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 WAINWRIGHT delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE MEDINA, JUSTICE JOHNSON, and JUSTICE WILLETT joined, and in which CHIEF JUSTICE JEFFERSON joined as to Part III(B)(3).

CHIEF JUSTICE JEFFERSON filed an opinion concurring in part, dissenting in part, and concurring in the judgment.

JUSTICE O'NEILL filed a dissenting opinion, in which JUSTICE BRISTER and JUSTICE GREEN joined.

We address for the first time whether the Medical Liability Insurance Improvement Act (MLIIA or the Act) governs a patient's claims that a nursing home's negligence in failing to provide adequate supervision and nursing services proximately caused her injuries from a sexual assault by

another patient. We conclude that the nursing home resident's claims in this case are causes of action for departures from accepted standards of professional health care and safety. Therefore, the causes of action constitute health care liability claims under the MLIIA and are governed by the two-year statute of limitations prescribed by the statute.

I. Factual and Procedural Background

From August 1, 1994 to January 17, 1999, Maria Rubio was a resident of Goliad Manor nursing home. She suffered from Senile Dementia of the Alzheimer's Type, rendering her mentally incapacitated for the duration of her stay at Goliad.

On July 14, 1999, Rubio's daughter, Mary Holcomb, as next friend, brought suit on Rubio's behalf against Diversicare General Partner, Inc., Diversicare Leasing Corporation, Advocat, Inc., and Texas Diversicare Limited Partnership doing business as Goliad Manor (collectively Diversicare) for injuries Rubio sustained in two separate falls while a resident at the facility. She alleged that Diversicare and its staff were negligent in failing to provide adequate supervision and nursing services to meet her fundamental needs; failing to budget for, hire, and train a sufficient number of qualified direct health care staff; failing to develop and implement adequate policies and procedures for safety, training, and staffing at its nursing homes; and for violations of section 22.04 of the Texas Penal Code entitled "Injury to Child, Elderly, or Disabled Individual." Rubio also brought a claim for breach of contract asserting that, as a Medicaid recipient, she was a third-party beneficiary to a contract between Diversicare and the Texas Department of Human Services under the Texas Medical Assistance Program.

On September 26, 2000, Rubio amended her petition to include damages arising from the alleged failure of Diversicare and its staff to adequately supervise and monitor Rubio to protect her from sexual abuse and assault by another resident in violation of sections 22.011 and 22.021 of the Texas Penal Code. She alleges multiple incidents of sexual assault occurring between October 1994 and April 1995. The summary judgment evidence identifies one incident that took place on April 25, 1995. A nurse entered Rubio's room and discovered a male resident straddling Rubio on the bed. Both Rubio's daughter and her physician were informed of the incident shortly after it occurred. Rubio remained a resident at Goliad Manor for another three and one-half years.

Rubio also added in her amended petition a claim for breach of an implied covenant to provide reasonably safe premises in which Rubio was a third-party beneficiary of the contract between Diversicare and the Texas Department of Human Services. Rubio further claimed fraudulent inducement, alleging that the facility represented that it would provide for her safety.

Diversicare moved for summary judgment on all of Rubio's claims arising from the alleged sexual assaults, arguing that the MLIIA's two-year statute of limitations barred recovery on the claims. The district court severed all the claims arising from the assaults and granted Diversicare's motion for summary judgment. The court of appeals reversed, holding that Rubio's claims arising from the alleged assaults are claims for common law negligence and are not covered by the MLIIA. 82 S.W.3d 778, 783–84. The court concluded that Rubio's mental incapacity tolled the statute of limitations for personal injury claims, as provided by section 16.003 of the Texas Civil Practice and Remedies Code. *Id.* at 781–82. Diversicare petitioned this Court for review.

II. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and judgment should be granted in favor of the movant as a matter of law. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense, including the accrual date of the cause of action. *Id.*; *see also Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 220 (Tex. 2003). If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. *KPMG Peat Marwick*, 988 S.W.2d at 748. When reviewing a summary judgment, we take as true all competent evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002) (citing *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997)). In reviewing a summary judgment, we consider all grounds presented to the trial court and preserved on appeal in the interest of judicial economy. *Knott*, 128 S.W.3d at 216; *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996).

In this case, the commencement date of the limitations period for the claims arising from the alleged sexual assaults depends upon whether the statute of limitations in the MLIIA or the Texas Civil Practice and Remedies Code applies. If the Texas Civil Practice and Remedies Code applies, the limitations period is tolled, and Rubio's claims are not barred. If the MLIIA supplies the statute of limitations, the limitations period is not tolled and Rubio's claims are barred. We note that for limitations purposes the parties do not dispute that the assaults occurred no later than 1995.

