandates that, when a plaintiff fails to timely serve an expert report, the court shall dismiss the claim "with prejudice" and shall award reasonable attorney's fees and costs. Tex. Civ. Prac. & Rem. Code § 74.351(b). In *Villafani v. Trejo*, we held that a motion to dismiss with prejudice and for attorney's fees under the predecessor to section 74.351 was a motion for sanctions that

survived a nonsuit, and therefore the defendant could appeal the denial of the motion. 251 S.W.3d 466, 470–71 (Tex. 2008). We noted that removing a defendant's ability to appeal the denial of a motion to dismiss because the plaintiff nonsuits the claim would frustrate the statute's purpose of deterring meritless suits. *Id.*[10]

Bagley also argues that RGSC's motion did not expressly request costs or attorney's fees. But RGSC's motion to dismiss was premised on Bagley's failure to comply with section 74.351(b), which requires the trial court to award costs and attorney's fees when a plaintiff fails to comply with the expert-report requirement. Tex. Civ. Prac. & Rem. Code § 74.351(b)(1). We have previously recognized that certain elements of recovery, such as prejudgment interest, need not be specifically pleaded when recovery is mandated by statute. *See Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 25 (Tex. 1987) ("[S]tatutory or contractual interest may be predicated on a prayer for general relief."). Courts of appeals have similarly concluded that a claim for attorney's fees need not be pleaded if fees are mandated by statute. *See, e.g.*, *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 884 (Tex. App.—Dallas 2009, no pet.) ("*Absent a mandatory statute*, a trial court's jurisdiction to render a judgment for attorney's fees

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[10] In his brief, Bagley asserts that he nonsuited his claims against RGSC with prejudice. However, nothing in the record suggests that Bagley's nonsuit was a dismissal with prejudice to refiling the claim. *See Aetna Cas. & Sur. Co. v. Specia*, 849 S.W.2d 805, 806 (Tex. 1993) ("Subject to certain conditions, a plaintiff who takes a nonsuit is not precluded from filing a subsequent suit seeking the same relief.").

must be invoked by pleadings. . . . ") (emphasis added); *State v. Estate of Brown*, 802 S.W.2d 898, 900 (Tex. App.—San Antonio 1991, no writ) (same). The motion to dismiss stated that RGSC was seeking relief under section 74.351(b), and it specifically noted that section 74.351(b) required the court to dismiss the claim and award attorney's fees and costs. Accordingly, we conclude that RGSC's motion to dismiss was a "motion for sanctions, attorney's fees or other costs" that was pending at the time Bagley nonsuited his claims against RGSC. Tex. R. Civ. P. 162. Therefore, RGSC's motion survived Bagley's nonsuit, and RGSC is a proper party to this appeal. Because Bagley's claims against RGSC are health care liability claims, RGSC is entitled to dismissal with prejudice and an award of reasonable attorney's fees and costs, as provided by section 74.351(b).

D. We remand claims against the individual defendants in the interest of justice.

Because section 74.351 mandates dismissal with prejudice, a determination that a claimant failed to serve the required expert report in a health care liability claim ordinarily results in rendition. *See, e.g.*, *Baylor Scott & White, Hillcrest Med. Ctr. v. Weems*, 575 S.W.3d 357, 367 (Tex. 2019) (reversing the lower court's holding that a plaintiff's claims were not HCLCs and rendering judgment in the hospital's favor because the plaintiff did not serve an expert report); *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753, 763 (Tex. 2014) (remanding for the trial court to dismiss the case and award attorney's fees and costs where plaintiff did not serve an expert report because plaintiff thought the claim was not an HCLC). However, we have broad authority to remand a case to the trial court when

justice so requires. TEX. R. APP. P. 60.3; *see, e.g.*, *Boyles v. Kerr*, 855 S.W.2d 593, 603 (Tex. 1993) ("We have broad discretion to remand for a new trial in the interest of justice where it appears that a party may have proceeded under the wrong legal theory."). The case for remand is especially compelling in cases where, as here, we have substantially clarified the law. *See Hamrick v. Ward*, 446 S.W.3d 377, 385 (Tex. 2014) (remanding in the interest of justice "in light of our clarification of the law"); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 26 (Tex. 1994) (remanding because the Court's opinion represented a "substantial clarification" of the law).

In this case, Bagley's failure to serve the requisite expert reports was not a mere error in interpreting section 74.351. Rather, our conclusion that an expert report was required in this case turns on a previously unaddressed preemption question. Because our decision today substantially clarifies that novel issue, we will remand Bagley's claims against the individual defendants to the trial court and direct the trial court to provide Bagley an additional sixty days to comply with section 74.351.

