IN THE SUPREME COURT OF TEXAS

NO. 02-0849

DIVERSICARE GENERAL PARTNER, INC., DIVERSICARE LEASING CORPORATION, ADVOCAT, INC., AND TEXAS DIVERSICARE LIMITED PARTNERSHIP D/B/A GOLIAD MANOR, PETITIONERS,

v.

MARIA G. RUBIO AND MARY HOLCOMB AS NEXT FRIEND OF MARIA G. RUBIO, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued September 24, 2003

JUSTICE O'NEILL, joined by JUSTICE BRISTER and JUSTICE GREEN, dissenting.

The facts of this case are not in dispute: in 1995, an elderly Alzheimer's patient was sexually assaulted by another patient while both were under the full-time care of a nursing home. The only question before us is whether the injured patient's claim against the nursing home is more properly characterized as an ordinary negligence claim or a health care liability claim. In this case, the pleadings themselves did not allege facts establishing which standard should govern the case. During trial court proceedings, plaintiff's counsel suggested that the claim derived, at least in part, from the nursing home's alleged failure to properly staff the facility. To the extent that it does, I

agree that the statute governing health care liability claims applies. I respectfully dissent, however, because the petition, liberally construed, alleges a broader claim for premises liability.

I

The Legislature enacted the Medical Liability and Insurance Improvement Act (MLIIA) in order to reduce the cost of medical malpractice insurance and thereby increase patients' access to health care. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(b)(1)-(5), 1977 Tex. Gen. Laws 2039, 2040 (former TEX. REV. CIV. STAT. art. 4590i, § 1.02(b)(1)-(5)), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. To accomplish these goals, the MLIIA mandates that plaintiffs follow certain procedures when bringing health care liability claims against physicians or other health care providers — for example, claimants must bring suit within two years, and they must file an expert report substantiating their claims within 180 days of filing suit. *Id.* §§ 10.01, 13.01. The MLIIA also contains limitations on the amount of damages recoverable. *Id.* § 11.02.

By its terms, the MLIIA imposes these restrictions on any "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" that causes injury to a patient. *Id.* § 1.03(a)(4). We have recognized that the heightened requirements applied to health care liability claims may sometimes create an incentive for litigants to re-cast a health care liability claim as another type of claim, and we have therefore held that courts must look beyond the pleadings to examine the nature of the underlying action. *MacGregor Med. Ass'n v. Campbell*, 985 S.W.2d 38, 40 (Tex. 1998).

Analyzing the underlying action is not always an easy task, but it is one that courts must undertake with great care; the Legislature's purpose in enacting the MLIIA may be thwarted if courts construe the MLIIA's definition of "health care liability claim" either too broadly or too narrowly. An overly narrow interpretation would render the statute ineffective because it would exclude too many suits from the statute's reach and thus hinder the Legislature's goal of reducing malpractice insurance rates.

Somewhat counterintuitively, however, an overly broad interpretation could have the same result. Health care providers, like other insured professionals, generally carry two insurance policies: a general liability policy that covers ordinary negligence, and a malpractice policy "to cover obligations arising from the rendering of professional services." *Cochran v. B.J. Servs. Co. USA*, 302 F.3d 499, 502 (5th Cir. 2002); *see also Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 201 (Tex. 2004). If a court determines that a plaintiff's pleadings allege a breach of the applicable standard of care for health care providers, then the defense and indemnification expenses will most likely fall under the malpractice policy rather than the general insurance policy. *See* TEX. INS. CODE art. 21.49–3, § 2(1)(defining "medical liability insurance" as applying to claims "arising out of the death or injury of any person as the result of negligence in rendering or the failure to render professional service by a health care provider"). Insurers therefore face their own litigation incentives: malpractice insurers benefit when a claim is characterized as ordinary negligence, and general-liability insurers benefit when a claim is characterized as a health care liability claim. *See Utica Nat'l Ins. Co.*, 141 S.W.3d at 201 (addressing a claim in which the general-liability insurer asserted that a patient's injuries arose from the "rendering or failure to render [a] professional

service"; the patient contracted Hepatitis C from an injection of contaminated drugs it failed to adequately secure); *see also Harris v. Sternberg*, 819 So. 2d 1134, 1137 (La. Ct. App. 2002) (addressing a claim in which the malpractice insurer asserted that the patient's injuries arose from ordinary negligence; the patient slipped and fell from the doctor's scale). Consequently, the adoption of an overly broad interpretation of "health care liability claim" could also hinder the Legislature's goal of ensuring that medical malpractice insurance is available at a reasonable cost: if courts sweep even ordinary negligence claims into the ambit of the MLIIA, then malpractice insurers may end up covering more of those claims. Malpractice insurance rates would then continue to rise as those insurance policies are required to cover claims that were not contemplated under the insurance contracts.

