

Presented:

32nd Annual UT Health Law Conference

April 7-9, 2021
Live Webcast

**OPERATIONAL IMPACT OF
SIGNIFICANT CASES**

**Yvonne K. Puig
Daphne Andritsos Calderon
Hannah Putnam**

Yvonne K. Puig
Norton Rose Fulbright US LLP
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701

yvonne.puig@nortonrosefulbright.com
(512) 536-2450

2021 UT HEALTH LAW CONFERENCE

I.	ISSUES AFFECTING HOSPITALS AND HEALTHCARE PROVIDERS.....	1
A.	Physician Credentialing.....	1
1.	Pisharodi v. Columbia Valley Healthcare System, L.P.....	1
2.	Equal Employment Opportunity Commission v. Yale New Haven Hospital, Inc.	2
B.	Theories of Liability.....	4
1.	De Paz v. Duane	4
2.	T.L. v. Cook Children’s Medical Center	6
3.	Memorial Hermann Health System v. Gomez	9
4.	University of Texas Southwestern Medical Center v. Rhoades	16
C.	Antitrust Claims.....	17
1.	Kenney v. American Board of Internal Medicine	17
D.	Regulation of the Practice of Medicine	22
1.	Texas Board of Chiropractic Examiners v. Texas Medical Association.....	22
E.	Claims Affecting Hospitals.....	27
1.	Farmers Texas County Mutual Insurance Company v. Beasley.....	27
2.	In re Christus Santa Rosa Healthcare Corp.....	29
3.	In re K&L Auto Crushers, LLC	30
II.	INTERPRETATION AND APPLICATION OF THE TEXAS CIVIL PRACTICE & REMEDIES CODE.....	31
A.	Substantive Issues Raised Under TCPRC.....	31
1.	Regent Care of San Antonio v. Robert H. Detrick	31
2.	Campbell v. Pompa.....	32
3.	Columbia Valley Healthcare System L.P. v. Andrade.....	35
4.	Glenn v. Leal.....	37
5.	Virlar v. Puente.....	39
6.	Duffey v. Sleep Center of Longview.....	45
7.	Morris v. Piparia	47
B.	Is It a Health Care Liability Claim?.....	48
1.	Baylor Scott & White Health v. Roughneen.....	48
2.	Coming Attractions Bridal and Formal, Inc. v. Texas Health Resources.....	50
3.	Aquatic Care Programs, Inc. v. Cooper	53

2021 UT HEALTH LAW CONFERENCE

C.	Causation Testimony and Reports Under TCPRC.....	55
1.	Walker v. Srivastava	55
2.	In re Turner	56
3.	Seton Family of Hospitals v. White	58
4.	Decker v. Columbia Medical Center of Plano	60
5.	Mooring v. Britton.....	61
III.	KEY U.S. SUPREME COURT ACA CASES	62
A.	Losses Under the Risk Corridor Program	62
1.	Maine Community Health Options v. United States	62
B.	IFRs and the Self-Certification Accommodation	64
1.	Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania	64
C.	The Individual Mandate	
1.	Texas v. California.....	66
	ENDNOTES	68

2021 UT HEALTH LAW CONFERENCE

I. ISSUES AFFECTING HOSPITALS AND HEALTHCARE PROVIDERS

A. Physician Credentialing

1. *Pisharodi v. Columbia Valley Healthcare System, L.P.*

In *Pisharodi*, Madhavan Pisharodi M.D. sued his employer, alleging breach of contract and malicious civil prosecution, arguing Valley Regional Medical Center (“Valley Regional”) maliciously instituted civil proceedings against him and violated the confidentiality clause of its medical staff bylaws.¹ The trial court dismissed his claims under the Texas Citizens Participation Act (“TCPA”) and Dr. Pisharodi appealed.² Dr. Pisharodi was accused of arriving to the hospital intoxicated while working as an on-call neurosurgeon, and was given the opportunity to take a blood test or delay the start of surgery.³ Dr. Pisharodi refused the blood test and left the hospital, intending to return in three hours to perform the surgery, but in the interim the patient was transferred to a nearby facility for surgery without Dr. Pisharodi's knowledge or approval.⁴ Valley Regional initiated peer review proceedings five months later to determine whether Dr. Pisharodi was under the influence of alcohol while working on-call and whether his condition delayed in patient care, and what, if any, action should be taken against him.⁵ Dr. Pisharodi claimed during the peer review hearing that “he was informed by a member of the panel that the family of the patient involved in the alleged incident had been informed he was under the influence of alcohol.”⁶ The hospital's Medical Executive Committee (MEC) did not recommend “any action or formal investigation of the matter.”⁷

