

No. 08-0453

IN THE SUPREME COURT OF TEXAS

**GEFFREY KLEIN, M.D. and
BAYLOR COLLEGE OF MEDICINE,**

Petitioners,

v.

**CYNTHIA HERNANDEZ, As The Parent
And Next Friend Of N.H., A Minor,**

Respondent.

**On Petition For Review From The
First Court Of Appeals At Houston, Texas**

GEFFREY KLEIN, M.D.'S PETITION FOR REVIEW

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- 1st Supp. at 6:1791 First Supplemental Clerk's Record in Cause Number 01-06-00569-CV, volume 6, page 1791.
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APPENDIX

The attached Appendix—cited as “App.” followed by the letter of the tab identifying the exhibit—consists of the following:

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- A.** Order from the trial court signed May 30, 2006, denying Petitioners' motion to dismiss for lack of jurisdiction.
- B.** Order from the trial court signed May 30, 2006, denying Petitioners' motion for summary judgment.
- C.** Opinion dated August 3, 2007, in the First Court of Appeals at Houston, Texas.
- D.** Substituted opinion dated April 17, 2008, in the First Court of Appeals at Houston, Texas.
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- F.** Tex. Health & Safety Code Ann. §§ 312.001–.007 (Vernon 2001 & Supp. 2007).
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- H.** Excerpts from Petitioners' Brief On The Merits filed in *Franka v. Velasquez*, No. 07-0131, In the Supreme Court of Texas.

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STATEMENT OF THE CASE

- Nature of the Case:** Respondents brought a health care liability claim against Baylor, a nonprofit medical school, and Dr. Klein, a resident physician in Baylor's obstetrics and gynecology program, for medical care he provided at a public hospital for the indigent and needy owned and operated by the Harris County Hospital District. This appeal concerns whether Baylor and Dr. Klein are immune from suit and immune from liability under chapter 312 of the Texas Health and Safety Code and the provisions of the Texas Tort Claims Act that it incorporates.
- Trial Court:** 152nd Judicial District Court, Harris County, The Hon. Ken Wise presiding.
- Trial Court Disposition:** Denied Petitioners' motions to dismiss for lack of jurisdiction and for summary judgment.
- Court of Appeals:** The Court of Appeals for the First District of Texas, Houston, Texas: Justices Taft, Jennings, and Alcalá.
- Parties in the Court of Appeals:** Appellants: Geoffrey Klein, M.D. and Baylor College of Medicine.
Appellee: Cynthia Hernandez as the Parent and Next Friend of N.H., A Minor
- Court of Appeals' Disposition:** The Court of Appeals issued an opinion and judgment on August 3, 2007. It granted rehearing, and on April 17, 2008, in an opinion authored by Justice Jennings, withdrew its prior opinion, vacated the judgment, and dismissed Petitioners' appeals for lack of jurisdiction. ___ S.W.3d ___, No. 01-06-00569-CV, 2008 WL 1747479 (Tex. App.—Houston [1st Dist.] Apr. 17, 2008, pet. filed).

STATEMENT OF JURISDICTION

This Court has jurisdiction under section 22.001(a)(2), (a)(6), and (e) of the Texas Government Code. Tex. Gov't Code Ann. §§ 22.001(a)(2), (a)(6), (e) (Vernon 2004). Specifically, in *Young v. Villegas*, 231 S.W.3d 1, 7-8 (Tex. App.—Houston [14th Dist.] 2007, pet. denied), the Fourteenth Court of Appeals held that section 51.014(a)(5) of the Texas Civil Practice and Remedies Code “authorized a Baylor doctor, who was similarly situated to Dr. Klein in the instant case, to appeal the denial of his summary judgment motion, in which he asserted immunity from individual liability.” *Klein v. Hernandez*, ___ S.W.3d ___, No. 01-06-00569-CV, 2008 WL 1747479, at *6 (Tex. App.—Houston [1st Dist.] Apr. 17, 2008, pet. filed).