III. Conclusion

We agree with the court of appeals that all of the causes of action Bagley asserted in the trial court are health care liability claims under the TMLA. But the court of appeals erred in concluding that 42 U.S.C. § 1983 preempts the TMLA's expert-report requirement. We hold it does not, and we therefore reverse the court of appeals' judgment and remand the case to the trial court. On remand, the trial court shall dismiss the claims against RGSC with prejudice,

award RGSC reasonable attorney's fees and costs as provided in section 74.351(b), and provide Bagley an additional sixty days to satisfy section 74.351's expert-report requirement in his claims against the remaining defendants.

/s/ Rebeca A. Huddle
Justice

OPINION DELIVERED: April 16, 2021

JUDGMENT OF THE THIRTEENTH COURT OF APPEALS (JUNE 13, 2019)

THE THIRTEENTH COURT OF APPEALS

RAMONA ROGERS, M. D., MODESTO ZAMORANO, STEPHANIE CUMPIAN, ROLANDO FLORES, HECTOR ONTIVEROS, PRISCILLA NIETO, SONIA HERNANDEZ-KEEBLE, BLAS ORTIZ, JR., DAVID MORON, M. D., JAIME FLORES AND RIO GRANDE STATE CENTER,

v.

DAVID SAXON BAGLEY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JEREMIAH RAY BAGLEY,

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No. 13-18-00092-CV

On Appeal from the 444th District Court of Cameron County, Texas Trial Cause No. 2017-DCL-00875-H

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be affirmed. The Court orders the judgment of the trial court AFFIRMED. Costs of the appeal are adjudged against appellants.

We further order this decision certified below for observance.

June 13, 2019

OPINION OF THE COURT OF APPEALS
THIRTEENTH DISTRICT OF TEXAS
(JUNE 13, 2019)

COURT OF APPEALS THIRTEENTH DISTRICT
OF TEXAS CORPUS CHRISTI-EDINBURG

RAMONA ROGERS, M. D., MODESTO ZAMORANO, STEPHANIE CUMPIAN, ROLANDO FLORES, HECTOR ONTIVEROS, PRISCILLA NIETO, SONIA HERNANDEZ-KEEBLE, BLAS ORTIZ, JR., DAVID MORON, M. D., JAIME FLORES AND RIO GRANDE STATE CENTER,

Appellants,

v.

DAVID SAXON BAGLEY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JEREMIAH RAY BAGLEY,

Appellee.

No. 13-18-00092-CV

On appeal from the 444th District Court
of Cameron County, Texas.

Before: CONTRERAS, Chief Justice.,
RODRIGUEZ and BENAVIDES[1]., Justices.

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[1] The Honorable Nelda V. Rodriguez, former Justice of this Court, was a member of the panel when this case was orally argued

OPINION

OPINION BY JUSTICE BENAVIDES

The question before us is whether a civil rights claim brought under 42 U.S.C. § 1983 that alleges excessive force against health care providers and a state hospital is subject to the expert report requirement of § 74.351 of the civil practice and remedies code *See* 42 U.S.C. § 1983; Tex. Civ. Prac. & Rem. Code Ann. § 74.351. Appellee David Saxon Bagley, individually and as representative of the estate of Joshua Ray Bagley, sued the Rio Grande State Center (RGSC) and a number of its employees for the death of his son Joshua who died after he was physically restrained at RGSC by RGSC staff.

Appellants, Ramona Rogers, M.D., Modesto Zambrano, Stephanie Cumpian, Rolando Flores, Hector Ontiveros, Priscilla Nieto, Sonia Hernandez-Keeble, Blas Ortiz Jr., David Moron, M.D., Jaime Flores, and RGSC, argue that Bagley's claims are healthcare liability claims (HCLCs) that must be dismissed for Bagley's failure to file an expert report pursuant to § 74.351(b). *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351. By two issues, appellants appeal the trial court's denial of their motions to dismiss Bagley's claims *Id.* We affirm.

I. Background

Joshua was a 37-year-old man with mental health issues who was involuntarily committed to

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but did not participate in this decision because her term of office expired on December 31, 2018.

RGSC for several months before he died. On February 7, 2015, Joshua allegedly struck a staff member who was assigned to monitor him. Immediately after, five other staff members forcibly restrained Joshua. In doing so, they tackled him and pinned him to the floor for approximately ten minutes. While he was restrained, a staff member forcibly administered an injection to calm Joshua. After Joshua was released from restraint, he returned to his room but was disoriented and unsteady. Joshua went into cardiac arrest shortly thereafter. RGSC staff performed CPR and called EMS. Joshua was pronounced dead at the hospital shortly thereafter.

Joshua's autopsy reflected numerous injuries. He was bruised; his thoracic spinous processes at T-2 through T-7 were fractured; aspects of his right ribs 4 through 9 were fractured and displaced; aspects of his left ribs 8 through 10 were fractured and displaced, resulting in laceration of the parietal pleura; both lungs were lacerated; his spleen was lacerated; and he had blood in his pleural and peritoneal cavities. The medical examiner reported Joshua's cause of death to be "excited delirium due to psychosis with restraint-associated blunt force trauma."