Dr. Pisharodi brought breach of contract and malicious prosecution claims against Valley Regional.⁸ Regarding the breach of contract claim, Dr. Pisharodi asserted that Valley Regional breached the confidentiality terms of its medical staff bylaws when it relayed allegations of his intoxication to local attorneys and the involved patient's family.⁹ With respect to his malicious prosecution claim, Pisharodi argued Valley Regional acted with malice and without probable cause when it instituted peer review actions based on the intoxication allegations.¹⁰ Valley Regional asserted in its defense that Dr. Pisharodi's claims were based on, related to, or in response to a “matter of public concern,” and such communications—including those stemming from the peer review process—were protected under the TCPA.¹¹ The trial court granted Valley Regional's motion to dismiss and awarded reasonable and necessary attorney's fees and expenses, as well as \$20,000 in sanctions pursuant to the TCPA.¹²

On appeal, the Thirteenth Court of Appeals noted that under the TCPA, “the [e]xercise of the right of free speech” includes a communication that is “made in connection with a matter of public concern.”¹³ The court went on to reason that the Texas Supreme Court and other Texas appellate courts have uniformly held that “the provision of medical services by a health care professional constitutes a matter of public concern.”¹⁴ Thus, the appellate court held that the alleged communication implicated in this appeal related to Dr. Pisharodi's ability to provide competent medical services and thus Valley Regional demonstrated the TCPA applied to the case.¹⁵

The court also noted that this was the third time Pisharodi was before the court of appeals on a TCPA-related appeal, and each appeal related to statements made during the peer review process.¹⁶ The court stated that “[w]e hold now as we did then that ‘any statements made during

2021 UT HEALTH LAW CONFERENCE

the peer review process constitute protected free speech' because 'the provision of medical services by a healthcare professional constitutes a matter of public concern.'" ¹⁷

In regard to Dr. Pisharodi's breach of contract claim, the appellate court explained that, unlike hospital bylaws, medical staff bylaws generally do not constitute contractual and binding rights on a healthcare system.¹⁸ The court held that none of the bylaw provisions Dr. Pisharodi excerpted or referenced from the 104-page set of bylaws provided evidence of the requisite contractual language that would have been binding on Valley Regional.¹⁹ The Thirteenth Court of Appeals thus held that Dr. Pisharodi failed to offer clear and specific evidence of the existence of a valid contract, and therefore the trial court did not abuse its discretion in granting Valley Regional's motion to dismiss.²⁰

The appellate court also rejected Dr. Pisharodi's malicious prosecution claim, only addressing the requirement that he suffer special damages, because that element was dispositive.²¹ "Special damages,' also referred to as 'special injury,' requires evidence of 'actual interference with the defendant's person (such as an arrest or detention) or property (such as an attachment, an appointment of receiver, a writ of replevin or an injunction).'" ²² Dr. Pisharodi provided no evidence of any injury following the peer review. Through an affidavit, Dr. Pisharodi argued he was unable to perform the surgery in question and lost approximately \$5,000.00 of income as a result.²³ However, the court reasoned, lost earnings cannot support a claim of special injury.²⁴ What was more, Dr. Pisharodi's asserted injury could not be considered to have been suffered as a result of the peer review because it was based on a surgery that preceded the peer review.²⁵

The appellate court then turned to the issue of attorney's fees and observed that the applicable provision of the TCPA provides that "the court shall award to the moving party . . . court costs, reasonable attorney's fees, and other expenses incurred in defending against the legal action as justice and equity may require."²⁶ The court then noted that the Supreme Court of Texas, however, had not yet interpreted whether Section 27.009 precluded a jury from determining the amount of "reasonable attorney's fees," and at least two other courts of appeals had declined to engage in a related constitutionality analysis of the issue.²⁷ The court reasoned, however, that guidance from the Texas Supreme court consistently holds that the issue of "reasonable" amount of attorney's fees to be awarded under a statute is typically a question of fact for a jury.²⁸ Thus, the Thirteenth Court of Appeals concluded that "Section 27 does not dictate the manner in which to determine the amount of attorney's fees, providing only that the award must be 'reasonable'" and "does not contain language that prohibits the parties from having a jury determine the reasonableness of an amount of attorney's fees to award."²⁹

Finally, the court of appeals found the trial court did not abuse its discretion with the imposition of sanctions, because sanctions are mandatory under Section 27 and the amount of sanctions is within the trial court's discretion.³⁰ Thus, the trial court's judgment was affirmed only in part and the case was remanded for a new trial on attorney's fees.³¹

2. *Equal Employment Opportunity Commission v. Yale New Haven Hospital, Inc.*

The Equal Employment Opportunity Commission ("EEOC") filed a lawsuit against Yale New Haven Hospital, Inc., ("YNHH") alleging violations of federal anti-discrimination laws due to

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Operational Impact of Significant Cases

First appeared as part of the conference materials for the
32nd Annual Health Law Conference session
"Operational Impact of Significant Cases"