Here, however, the First Court of Appeals held “that section 51.014(a)(5) does not authorize Dr. Klein’s interlocutory appeal of the trial court’s denial of his summary judgment motion.” *Id.* at *7 (“respectfully disagree[ing] with the Fourteenth Court of Appeals’s holding in *Young*”). Appellate jurisdiction in these cases, therefore, depends upon whether a case is randomly assigned to the First or the Fourteenth Court of Appeals. Because of this conflict, the Court has jurisdiction over the entire case, including Dr. Klein’s other issues and issues specific to Baylor. *Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001) (“As we have repeatedly recognized, if our jurisdiction is properly invoked on one issue, we acquire jurisdiction of the entire case.”).

Moreover, the availability of appeal and the underlying issues regarding the interpretation and application of chapter 312 of the Texas Health and Safety Code are important to the jurisprudence of the State. Indeed, the Court is currently considering

Franka v. Velasquez, 216 S.W.3d 409 (Tex. App.—San Antonio 2006, pet. granted), which involves the relationship between section 312.007(a) and section 101.106 of the Texas Tort Claims Act. That issue will also be presented to the Court in a petition shortly to be filed seeking review of Cause No. 01-07-00570-CV. *See infra* § IV.A.2.

ISSUES PRESENTED¹

Jurisdiction over Dr. Klein’s appeal:

Section 312.007(a) of the Texas Health and Safety Code declares that a supported medical school “is a state agency” and that a resident of such a school “is an employee of a state agency . . . for purposes of determining the liability, if any, of the person . . .” Baylor is a supported medical school, and Dr. Klein was a Baylor resident. Did the Court of Appeals err in finding that it had no jurisdiction to consider Dr. Klein’s appeal of orders denying a plea to the jurisdiction and a motion for summary judgment asserting immunity?

The merits of Dr. Klein’s assertion of immunity:

Does chapter 312 provide immunity under the circumstances of this case for Baylor and Dr. Klein in connection with their activities at a public hospital?

¹ Because of its erroneous resolution of the jurisdictional issue against Dr. Klein, the Court of Appeals found it unnecessary to reach his points of error regarding immunity. Argument and briefing is reserved for Dr. Klein’s brief on the merits pursuant to Tex. R. App. P. 53.4 for issues listed here and not fully treated herein.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Geoffrey Klein, M.D. respectfully files this Petition For Review to complain of the Court of Appeals' opinion and judgment issued on April 17, 2008 and would show the Court as follows:

I. INTRODUCTION

“[Dr. Klein] is an employee of a state agency . . . for purposes of determining the liability, if any, of the person. . . .” Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001).

In seeking interlocutory appellate review, Dr. Klein only asked the First Court of Appeals to hold that the above quoted section means exactly what it says. The First Court of Appeals refused. What is more, the Fourteenth Court of Appeals has held exactly the opposite. Thus, jurisdiction over an appeal like this one depends upon the fortuity of which Houston appellate court receives random assignment of the case. This problem is not an isolated one, and it threatens to interfere with the statutory structure for providing medical care to indigent patients in this State's largest city.

Dr. Klein, a resident at Baylor College of Medicine, provided care for the indigent citizens of Harris County under a publicly funded arrangement with the Harris County Hospital District that was blessed by the Legislature. This arrangement was part of a bargain struck by the Legislature in which “supported medical schools” and their physicians cooperate with each other and the government to fulfill the public purpose of providing this care, in exchange for which they are treated as public entities and public employees under the conditions specified in the statutes. Very simply, Baylor residents are supposed to be

treated the same as UT physicians when (as here) they are engaged in their publicly funded public purpose of providing charity care. Dr. Klein was not so treated.

When sued, Dr. Klein moved to dismiss and for summary judgment contending that he was immune. The trial court denied his motion, and regardless of the merits of that ruling, the First Court of Appeals dismissed his appeal in direct conflict with the position taken by the Fourteenth Court of Appeals concerning another Baylor physician. Section 51.014 provides jurisdiction for such appeals by employees of a state agency, and the Legislature has plainly declared that Dr. Klein is such an employee for this purpose. The First Court, therefore, is just as plainly wrong and must be reversed.