Bagley's original petition asserted negligence under the Texas Tort Claims Act (TTCA), and civil rights claims pursuant to §§ 1983 and 1988. *See* 42 U.S.C. §§ 1983, 1988; Tex. Civ. Prac. & Rem. Code Ann. ch. 101. Bagley filed a first amended petition before any of the defendants filed answers and again asserted negligence claims under the TTCA and civil rights claims. *See* 42 U.S.C. §§ 1983, 1988; Tex. Civ. Prac. & Rem. Code Ann. ch. 101.

Appellants responded to the suit with general denials, asserted application of Texas civil practice and remedies code chapters 74 and 108, official immunity, and sought dismissal pursuant to § 101.106(e) of the civil practice and remedies code. *See* Tex. Civ. Prac. & Rem. Code Ann. chs. 74, 108, § 101.106(e).

Appellants also filed a motion to dismiss for Bagley's failure to serve expert reports in August 2017. *See id.* § 74.351(b). Appellants argued that Bagley's claims constituted HCLCs. Bagley responded that § 74.351 did not apply because he sought relief under the civil rights statute § 1983 for excessive force. In response, Bagley attached the autopsy report, Joshua's death certificate, and the report of the Office of Inspector General from the Texas Health and Human Services which concluded that RGSC employees used improper restraint techniques.

The trial court held a non-evidentiary hearing during which Bagley orally nonsuited RGSC. On January 30, 2018, Bagley filed his fourth amended petition that nonsuited RGSC and all non-constitutional claims from this action. The trial court denied the motion to dismiss on January 30, 2018. Appellants filed this interlocutory appeal. *See id.* § 51.014(a)(9).

II. RGSC

We must first determine whether RGSC is a proper party to the appeal. Bagley non-suited his claims against RGSC which was no longer a party at the time the motion to dismiss was denied or when the notice of interlocutory appeal was filed. RGSC argues that its motion to dismiss sought dismissal with prejudice and an award of mandatory reasonable attorneys' fees and costs before the nonsuit, and

therefore its claim for dismissal, costs, and fees survived the nonsuit. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b).

"Under the Texas Rules of Civil Procedure, [a]t any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes." *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon ex rel. Shultz*, 195 S.W.3d 98, 100 (Tex. 2006) (quoting Tex. R. Civ. P. 162). However, a nonsuit or dismissal "shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of dismissal. . . . " Tex. R. Civ. P. 162; *see Villafani v. Trejo*, 251 S.W.3d 466, 469 (Tex. 2008); *Fulp v. Miller*, 286 S.W.3d 501, 509 (Tex. App.—Corpus Christi–Edinburg 2009, no pet.) (holding that a motion to dismiss pursuant to § 74.351(b) constitutes a motion for sanctions). Accordingly, we hold that RGSC may properly appeal the trial court's failure to grant its motion to dismiss with prejudice and failure to award attorneys' fees and costs.

III. Health Care Liability Claims

By their first issue, appellants argue that Bagley's claims are HCLCs. *See* Tex. Civ. Prac. & Rem. Code Ann. ch. 74. "Determining whether claims are HCLCs requires courts to construe the TMLA [Chapter 74]. We review issues of statutory interpretation de novo." *Loaisiga v. Cerda*, 379 S.W.3d 248, 254–55 (Tex. 2012).

According to the statutory definition, a lawsuit is a HCLC if it has the following three elements: (1) the defendant is a health care provider or physician; (2) the claimant's cause of action is for treatment,

lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's alleged departure from accepted standards proximately caused the claimant's injury or death. Tex. Civ. Prac. & Rem. Code § 74.001(a)(13); *see Loaisiga.* 379 S.W.3d at 255.

RGSC is a state hospital that provides inpatient and outpatient mental health services and is defined to be a health care institution. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(11). A health care provider is defined as any employee of a health care provider or health care institution. *Id.* § 74.001(a)(12)(B)(ii). Bagley's claims meet the first of the three-part test of a HCLC; they are against healthcare providers, a healthcare institution, and physicians.

The second part is whether Bagley's claims are for a departure from accepted standards related to health care. *See id.* § 74.001(a)(13). Bagley asserts that the staff used excessive force in restraining his son. Analysis of the cause of action "focuses on the facts underlying the claim, not the form of, or artfully-phrased language in, the plaintiff's pleadings describing the facts or legal theories asserted." *Loaisiga*, 379 S.W.3d at 255. Thus,

> claims premised on facts that could support claims against a physician or health care provider for departures from accepted standards of medical care, health care, or safety . . . directly related to health care are HCLCs, regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards.