This Court has recognized the importance of correctly classifying these claims and has developed a framework for analysis in these cases. If a claim arises from an action that is an "inseparable part of the rendition of medical services," then the MLIIA applies to the claim. *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995). Thus, if a plaintiff, in order to "successfully prove th[e] claim, . . . must prove a breach of the applicable standard of care for health care providers," then the action arises under the MLIIA — regardless of how the litigants choose to characterize it. *MacGregor Med. Ass'n*, 985 S.W.2d at 40-41 (holding that a claim that a health care provider failed to properly diagnose and treat a patient was a health care liability claim even though the plaintiff attempted to characterize it as a DTPA claim arising from the provider's alleged misrepresentation that it would provide "qualified personnel and resources," and "the best health services possible"). However, if the claim is not based upon such a breach, then it is not a health care liability claim.

Sorokolit v. Rhodes, 889 S.W.2d 239, 242 (Tex. 1994) (holding that a claim that a physician "knowingly breached his express warranty of a particular result" was not a health care liability claim because it did not require "a determination of whether a physician failed to meet the standard of medical care").

Courts in other states have applied a similar framework. First, they have tended to construe state malpractice statutes as applying only to breaches of the professional standard of care. *See*, *e.g.*, *Dorris v. Detroit Osteopathic Hosp. Corp.*, 594 N.W.2d 455, 465 (Mich. 1999) (holding that Michigan's medical malpractice statute would apply to a claim raising "questions of professional medical management"); *Woodard v. Krans*, 600 N.E.2d 477, 488 (Ill. App. Ct. 1992) (holding that "[w]here determining the standard of care requires applying distinctively medical knowledge or principles, however basic, the plaintiff must comply with [Illinois's malpractice statute]"). Second, they have held that claims not directly tied to the provision of health care should be governed by an ordinary negligence standard. *See Cannon v. McKen*, 459 A.2d 196, 201 (Md. 1983) ("Those claims for damages arising from a professional's failure to exercise due care in non-professional situations such as premises liability, slander, assault, etc., were not intended to be covered under [Maryland's malpractice act] and should proceed in the usual tort claim manner."); *see also Dent v. Memorial Hosp.*, 509 S.E.2d 908, 910 (Ga. 1998) (holding that negligence in the decision of "[w]hether to use certain equipment at all, what type of equipment to use, and whether certain equipment should be available in a specific case" would amount to malpractice, but that "the failure to operate equipment correctly or in accordance with a doctor's instructions or to keep certain equipment on hand is only ordinary, not professional, negligence").

In this case, Ms. Rubio's pleadings do not clearly establish whether all of her claims pertain to breach of the "applicable standard of care for health care providers," *MacGregor Med. Ass'n*, 985 S.W.2d at 41, or whether some of the claims assert a breach only of an ordinary standard of care. Several of her allegations could pertain either to general negligence or to professional malpractice; for example, she alleges that Diversicare failed to "protect Ms. Rubio from repeated acts of sexual abuse and assault by others . . . ." Ms. Rubio's pleadings do not specify what particular acts or omissions led to the assaults. Sadly, it has been recognized that "nursing-home residents and hospital patients have been the victims of assault not only by employees but also by others, even persons wandering in off the street." *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 49 S.W.3d 107, 113 (Ark. 2001). Consequently, an assault in a residential care facility may arise from any number of negligent acts: failure to secure the premises, failure to adequately screen personnel, failure to adequately restrain mentally impaired patients, or failure to provide adequate nursing services. *See*, *e.g.*, *id.*; *see also Reaux v. Our Lady of Lourdes Hosp.*, 492 So. 2d 233 (La. Ct. App. 1986), *writ denied*, 496 So. 2d 333 (La. 1986) (holding that allegations of assault, rape, and battery by a hospital intruder did not fall within Louisiana's Medical Malpractice Act); ERIC M. CARLSON, LONG-TERM CARE ADVOCACY § 10.09 (2002). Thus, an allegation that a nursing home failed to protect a patient from assault can sound either in medical malpractice or in ordinary negligence.

A

To the extent that Ms. Rubio's causes of action depend on an underlying claim of understaffing, I agree that they are governed by the MLIIA. Ms. Rubio's attorneys suggested in the

trial court that her claims related to the nursing home's staffing procedures, stating that the "underlying cause" of the assault was that the nursing home was "dangerously understaffed." In this Court, the attorneys emphasized at oral argument that the sexual-assault claim was "inextricably intertwined with what's necessary for an Alzheimer patient-to-staff ratio" and agreed that their legal argument was based on the premise that "there is no medical judgment in determining how much staff is needed for those patients more in need of supervision."