II. STATEMENT OF FACTS

A. Baylor Provides Medical Care At Ben Taub, A County Hospital Created To Provide Care To The Indigent And Needy

Counties with at least 190,000 inhabitants, like Harris County, are statutorily empowered to “create a countywide hospital district and provide for the establishment of a hospital or hospital system to furnish medical aid and hospital care to indigent and needy persons residing in the district.”² This case concerns medical care provided in 1994 by Dr. Klein, then a second-year resident in Baylor’s obstetrics and gynecology residency program, at one such hospital for the indigent and needy, Ben Taub General Hospital (“Ben Taub”), part of the Harris County Hospital District.³

² Tex. Health & Safety Code Ann. § 281.002(a) (Vernon 2001 & Supp. 2007).

³ See *Klein*, 2008 WL 1747479, at *1; 1st Supp. at 6:1791; see also www.hchdonline.com/about/history.htm (giving the history of the Harris County Hospital District, including Ben Taub).

In 1994, the residents and faculty of Baylor’s residency program provided all obstetrical and gynecological medical care services at Ben Taub, and they still do so today.⁴ They do so because Baylor, a private, non-profit institution, is a supported medical school,⁵ and the Legislature has authorized “coordination and cooperation” between public hospitals like Ben Taub⁶ and “supported medical or dental schools.”⁷ In chapter 312 of the Texas Health and Safety Code, the Legislature has “remove[d] impediments to that coordination and cooperation in order to: (1) enhance the education of students, interns, residents, and fellows attending [the schools]; (2) enhance patient care; and (3) avoid any waste of public money.”⁸ Basically, supported medical or dental schools contract to provide medical, dental or other patient services to public hospitals⁹; schools get places to teach, their medical trainees and dental trainees and staff get patients to treat, patients receive the most up-to-date care, and the State saves money by not having to do these things itself.

⁴ See *Klein*, 2008 WL 1747479, at *1; 1CR56-134; 2CR290-364, 370-535; 4CR832-43.

⁵ See *Klein*, 2008 WL 1747479, at *3 (“Baylor did present summary judgment evidence that it is a supported medical school engaged in the type of medical clinical education required for Baylor to invoke section 312.006.”); see also Tex. Health & Safety Code Ann. § 312.002(6) (Vernon 2001) (defining “supported medical or dental school”).

⁶ See Tex. Health & Safety Code Ann. § 312.002(5) (Vernon 2001 & Supp. 2007) (“‘Public hospital’ means a hospital, clinic, or other facility for the provision of health care or dental care that is owned or operated by the federal government, the state, or a political subdivision or municipal corporation of the state, including a hospital district or authority.”).

⁷ Tex. Health & Safety Code Ann. § 312.001(b) (Vernon 2001).

⁸ *Id.*

⁹ See Tex. Health & Safety Code Ann. §§ 312.003, .004 (Vernon 2001).

B. Baylor’s Compensation For This Care Is Approved And Paid By The State And The County

Chapter 312 authorizes supported medical and dental schools to contract with public hospitals through a coordinating entity.¹⁰ Here, Baylor and the University of Texas Medical School at Houston (“UT”), through the University of Texas Health Science Center at Houston, agreed to provide medical care and services, and medical education, training and research activities at Ben Taub and the other public hospital facilities and clinics owned and operated by the Harris County Hospital District through a coordinating entity called Affiliated Medical Services (“AMS”).¹¹ The agreement between Baylor and UT regarding AMS was submitted to and approved by the Texas Commissioner of Health.¹² Likewise, AMS was approved and certified by the State Board of Medical Examiners as a non-profit corporation organized to benefit “the public.”¹³

¹⁰ See Tex. Health & Safety Code Ann. §§ 312.003, .004 (Vernon 2001).

¹¹ See 1CR56-134; 2CR290-364.

¹² 1CR68; see 2CR415.

¹³ 1CR68 (stating that AMS was approved and certified under what is now section 162.001 of the Texas Occupations Code). Section 162.001(b) provides in pertinent part:

The board shall approve and certify a health organization that:

(1) is a nonprofit corporation . . . organized to:

(A) conduct scientific research and research projects in the public interest in the field of medical science, medical economics, public health, sociology, or a related area;

(B) support medical education in medical schools through grants and scholarships;

(C) improve and develop the capabilities of individuals and institutions studying, teaching, and practicing medicine;