Id.; *see* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13). "The broad language of the [Texas Medical Liability Act] TMLA evidences legislative intent for the statute to have expansive application." *Loaisiga*, 379 S.W.3d at 256. "The breadth of the statute's text essentially creates a presumption that a claim is an HCLC if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the course of a patient's care, treatment, or confinement." *Id.* The presumption is rebuttable. *Id.*

Texas courts have interpreted HCLCs broadly to include an employee who was injured while employed by a health care facility or a person injured by a physician who committed an assault. *See Loaisiga*, 379 S.W.3d at 258–59; *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 174–75 (Tex. 2012) (holding that claims for on-the-job injuries against the hospital sustained by a psychiatric technician caused by a patient were HCLCs); *Morrison* v. *Whispering Pines Lodge I, L.L.P.*, 428 S.W.3d 327, 332 (Tex. App.–Texarkana 2014, pet. denied) (holding nursing home employee's claim for injury from slip and fall on wet floor constituted a HCLC).

In *Morrison*, the court concluded "that, if there is at least an indirect connection between Morrison's claim and the provision of health care, we are bound to rule that the claim is a HCLC." 428 S.W.3d at 332; *see also Oak Park, Inc. v. Harrison*, 206 S.W.3d 133, 135 (Tex. App.—Eastland 2006, no pet.).

In *Oak Park,* a patient receiving treatment for addiction, Harrison, was injured in the facility's common area when another patient attempted to escape. 206 S.W.3d at 141 While the escaping patient

was being restrained, Harrison was injured in the melee. Harrison sued alleging negligence and premises liability causes of action. *Id.* He did not file an expert medical report and the trial court declined to dismiss his claims. *Id.* at 136. The court of appeals reversed and rendered judgment dismissing Harrison's claims with prejudice after holding that his "claims are health care liability claims." *Id.* at 141.

However, in *Ross v. St. Luke's Episcopal Hospital*, the Texas Supreme Court held that a premises liability case is not necessarily a HCLC unless there is a nexus between the safety standards allegedly violated and the provision of health care. 462 S.W.3d 496, 504–05 (Tex. 2015) (holding that claim for injuries of a visitor who slipped and fell near the hospital exit doors was not a HCLC). The pivotal issue is whether the safety standards implicated the defendant's duties as a health care provider. *Id.* at 505.

Although Bagley alleged excessive force, his claims are brought against health care providers in a health care institution over the restraint of a patient. Restraint of mental health patients implicates healthcare safety issues. *See* Tex. Health & Safety Code Ann. § 552.052 (requiring training of state hospital employees on the "safe and proper use of restraints," "prevention and management of aggressive or violent behavior," and "emergency response," among other subjects). Under Texas law, Bagley's claims are directly related to the safety of mental health patients, the second part of the test for a HCLC.

The third and final portion of the test is whether Joshua's death was caused by the alleged departure from accepted standards. Bagley asserts that the providers used excessive force in restraining Joshua

which caused his death thus meeting the third part of the test for a HCLC. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13);*Oak Park*, 206 S.W.3d at 141. We sustain appellants' first issue.

IV. Federal Civil Rights Claims

Bagley argued to the trial court that 42 U.S.C. § 1983 preempted Chapter 74. *See* 42 U.S.C. § 1983; Tex. Civ. Prac. & Rem. Code Ann. ch. 74. By appellants' second issue, they argue that § 1983 does not preempt the requirements of § 74.351 that a person who asserts a HCLC is required to file and serve an adequate medical expert's report within 120 days after each defendant has answered the suit. *See* 42 U.S.C. § 1983; Tex. Civ. Prac. & Rem. Code Ann. § 74.351.

A. Standard of Review and Applicable Law

Whether § 1983 preempts § 74.351 is a question of law that we review de novo. *See In re GlobalSantaFe Corp.*, 275 S.W.3d 477, 489 (Tex. 2008) (orig. proceeding); *DHL Express (USA) Inc. v. Falcon Express Int'l, Inc.*, 408 S.W.3d 406, 410 (Tex. App.–Houston [1st Dist.] 2013, pet. denied); *see also Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994).

The United States Constitution provides that the laws of the United States are "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Thus, when a state law conflicts with federal law, it is preempted and has no effect. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 330 (2011); *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981); *BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 504

(Tex. 2008); *Kan. City S. Ry. Co. v. Oney*, 380 S.W.3d 795, 799 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("Whether substantive or procedural, state law is preempted when it interferes with or restricts remedies under a federal statute.") (citing *Felder v. Casey,* 487 U.S. 131, 138 (1988)). However, the Supreme Court "limits the preemption doctrine by presuming that Congress did not intend to displace state law." *Great Dane Trailers v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001) (citing *Maryland*, 451 U.S. at 748).

In resolving questions of inconsistency between state and federal law, courts must look not only at the particular federal statutes and constitutional provisions, but also at "the policies expressed in [them]." *Moore v. Brunswick Bowling & Billiards Corp*., 889 S.W.2d 246, 248 (Tex. 1994). Of particular importance is whether application of state law "would be inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Ry Express Agency, Inc.*, 421 U.S. 454, 465 (1975). Section 1983 is "one of the 'Reconstruction civil rights statutes' that this Court has accorded a sweep as broad as [their] language." *Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)). When the federal statute does not directly speak to preemption, the court "must be guided by the goals and policies of the Act" in determining preemption. *Int'l Paper Co. v. Oulette,* 479 U.S. 481, 493 (1987); *Slade v. City of Marshall, Tex.*, 814 F.3d 263, 267 (5th Cir. 2016).