This premise, however, is incorrect; in fact, a nursing home is required by law to use medical judgment in its staffing decisions. 40 TEX. ADMIN. CODE § 19.1001. State regulations require that a nursing home offer "sufficient staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care." *Id.* The "resident assessment" requires the facility to analyze, among other things, the resident's "physical functioning and structural problems," "psychosocial well-being," and "disease diagnoses and health conditions." *Id.* § 19.801. The "plan of care" must be prepared by "an interdisciplinary team that includes the attending physician, a registered nurse with responsibility for the resident, and other appropriate staff" and must include "measurable short-term and long-term objectives and timetables to meet a resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment." *Id.* § 19.802. Because a nursing home is required to consider the physical and mental-health conditions of each of its residents in determining its staffing needs, these decisions simply cannot be made without employing medical judgment.

B

Not all of the claims pleaded by Ms. Rubio necessarily related to the allegations of understaffing, however. Instead, her pleading also asserted that the facility failed to use ordinary care to protect her from a known danger; specifically, she pleaded that "[d]efendants were well aware" of the alleged assailant's sexual-assault history and that the facility failed "to take preventive measures to avert any reoccurrence." This allegation, broadly construed, asserts a premises liability claim; it does not necessarily require the exercise of medical judgment, but could instead be read to support a claim that the facility failed to use ordinary care to secure the premises.

Ms. Rubio's premises liability claim is similar to the claims in several other cases decided by our courts of appeals. *See Healthcare Ctrs. of Tex., Inc. v. Rigby*, 97 S.W.3d 610, 616–17 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Zuniga v. Healthcare San Antonio, Inc.*, 94 S.W.3d 778, 780 (Tex. App.—San Antonio 2002, no pet.); *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 670 (Tex. App.—Dallas 2001, no pet.); *Sisters of Charity of the Incarnate Word, Houston, Tex. v. Gobert*, 992 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1997, no pet.). The Court today overrules these cases "to the extent they hold that the patients' claims for assault by other patients are not health care liability claims." ___ S.W.3d ___, ___. I would not overrule these cases; each of the plaintiffs in these cases assert claims that extend beyond claims for "inadequate care and supervision," just as Ms. Rubio did in this case. In *Rigby*, for example, there was evidence that a nursing home administrator induced a nursing home to accept a sexually violent patient by misrepresenting the scope of the patient's prior acts. *Rigby*, 97 S.W.3d at 615. Deliberate misrepresentation does not involve medical judgment. Furthermore, there was evidence that the

facility in that case knew the attacker had a history of sexual violence and yet failed to take even ordinary safety precautions; in that case, I believe the court of appeals correctly concluded that the suit was based on "simple negligence in failing to take adequate safety measures to protect its residents from a known sexual deviant." *Id.* at 622.

Nor would I overrule the other cases. In *Bush*, a patient was assaulted by another patient while under the care of a hospital facility; the plaintiff claimed that the facility failed to warn her of a known danger. *Bush*, 39 S.W.3d at 670-71. I would not hold that a duty to warn of a known danger on the premises depends on medical judgment or skill. In *Zuniga*, a case with similar facts, the plaintiff also brought a premises liability claim that was not limited to questions relating to proper treatment but instead asserted that the facility "did not provide her a safe environment." *Zuniga*, 94 S.W.3d at 782. Finally, in *Gobert*, the court neither mentioned the MLIIA nor considered whether it would apply to the case. *Gobert*, 992 S.W.2d 25.

Because the pleadings in this case did not allege facts establishing whether Ms. Rubio's claims resulted from an alleged failure to provide adequate patient care or resulted from an alleged failure to secure the premises, the pleadings did not establish whether the claim was a health care liability claim or whether it sounded in ordinary negligence. When a plaintiff's pleading does not give "fair and adequate notice of the facts upon which the pleader bases his claim," then the defendant may file special exceptions to obtain a more definite statement of the plaintiff's claim. *Roark v. Allen*, 633 S.W.2d 804, 810 (Tex. 1982). Here, however, the nursing home did not file special exceptions. We have recognized that in the absence of such special exceptions, the petition must be "construed liberally in favor of the pleader" and that the court "should uphold the petition

as to a cause of action that may be reasonably inferred from what is specifically stated . . . ." *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993). Consequently, I would hold that the petition, construed liberally in favor of Ms. Rubio, stated a cause of action for premises liability. *See Charrin v. Methodist Hospital*, 432 S.W.2d 572, 574 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ) ("A patient accepted by a hospital enjoys the status of an invitee or business visitor entitled to the exercise of ordinary care by the hospital to keep its premises in reasonably safe condition for the expected use.").