(D) deliver health care to the public; or

AMS entered into an “Agreement of Affiliation” with the Harris County Hospital District.¹⁴ This agreement also had to be submitted to and approved by the Commissioner of Health.¹⁵ In addition, it had to be approved by the Commissioner’s Court of Harris County, Texas, “sitting as the governing body of Harris County.”¹⁶ The agreement sets out Baylor’s responsibilities with regard to staffing the District’s various facilities, the amounts of public money Baylor is to receive, the public purposes Baylor is expected to serve in exchange for the money, and the oversight and approval exercised by various public officials and bodies.¹⁷

With regard to compensation in particular, Baylor’s compensation is recalculated every year.¹⁸ The agreed amount includes “only the costs associated with the actual District patient care activities and District administrative activities of Providers furnished to the District,” and must be “presented to the Commissioner’s Court of Harris County for its review and approval,” and “filed with the Board of Health for approval by the Commissioner of Health.”¹⁹ The “absolute essence” of the agreement is that the

(E) instruct the general public in medical science, public health, and hygiene and provide related instruction useful to individuals and beneficial to the community;

Tex. Occ. Code Ann. § 162.001(b) (Vernon 2004 & Supp. 2007).

¹⁴ See 2CR410-12.

¹⁵ 2CR506.

¹⁶ 2CR508.

¹⁷ See generally 2CR416-487.

¹⁸ 2CR453-54.

¹⁹ 2CR455-58.

compensation owed Baylor is part of the Harris County Hospital District’s publicly-funded budget for the year.²⁰

Moreover, while Baylor is expected to provide and pay for malpractice coverage or self-insurance for itself and its “medical and other students,”²¹ to the extent the claims experience increases the cost of such insurance, it is a cost that goes into the formula for computing Baylor’s compensation and comes directly out of the public coffers.²² That is, “the District has agreed to pay such costs for House Staff professional liability insurance coverage as an element of the annual Contract Amount.”²³

C. The Legislature Has Defined Baylor Physicians Working At Ben Taub As “Employee(s) Of A State Agency”

Because Baylor employees like Dr. Klein are working for the public at public hospitals and public money is being paid for their services, the Legislature—in chapter 312—made them employees of state agencies for specific purposes. Entitled “Individual Liability,” section 312.007(a) provides in pertinent part that a “supported medical or dental school . . . is a state agency, and a director, trustee, officer, intern, resident, fellow, faculty member, or other associated health care professional or employee of a . . . supported medical or dental school . . . *is an employee of a state agency* for purposes of Chapter 104, Civil

²⁰ See 2CR462 (“Prior to the execution of the Agreement, the District has advised AMS, and AMS clearly understands and agrees, such understanding and agreement being of the absolute essence of this Agreement, that with respect to each Fiscal Year during the Term, the District intends to place in its annual Fiscal Year budget the annual Contract Amount . . . , which intended budget amount is subject to Harris County Commissioner’s Court approval.”).

²¹ See 2CR438-40.

²² 2CR456-58.

²³ 2CR458.

Practice and Remedies Code, *and for purposes of determining the liability*, if any, of the person for the person's acts or omissions while engaged in the coordinated or cooperative activities of the . . . school"²⁴ As the Court of Appeals noted, chapter 104 "provides the circumstances under which the state must indemnify its employees, former employees, and certain individuals under contract with or in the service of particular state entities for damages, court costs, and attorney's fees."²⁵ Dr. Klein is thus an employee of a state agency for two purposes.²⁶ He enjoys the same liability protections as state agency employees (the "determining the liability" purpose), and also, if ultimately found liable, the same rights to indemnity from the state (the "Chapter 104" purpose).

Dr. Klein moved to dismiss and for summary judgment essentially on the basis that the "determining the liability" purpose, in conjunction with other provisions of chapter 312, entitle him to immunity.²⁷ The trial court denied both motions, and the Court of Appeals dismissed his interlocutory appeal for lack of jurisdiction.²⁸

III. SUMMARY OF THE ARGUMENT

Section 312.007(a) makes Dr. Klein an "employee of a state agency." And an individual who is an employee of the state has the right to an interlocutory appeal from the

²⁴ Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001) (emphasis added).

²⁵ *Klein*, 2008 WL 1747479, at *4 n.14 (citing Tex. Civ. Prac. & Rem. Code Ann. §§ 104.001-.009 (Vernon 2005 & Supp. 2007)).