B. Preemption Analysis

1. Federal Causes of Action Brought in State Court

Federal and state courts have concurrent jurisdiction over several federal causes of action including those brought pursuant to § 1983. *See* 42 U.S.C. § 1983; *see also Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942) (holding concurrent jurisdiction over Jones Act cases); *Scott v. Atchison, Topeka & Santa Fe Ry Co.*, 572 S.W.2d 273, 281 (Tex. 1978) (recognizing that federal law controls substantive rights in FELA claims brought in state court).

When a litigant files suit in state court to recover under a federal statute, he is entitled to the full benefit of federal law. *See Garrett*, 317 U.S. at 244 (holding that state rules regarding construction of a release had to give way to admiralty rules relating to seamen); *Scott v. Godwin*, 147 S.W.3d 609, 615 (Tex. App.—Corpus Christi–Edinburg 2004, pet. dism'd). State courts therefore apply federal substantive law and state rules of procedure. *See Scott*, 572 S.W.2d 273, 276; *Mo. Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 870 (Tex. 1973) (discussing FELA claims). "[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder*, 487 U.S. at 138 (quoting *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949)).

2. Purpose and Scope of § 1983

We must determine whether the state procedural law stands in the way of accomplishing the goal of the federal statute. "[T]he central purpose [of § 1983]

is to provide compensatory relief to those deprived of their federal rights by state actors." *Felder*, 487 U.S. at 141; *see Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) (tracing history of § 1983 back to the Civil Rights Act of 1866 which guaranteed broad and sweeping protection of basic civil rights). "Since the purposes and objectives of § 1983 are themselves broad compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law—the preemptive sweep of § 1983 is obviously considerable." *Beeks v. Hundley*, 34 F.3d 658, 661 (8th Cir. 1994) (citing *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978)).

The broad scope of § 1983 provides a remedy for claims of excessive force by state actors against persons involuntarily committed for mental health reasons. *See Davis v. Rennie*, 264 F.3d 86, 117 (1st Cir. 2001) (affirming judgment in favor of involuntarily committed mental patient against mental hospital personnel who allegedly used excessive force during restraint); *Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) (reviewing § 1983 claims made by the family of a mental patient who died after alleged excessive force during take down); *see also Rushing v. Simpson*, No. 4:08CV1338, 2009 WL 4825196, *9 (E.D. Mo. Dec. 11, 2009) (dismissing excessive force claims on summary judgment after finding force used was reasonable)*; Nicolaison v. Brown*, No. Civ. 05-1255, 2007 WL 851616, *11 (D. Mn. Feb. 6, 2007) (Mag. op.) (denying summary judgment on excessive force claim against officers without expert testimony). The standard used for violations of the Fourteenth Amendment by use of excessive force was set by *Kingsley v. Hendrickson*:

whether "the force purposely or knowingly used against [the plaintiff] was objectively unreasonable" under the existing facts and circumstances. ___ U.S. ___, 135 S.Ct. 2466, 2473 (2015).

3. Purpose and Scope of TMLA

In contrast to the broad remedial aim of § 1983 for violations of constitutional requirements by state actors, the TMLA was enacted in 1977 to combat a medical malpractice crisis in Texas. *See Scoresby v. Santillan*, 346 S.W.3d 546, 552 (Tex. 2011); *State v. Emeritus Corp.*, 466 S.W.3d 233, 243 (Tex. App.—Corpus Christi–Edinburg 2015, pet. denied). The current expert report requirement became part of the revised framework of the TMLA after 2005. Section 74.351(b) requires a trial court to dismiss a plaintiff's claims with prejudice and to award the defendant's attorneys' fees and costs if a plaintiff fails to file a timely and adequate medical expert report. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b). Thus, the expert report requirement is more than a procedural rule; it "'is a threshold requirement for the continuation of a lawsuit.'" *Med. Hosp. of Buna Tex., Inc. v. Wheatley*, 287 S.W.3d 286, 294 (Tex. App.—Beaumont 2009, pet. denied). Section 74.351 further provides limitations on discovery and requires dismissal of a plaintiff's claims with prejudice early in the litigation if the plaintiff fails to timely file a compliant report. *See Passmore v. Baylor Health Care Sys.*, 823 F.3d 292, 298 (5th Cir. 2016) (declining to apply § 74.351(b) in cases brought in federal court because it is inconsistent with the federal rules of procedure); *see also Med. Hosp. of Buna Tex., Inc.*, 287 S.W.3d at 294.