II

I also note my disagreement with the suggestion in CHIEF JUSTICE JEFFERSON's concurrence that a "safety" claim under the MLIIA need not be related to the provision of health care. Instead, I agree with the Court that the MLIIA encompasses claims for a "departure from an accepted standard of . . . safety" when those claims are directly related to the provision of health care, including claims based on "professional supervision, monitoring, and protection of . . . patient[s]." ___ S.W.3d at ___.

The statute in effect at the time this case arose provided that claims "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" would be governed by the MLIIA. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4)) (repealed 2003). The Legislature did not provide that the statute governs all claims against a health care provider or physician; instead, it limited the statute's scope

to claims "for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety." *Id.*

CHIEF JUSTICE JEFFERSON suggests that the term "safety" is broad enough to encompass a premises liability claim unrelated to the provision of health care. ___ S.W.3d at ___. I disagree that the term can be read so broadly; instead, it must be read in the context of the MLIIA, which was enacted to address concerns about health care costs. TEX. GOV'T CODE § 311.011 (providing that "[w]ords and phrases shall be *read in context*" as well as "construed according to the rules of grammar and common usage") (emphasis added); *see also Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (noting that it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

If we follow the dictates of the Code Construction Act and read the term "safety" in the context of the statute as a whole, then the natural conclusion is that "safety" in this statute means safety *as it relates to health care*. This is the conclusion that has been reached by each of the courts of appeals considering the issue; these courts have then analyzed whether professional judgment is required to determine the proper standard of safety or whether only a general duty of care is implicated. *See Marks v. St. Luke's Episcopal Hosp.*, No. 01-04-00228-CV, 2005 Tex. App. LEXIS 1694, at *8 (Tex. App. Houston [1st Dist.] 2005, pet. filed) (noting that, in a case where a patient was injured by a broken hospital bed, "[t]he underlying nature of his allegations is of an unsafe condition created by an item of furniture," and concluding that "[s]uch a complaint relates to premises liability, not health care liability, and is governed by the standard of ordinary negligence");

Bush, 39 S.W.3d at 673 ("Although the Act includes breaches of accepted standards of safety within the definition of a health care liability claim, the term 'safety' cannot be read in isolation. The breach must be of an accepted standard of safety within the health care industry.") (citation omitted); *Rogers v. Crossroads Nursing Serv., Inc.*, 13 S.W.3d 417, 419 (Tex. App.—Corpus Christi 1999, no pet.) (noting that "[o]ne of the rules of statutory construction is to construe the entire Act, reading each part of it so that one part does not conflict with another and to harmonize its various provisions," and concluding that "the only reasonable interpretation is that a departure from accepted standards of safety means safety in the diagnosis, care or treatment").

The Legislature itself has recently indicated that it agrees with our appellate courts' consistent judicial interpretation of the word "safety" in this statute. When it recently amended the definition of "health care liability claim," the Legislature clarified that claims falling under the statute must relate to the actual provision of health care. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). The statute now provides that all claims "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*" are included in the definition of health care liability claim. *Id*. (emphasis added). Although I believe that the plain language of the former statute makes it clear that "safety" was intended to be related to health care, this amendment removes any doubt. *See Alexander v. Alexandria*, 9 U.S. 1, 7-8 (1809) (concluding that the subsequent amendments of a legislative body may "show the sense in which the legislature employed doubtful phrases previously used," and that courts should accept this "legislative sense of its own language" as "a direction to courts in expounding the provisions of the law"); *see also Red Lion Broadcasting Co. v. FCC*, 395

U.S. 367, 381-82 (1969) (noting that a consistent statutory interpretation should be given great weight when a legislative body has not merely silently acquiesced to that interpretation, but has actually "ratified it with positive legislation"). The Legislature has now enacted positive legislation ratifying the courts of appeals' construction of the term "safety," and I believe we should interpret the term in accordance with this construction.

III

I agree that the MLIIA would govern a claim that the nursing home failed to properly staff the facility. Because a nursing home is required to consider the physical and mental-health conditions of each of its residents in determining its staffing needs, staffing decisions cannot be made without employing medical judgment. Similarly, any safety claim arising from such staffing decisions would be "directly related to health care" and therefore also covered under the MLIIA. However, because the plaintiff's petition also included an allegation that the facility failed to use ordinary care to protect her from a known sexual offender, it alleged a broader premises liability claim. I therefore respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: October 14, 2005