²⁶ See Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 10.46 (2d ed. 2006) (recognizing that "and" is a coordinating conjunction that joins "clauses of equal stature").

²⁷ See *Klein*, 2008 WL 1747479, at **1-2, 4.

²⁸ *Klein*, 2008 WL 1747479, at *1.

denial of specific rulings denying an immunity defense. As that is exactly the situation here, the Court of Appeals had no power to dismiss his appeal for lack of jurisdiction.

IV. ARGUMENT AND AUTHORITIES

A. Reasons The Court Should Grant Review

I. The Fourteenth Court and the First Court are in direct conflict concerning appellate jurisdiction

At present a Baylor physician's entitlement to take an interlocutory appeal depends entirely upon the random assignment of his or her case. If assigned to the Fourteenth Court, the appeal will be heard (as in *Young*); but if assigned to the First Court, it will instead be dismissed for lack of jurisdiction (as here). This situation is untenable.

Young presents almost identical facts as this case. The parents of a minor child allegedly injured by negligent treatment at Ben Taub sued Dr. Young and Baylor, who filed joint motions for summary judgment and to dismiss. 231 S.W.3d at 2. As here, the plaintiffs nonsuited all of their claims against Baylor before the trial court ruled on the motions. *Id.* The trial court subsequently denied the motions as to Dr. Young. *Id.* Both Baylor and Dr. Young appealed. *Id.* The Fourteenth Court found that it did have jurisdiction to consider Dr. Young's appeal:

Dr. Young is a faculty member at Baylor. Therefore, the evidence submitted by Baylor proves that, under section 312.007(a), this court must treat Dr. Young as an employee of a state agency for purposes of determining her liability, if any, for her acts or omissions while engaged in the activities that gave rise to the [plaintiffs'] claims. In determining the liability, if any, of an employee of a state agency for her acts or omissions, trial courts may rule on motions for summary judgment asserting immunity, and if trial courts deny such motions, then courts of appeals may entertain interlocutory appeals from the order denying these motions. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5). Therefore, we conclude that this court has

appellate jurisdiction over Dr. Young's appeal from the trial court's interlocutory order denying the Summary Judgment Motions as to her.

Id. at 8 (citation omitted). Contrary to the First Court, there is nothing "circular" about this reasoning. *Klein*, 2008 WL 1747479, at *6. It is exactly what the law requires.

2. The statutory scheme making up this case is currently before the Court and other cases are right behind this one

This is neither the first nor the last time the Court will be called upon to consider immunity provided by chapter 312. At issue in *Franka*, pending before the Court in No. 07-0131, is whether section 101.106 of the Civil Practice and Remedies Code entitles physicians at the University of Texas Health Science Center at San Antonio to be dismissed from suits based on conduct occurring in the course of their employment.²⁹ The petitioners maintain that section 312.007(a) makes them employees of a governmental unit for purposes of this immunity defense.³⁰

In *Zimmerman v. Anaya*, No. 01-07-00570-CV, 2008 WL 2339805 (Tex. App.—Houston [1st Dist.] June 5, 2008, no pet. h.) (mem. op.), the First Court of Appeals followed *Klein* and held that another Baylor resident at Ben Taub was not entitled to an interlocutory appeal based on an assertion of immunity under section 312.007(a). The petition for review is currently due on Monday, July 21, 2008. *Zimmerman*, like *Franka*, involves the question of whether immunity under section 101.106 of the Tort Claims Act applies to Baylor physicians

²⁹ See App. H at xii, xiv.

³⁰ See App. H at 34-37 (“[T]he legislature provided in § 312.007(a) that participating medical schools would be deemed state agencies and that participating professionals would be deemed state employees for purposes of individual liability and state indemnity.”).

through section 312.007(a) of the Health and Safety Code. As Petitioners' counsel are handling the *Zimmerman* appeal as well, the Court can be assured that a petition will be filed. Given the conflict between the First Court and the Fourteenth Court, others are sure to follow.