As discussed, the TMLA has been interpreted broadly. As an example, persons who allege intentional assault against a health care provider are required to file expert reports even if the conduct alleged constitutes a criminal act. *See Loaisiga*, 379 S.W.3d at 256 (holding that allegations of assault by patient against physician who fondled her breast during a medical exam for flu symptoms required an expert report pursuant to § 74.351(b) because she failed to conclusively negate that her claim was a HCLC).[2] Excessive force claims, like assault claims, do not ordinarily arise in the provision of health care.

4. Discussion

After considering the purpose and scope of both § 1983 and the TMLA, the Court must determine whether the expert report requirement in § 74.351 is "consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of

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[2] When suing a healthcare provider, a plaintiff may avoid the expert report requirement only under the circumstances outlined below:

> [A] claim against a medical or health care provider for assault is not an HCLC if the record conclusively shows that (1) there is no complaint about any act of the provider related to medical or health care services other than the alleged offensive contact, (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and (3) the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place.

Loasiga v. Cerda, 379 S.W.3d 248, 256 (Tex. 2012).

Congress?" *Felder*, 487 U.S. at 138; *see Haywood v. Drown*, 556 U.S. 729, 735 (2009).

The *Felder* Court held that a Wisconsin notice statute was preempted by § 1983 because it

> conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is preempted when the § 1983 action is brought in a state court.

487 U.S. at 138. The *Felder* Court further explained,

> [A]pplication of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory aims of the federal civil rights laws. Second, it reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts.

Id. at 141.

In *Haywood*, the Court held that a New York statute that limited § 1983 claims against correctional officers to a single court with no right to a jury trial, no attorneys' fees, and strict notice provisions was preempted by federal law. 566 U.S. at 737, 742; *see also Godwin v. Mem'l Med. Ctr*, 130 N.M. 434, 443–44, 25 P.3d 273, 282 (N.M. Ct. App. 2001, no. cert.) (holding that tort claims notice requirement was preempted by the Emergency Medical Treatment and Active Labor Act).

Section 74.351 operates differently than the notice requirements at issue in *Felder* and in *Godwin*. Section 74.351's expert report requirement serves two purposes: (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 the plaintiff's claims have merit. *See Am. Transitional Care Ctrs of Tex. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001) (considering a previous version of TMLA); *McAllen Hosps., L.P. v. Gonzalez*, 566 S.W.3d 451, 456 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.); *see also Thilo Burzlaff, M.D., P.A. v. Weber*, 582 S.W.3d 314, 324 (Tex. App.—San Antonio Mar. 7, 2018, no pet.).

As in *Hayward* which involved a statute designed to protect correctional officers from perceived frivolous claims for damages, the TMLA, including § 74.351, provides protection to health care providers, physicians, and institutions from perceived frivolous claims and pretrial discovery. *See* Tex. Civ. Prac. & Rem. Code Ann. ch. 74; *Am. Transitional Care Ctrs of Tex.*, 46 S.W.3d at 877.[3] Similarly to *Felder* and *Godwin*, the

[3] As the Texas Supreme Court explained:

expert report requirement provides the state actors with early notice of the details of the claims against them and a means of early dismissal of those claims when the requirement is not met. *See Felder*, 487 U.S. at 144; *Godwin*, 130 N.M. at 443–44, 25 P.3d at 282. In no other § 1983 action is a state plaintiff required to establish the merits of his or her claim against a state actor so quickly; instead, the ordinary rules of civil procedure apply. Although the expert report requirement does not uniquely discriminate against the federal right, it uniquely burdens the state court plaintiff under § 1983 differently than a similar plaintiff who sues in federal court. That difference can be dispositive. *Compare Bogart*, 257 S.W.3d 354, 373 (Tex. App.—Austin 2008, no pet.) (reversing trial court's finding that expert report was adequate and rendering judgment against plaintiff) *with Passmore*, 823 F.3d at 299 (reversing dismissal for failure to provide expert reports and allowing medical malpractice claim to proceed).

The Texas Supreme Court recognizes that state procedural rules must give way to federal preemption when they conflict with the goals of the federal statute. *See In re GlobalSantaFe Corp.*, 275 S.W.3d at 489. In

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> Because expert testimony is crucial to a medical-malpractice case, knowing what specific conduct the plaintiff's experts have called into question is critical to both the defendant's ability to prepare for trial and the trial court's ability to evaluate the viability of the plaintiff's claims. This makes eliciting an expert's opinions early in the litigation an obvious place to start in attempting to reduce frivolous lawsuits.

Am. Transitional Care Ctrs of Tex. v. Palacios, 46 S.W.3d 873, 876–77 (Tex. 2001).