B. The First Court Of Appeals Wrongly Declined To Exercise Jurisdiction

Statutory construction is a question of law. *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989). “ ‘Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language, and not elsewhere.’ ” *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 860 (Tex. 2005) (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment) (quoting *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (Tex. 1920)). “ ‘Straightforward statutory construction ensures that ordinary citizens are able ‘to rely on the plain language of a statute to mean what it says.’ ” *Id.* (quoting *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex. 1999)). “ ‘But when courts ‘abandon the plain meaning of words, statutory construction rests upon insecure and obscure foundations at best.’ ” *Id.* (quoting *State v. Jackson*, 376 S.W.2d 341, 346 (Tex. 1964)). And the First Court abandoned the plain meaning here.

Section 51.014(a)(5) of the Civil Practice and Remedies Code provides that a person may appeal from an interlocutory order of a district court that “denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.” Tex. Civ. Prac. &

Rem. Code Ann. § 51.014(a)(5) (Vernon Supp. 2007). That is, appellate jurisdiction exists when there is (1) the right kind of party; (2) complaining of the right kind of order; and (3) raising the right kind of defense. The right kind of party is “an officer or employee of the state.” The right kind of ruling is the denial of a summary judgment motion. The right kind of defense is an “assertion of immunity.” Here we have all three.

I. Dr. Klein, a statutory employee of a state agency, is a proper appellant under section 51.014(a)(5)

According to the Court of Appeals, it had no jurisdiction to consider this appeal because “the plain language of section 312.007(a), as quoted above, does not confer upon Dr. Klein the immunity from liability enjoyed by an employee of a state agency.” *Klein*, 2008 WL 1747479, at *7. ***But it plainly does.*** Dr. Klein “is an employee of a state agency . . . for purposes of determining [his] liability, if any” for his actions at Ben Taub. Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001).³¹

More importantly, the *merits* of Dr. Klein’s “immunity from liability” arguments are irrelevant. *See* § IV.B.3, *infra*. All that matters for jurisdictional purposes is that section 312.007(a) makes him “an employee of a state agency”—*i.e.*, a state employee—with regard to determining his liability for the claims at issue. Tex. Health & Safety Code Ann. § 312.007(a) (Vernon 2001); *see Young*, 231 S.W.3d at 8 & n.6 (declining to “address the effect, if any, of section 312.007 on the defenses available to [the doctor] in this case.”). This alone brings him within the jurisdiction conferred by section 51.014.

³¹ *See Campbell v. Jones*, 264 S.W.2d 425, 427 (Tex. 1954) (recognizing that government employees have common-law immunity from personal liability while performing discretionary duties in good faith within the scope of their authority).

Instead of simply reading the statute, the Court of Appeals invented a requirement that the individual be an “*actual*” state employee. *Klein*, 2008 WL 1747479, at *7. The court provided no inkling of where it got this “actual” requirement from—certainly not section 51.014(a)(5) itself—much less explain who it considers qualified for this status. Moreover, there is no explanation why a person whom the Legislature declares to be an employee of a state agency is anything less than an “actual” employee of a state agency. “As a rule, a court should not by judicial fiat insert non-existent language into statutes or into parties’ agreed-to contracts, or delete existent language from them either.” *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 n.41 (Tex. 2007). The plain wording of section 312.007(a) means that Dr. Klein satisfies even this made-up “actual employee” standard.

2. The right kind of ruling is (as here) the denial of a summary judgment motion under section 51.014(a)(5)

There is no question that this element is also satisfied. *See Klein*, 2008 WL 1747479, at *1 (“In this interlocutory appeal, Baylor and Dr. Klein challenge the trial court’s order denying their joint motion to dismiss, for lack of jurisdiction, . . . and the trial court’s order denying their joint motion for summary judgment.”) (citation omitted).

3. The right kind of defense is “an assertion of immunity,” and immunity is precisely what Dr. Klein has asserted

Again, section 51.014(a)(5) requires only “an *assertion* of immunity” for appellate jurisdiction to exist. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(5) (Vernon Supp. 2007) (emphasis added). “It is generally presumed that every word in a statute is used for a

purpose.” *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 600 (Tex. 1975).³² An assertion is a “declaration or allegation.” *Black’s Law Dictionary* 124 (8th ed. 2004).³³ Section 51.014(a)(5) must be construed, therefore, to require simply an allegation of immunity.³⁴ See *City of Beverly Hills v. Guevara*, 904 S.W.2d 655, 656 (Tex. 1995) (per curiam) (“The City’s motion for summary judgment was clearly ‘based on’ official immunity within the meaning of section 51.014(5). Whether the claim of official immunity was valid should have been decided on the merits.”). As Dr. Klein certainly asserted his immunity under chapter 312, this element is satisfied as well. In their joint answer, for example, Baylor and Dr. Klein “hereby expressly invoke the affirmative defense authorized by . . . TEX. HEALTH & SAFETY CODE Section 312 et seq., TEX. CIV. PRAC. REM. CODE Section 101 et seq., and TEX EDUC. CODE Section 61 et seq. limiting the liability and suit **and providing immunity** of said Defendants.”³⁵ Likewise, the basis for their summary judgment motion is that “Movants are entitled to summary judgment because they are **immune from liability and suit** under Texas Health & Safety Code § 312.006.”³⁶

³² See also *AMX Enters., Inc. v. Bank One, N.A.*, 196 S.W.3d 202, 208 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (“It is a well-settled rule of statutory construction that we must presume that every word of a statute has been used for a purpose. Likewise, we must presume that every word excluded from a statute has been excluded for a purpose.”) (citation omitted).

³³ See also *Webster’s Third New Int’l Dictionary of the English Language Unabridged* 131 (2002) (defining “assertion” as both “insistent and positive affirming, maintaining or defending (as of a right or attribute),” and “a declaration that something is the case”).

³⁴ The allegation must obviously be colorable, *i.e.*, there must be some basis for it. Here, that basis is provided by section 312.007(a).

³⁵ 1CR52 (capitalization in original) (emphasis added).

³⁶ 1CR56 (emphasis added). Petitioners also asserted immunity in their supplemental motion for summary judgment and motion to dismiss. See 2CR383 (“For the reasons set forth above and in the motion for summary judgment, Movants are immune from suit and liability pursuant to TEX. HEALTH &

The Court of Appeals, however, ignored that only an “assertion” is necessary. Without explaining its reasoning, the court apparently disagrees that Dr. Klein enjoys immunity under chapter 312. But again, the focus of the section 51.014(a)(5) inquiry is *not* on the *merits* of Dr. Klein’s appeal, just that he has asserted the right kind of claim. And he has. The Court of Appeals had no authority to dismiss his appeal for lack of jurisdiction, especially if it is going attempt a de facto ruling on the merits.

C. An Answer To The Court Of Appeals’ Question

The crux of the Court of Appeals’ error is revealed in its rhetorical question: “Why would the Legislature grant doctors, like Klein and Young, the right to appeal their summary judgment motions, but deny their employer, like Baylor, the right to appeal the denial of its jurisdictional plea?” *Klein*, 2008 WL 1747479, at *7. Well, first and foremost, the Legislature hasn’t. Both Baylor and its physicians are given statutory right to interlocutory appeal. But beyond this, Dr. Klein can appeal because the statutory language compels such a finding. And just because the Court of Appeals couldn’t think of a reason doesn’t mean there isn’t one (or many). *See id.*

“The very reasons for the grant of immunity are effectively unsalvageable if the official is determined to be immune from liability only after a trial on the merits. The articulated basis for such immunity is: the importance of avoiding distraction of officials from their governmental duties; the desire to avoid inhibition of discretionary action; minimizing deterrence of able people from public service; avoiding the costs of an

SAFETY CODE Section 312 et seq., TEX. CIV. PRAC. REM. CODE Section 101 et seq., and TEX EDUC. CODE Section 61 et seq., and as such, their motion for summary judgment and motion to dismiss are meritorious.”).

unnecessary trial; and insulating officials from burdensome discovery.” *Travis v. City of Mesquite*, 830 S.W.2d 94, 102 n.4 (Tex. 1992) (Cornyn, J., concurring) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). These concerns are present here, and the legislative grant of jurisdiction must be followed..

V. CONCLUSION AND PRAYER

Dr. Klein is an “employee of a state agency” whose claim of immunity was denied by the trial court. By law, he is entitled to have his appeal of that decision heard by the Court of Appeals. Accordingly, Dr. Klein asks this Court to order full briefing on the merits, to grant its petition for review, and to reverse the judgment of the Court of Appeals and remand, and to grant such other and further relief to which Petitioners shall show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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