GlobalSantaFe Corp., the court found that a portion of civil practice and remedies code chapter 90 addressing asbestos and silicosis injuries was inconsistent with the federal Jones Act. *Id.* It held that § 90.004(b) which imposed a threshold impairment requirement could not be applied in those cases. *Id.* ("We further conclude that Chapter 90 must not be interpreted to impose a higher standard of proof for causation than the federal standard applicable to Jones Act cases."). The *GlobalSantaFe* Court also held that other portions of Chapter 90, including the expert report component, were not preempted. *Id.* Unlike the expert report requirement in § 74.351(b) though, the chapter 90 requirement in the pre-2003 statute did not require dismissal of a plaintiff's claim or that discovery be stayed until a compliant report was filed. *See Oney*, 380 S.W.3d at 801 (discussing preceding version of §§ 90.003, 90.004, and 90.007); Tex. Civ. Prac. & Rem. Code Ann. § 90.07(d).

In *Oney*, a FELA suit for a railroad worker's death from lung cancer arising out of his asbestos and silica exposure, the court of appeals held that portions of the 2005 version of Chapter 90 were preempted. *Oney*, 380 S.W.3d at 799. The goal of the FELA was to compensate railroad workers who were being injured and killed in their employment and for whom common law remedies had proved to be inadequate. *Id.* After considering the goals of FELA, the *Oney* court held that §§ 90.003, 90.004, and 90.007 were preempted because they interfered with FELA's goal of provid-

ing a broad remedy to injured railroad workers.[4] *Id.* at 808.

Appellants seek dismissal with prejudice, along with attorneys' fees and costs for Bagley's failure to file an expert medical report. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b); *see also Med. Hosp. of Buna Tex.,* 287 S.W.3d at 294 ("Like dismissal under § 74.351, an award of costs and attorney's fees under § 74.351 is not discretionary."). After considering the goals of § 1983 to provide a broad remedy for redress of unconstitutional actions by state actors, and the different focus of Chapter 74, we hold that the expert report requirement of § 74.351 conflicts with the purpose of § 1983 and its application unfairly burdens a state court § 1983 claimant in a manner that can be dispositive. Accordingly, in this narrow class of cases, we hold that § 1983 preempts § 74.351 when claims for excessive force occur within a healthcare institution or against a healthcare provider or physician. *See Oney*, 380 S.W.3d at 808.

We overrule appellants' second issue.

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[4] The current version of § 90.003 provides detailed requirements for expert medical reports for persons asserting an asbestos related injury. *See* Tex. Civ. Prac. & Rem. Code Ann. § 90.03. Section 90.004 provides similar requirements for persons asserting a silica-related injury. *Id.* § 90.04. Section 90.007 provides for dismissal of any suit in which a claimant fails to comply with the requirements of §§ 90.003 and 90.004. *Id.* § 90.007.

V. Conclusion

Although we sustained appellants' first issue, because we hold that § 1983 preempts § 74.351, we affirm the trial court's order.

/s/ Gina M. Benavides
Justice

Delivered and filed the
13th day of June, 2019.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO SERVE CHAPTER 74 EXPERT REPORT (JANUARY 30, 2018)

IN THE DISTRICT COURT 444th JUDICIAL DISTRICT CAMERON COUNTY, TEXAS

DAVID SAXON BAGLEY, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF JEREMIAH RAY BAGLEY,

Plaintiff,

v.

RAMONA ROGERS, M.D., MODESTO ZAMBRANO, STEPHANIE CUMPIAN, ROLANDO FLORES, HECTOR ONTIVEROS, PRISCILLA NIETO, SONIA HERNANDEZ-KEEBLE, BLAS ORTIZ, JR., DAVID MORON, M.D., JAIME FLORES, AND RIO GRANDE STATE CENTER,

Defendants.

Cause No. 2017-DCL-00875

Before: David A. SANCHEZ, Judge Presiding.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO SERVE CHAPTER 74 EXPERT REPORT

On January 24, 2018, the Court heard Defendants RAMONA ROGERS, M.D., MODESTO ZAMORANO, STEPHANIE CUMPIAN, ROLANDO FLORES, HECTOR ONTIVEROS, PRISCILLA NIETO, SONIA HERNANDEZ-KEEBLE, BLAS ORTIZ, JR., DAVID MORON, M.D., JAIME FLORES and RIO GRANDE STATE CENTER's Motion to Dismiss for Failure to Serve Chapter 74 Expert Report. After considering Defendants' Motion to Dismiss, Plaintiff's Response, and arguments of counsel, it appears to the Court that the Motion should be DENIED.

IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss for Failure to Serve Chapter 74 Expert Report be and is hereby DENIED.

SIGNED on Signed 1/30/2018 3:35PM, 2017.

/s/ David A. Sanchez
Judge Presiding

1/30/18

ORDER OF THE SUPREME COURT OF TEXAS DENYING MOTION FOR REHEARING (JUNE 18, 2021)

IN THE SUPREME COURT OF TEXAS

ROGERS

v.

BAGLEY

Case No. 19-0634

COA #: 13-18-00092-CV

TC#: 2017-DCL-00875-H

Today the Supreme Court of Texas denied the motion for rehearing in the above-referenced cause.

District Clerk Cameron County
Cameron County Courthouse
Judicial Building–3rd Floor
974 E. Harrison Street
Brownsville, TX 78520-7123
Delivered Via E-Mail

STATUTORY PROVISION INVOLVED

Tex. Civ. Prac. & Rem. Code § 74.001
Sec. 001. Definitions

(a) In this chapter:

(1) "Affiliate" means a person who, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with a specified person, including any direct or indirect parent or subsidiary.

(2) "Claimant" means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant.

(3) "Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the person, whether through ownership of equity or securities, by contract, or otherwise.

(4) "Court" means any federal or state court.

(5) "Disclosure panel" means the Texas Medical Disclosure Panel.

(6) "Economic damages" has the meaning assigned by Section 41.001.

(7) "Emergency medical care" means bona fide emergency services provided after the sudden

onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.

(8) "Emergency medical services provider" means a licensed public or private provider to which Chapter 773, Health and Safety Code, applies.

(9) "Gross negligence" has the meaning assigned by Section 41.001.

(10) "Health care" means any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

(11) "Health care institution" includes:

(A) an ambulatory surgical center;

(B) an assisted living facility licensed under Chapter 247, Health and Safety Code;

(C) an emergency medical services provider;

(D) a health services district created under Chapter 287, Health and Safety Code;

(E) a home and community support services agency;

(F) a hospice;

(G) a hospital;

(H) a hospital system;

(I) an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended;

(J) a nursing home; or

(K) an end stage renal disease facility licensed under Section 251.011, Health and Safety Code.

(12)

(A) "Health care provider" means any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including:

(i) a registered nurse;

(ii) a dentist;

(iii) a podiatrist;

(iv) a pharmacist;

(v) a chiropractor;

(vi) an optometrist;

(vii) a health care institution; or

(viii) a health care collaborative certified under Chapter 848, Insurance Code.

(B) The term includes:

(i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and

(ii) an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship.

(13) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards 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. The term does not include a cause of action described by Section 406.033(a) or 408.001(b), Labor Code, against an employer by an employee or the employee's surviving spouse or heir.

(14) "Home and community support services agency" means a licensed public or provider agency to

which Chapter 142, Health and Safety Code, applies.

(15) "Hospice" means a hospice facility or activity to which Chapter 142, Health and Safety Code, applies.

(16) "Hospital" means a licensed public or private institution as defined in Chapter 241, Health and Safety Code, or licensed under Chapter 577, Health and Safety Code.

(17) "Hospital system" means a system of hospitals located in this state that are under the common governance or control of a corporate parent.

(18) "Intermediate care facility for the mentally retarded" means a licensed public or private institution to which Chapter 252, Health and Safety Code, applies.

(19) "Medical care" means any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement.

(20) "Noneconomic damages" has the meaning assigned by Section 41.001.

(21) "Nursing home" means a licensed public or private institution to which Chapter 242, Health and Safety Code, applies.

(22) "Pharmacist" means one licensed under Chapter 551, Occupations Code, who, for the purposes of this chapter, performs those activities limited to

the dispensing of prescription medicines which result in health care liability claims and does not include any other cause of action that may exist at common law against them, including but not limited to causes of action for the sale of mishandled or defective products.

(23) "Physician" means:

(A) an individual licensed to practice medicine in this state;

(B) a professional association organized under the Texas Professional Association Act (Article 1528f, Vernon's Texas Civil Statutes) by an individual physician or group of physicians;

(C) a partnership or limited liability partnership formed by a group of physicians;

(D) a nonprofit health corporation certified under Section 162.001, Occupations Code; or

(E) a company formed by a group of physicians under the Texas Limited Liability Company Act (Article 1528n, Vernon's Texas Civil Statutes).

(24) "Professional or administrative services" means those duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs.

(25) "Representative" means the spouse, parent, guardian, trustee, authorized attorney, or other authorized legal agent of the patient or claimant.

(b) Any legal term or word of art used in this chapter, not otherwise defined in this chapter, shall have such meaning as is consistent with the common law.

Tex. Civ. Prac. & Rem. Code § 74.351
Sec. 74.351. Expert Report.

(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney 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. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

(1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

(2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30 day extension shall run from the date the plaintiff first received the notice.

(d) to (h)[Reserved].

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Subject to Subsection (t), an expert report served under this section:

(1) is not admissible in evidence by any party;

(2) shall not be used in a deposition, trial, or other proceeding; and

(3) shall not be referred to by any party during the course of the action for any purpose.

(l) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (r)(6).

(m) to (q)[Reserved].

(r)In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim. (3)[Reserved].

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counter defendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401;

(B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402;

(C) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence;

(D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or

(E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages

claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.

(6) "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report 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.

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

(1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;

(2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and

(3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(t) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection

(a), the restrictions imposed by Subsection (k) on use of the expert report by any party are waived.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).

42 U.S.C. § 1983
§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.