III. Discussion

In the MLIIA, the Legislature modified the liability laws relating to health care claims to address what the Legislature described as a medical "crisis [that] has had a material adverse effect on the delivery of medical and health care in Texas." Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(6), 1977 Tex. Gen. Laws 2039, 2040 (former TEX. REV. CIV. STAT. art. 4590i, § 1.02(6)), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884; *see also* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 884 (reiterating the Legislature's concern about the gravity of an ongoing "medical malpractice insurance crisis" caused in part by an increased number of health care liability claims since 1995).[1] The Legislature instituted heightened requirements for filing and maintaining lawsuits that assert professional liability claims against health care providers, shortened the statute of limitations and restricted tolling for such claims, and capped certain types of damages recoverable from these lawsuits. Rubio asserts that her claims are not governed by the MLIIA and, therefore, are not barred by the statute of limitations because her claims are tolled by statutory provisions in the Texas Civil Practice and Remedies Code.

A. Statute of Limitations for Health Care Liability Claims

Rubio filed suit in July 1999 for injuries from two alleged falls at Goliad Manor. In September 2000, nearly five and one-half years after the alleged assaults took place, she amended

[1] While this case was pending on appeal, the Legislature repealed the MLIIA, amended parts of the previous article 4590i, and recodified it in 2003 as chapter 74 of the Texas Civil Practice and Remedies Code. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847. Because article 4590i continues to govern this case, we will cite the former article rather than the Civil Practice and Remedies Code.

her complaint to plead claims for sexual assaults by another nursing home resident during 1995. Rubio argues that because her claims are not health care liability claims under the MLIIA, they are governed by the general statute of limitations for personal injury claims, which tolls the statute of limitations due to mental incapacity. TEX. CIV. PRAC. & REM. CODE §§ 16.001(b), 16.003. Diversicare argues that these claims are barred by the two-year statute of limitations under the MLIIA, which does not provide for tolling based on mental incapacity.[2] The parties agree that Rubio was mentally incapacitated during her entire stay at Goliad Manor.

Section 10.01 of the MLIIA states:

> Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed . . . . Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.

Former TEX. REV. CIV. STAT. art. 4590i, § 10.01. The MLIIA's two-year statute of limitations applies to health care liability claims as defined by the statute.[3]

To determine whether a cause of action is a health care liability claim that falls under the rubric of the MLIIA, we examine the underlying nature of the claim and are not bound by the form of the pleading. *See Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994). The MLIIA defines a health care liability claim as:

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[2] Plaintiffs did not raise constitutional challenges concerning the tolling provisions in the MLIIA.

[3] The two-year statute of limitations, by its terms, may be tolled for up to 75 days by giving written notice as provided in the Act or for minors under the age of 12 until their 14th birthday. Former TEX. REV. CIV. STAT. art. 4590i, §§ 4.01(c), 10.01. These provisions are not at issue in this case.

> 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 which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

Former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4). "Health care" is broadly defined as "any act or treatment performed or furnished, or which 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." *Id.* § 1.03(a)(2). A nursing home is a health care provider. *Id.* § 1.03(a)(3). In this case, we must determine if Rubio's claims for inadequate supervision and nursing services to protect her from assault and meet her health care needs during confinement in the nursing home are governed by the MLIIA.

A cause of action against a health care provider is a health care liability claim under the MLIIA if it is based on a claimed departure from an accepted standard of medical care, health care, or safety of the patient, whether the action sounds in tort or contract. *Id.* § 1.03(a)(4); *MacGregor Med. Assoc. v. Campbell*, 985 S.W.2d 38, 41 (Tex. 1998); *Gormley v. Stover*, 907 S.W.2d 448, 449 (Tex. 1995); *Sorokolit*, 889 S.W.2d at 242; *Mulligan v. Beverly Enters.-Tex., Inc.*, 954 S.W.2d 881, 884 (Tex. App.—Houston [14th Dist.] 1997, no pet.); *Waters ex rel. Walton v. Del-Ky, Inc.*, 844 S.W.2d 250, 258–59 (Tex. App.—Dallas 1992, no writ). A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of medical services. *See* former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2), (4); *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995); *Shaw v. BMW Healthcare, Inc.*, 100 S.W.3d 8, 15 (Tex. App.—Tyler 2002, pet. denied).

The necessity of expert testimony from a medical or health care professional to prove a claim may also be an important factor in determining whether a cause of action is an inseparable part of the rendition of medical or health care services. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 544 (Tex. 2004); *see, e.g.*, *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 674 (Tex. App.—Dallas 2001, no pet.) (Dodson, J. dissenting) ("Further, the claims in this case are of the type that would require expert testimony as to the appropriate standard of care in segregating patients in a psychiatric hospital . . . ."); *Rogers v. Crossroads Nursing Serv., Inc.*, 13 S.W.3d 417, 419 (Tex. App.—Corpus Christi 1999, no pet.). *But see Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990) (noting that expert testimony is not needed to establish breach of a medical duty where the departure is plainly within the common knowledge of laymen, such as leaving a sponge in a patient after surgery).

In *Walden*, this Court held that a claim for ill-fitting dentures is a health care liability claim governed by the MLIIA. 907 S.W.2d at 448. Lena Jeffery sued her dentist Dr. Terry Walden for breach of implied warranty, breach of contract, and DTPA violations for failure to provide dentures that fit. *Id.* at 447. We held that providing dentures was inseparable from health care provided to the patient as part of the provision of professional dental services. *Id.* at 448.

In *Shaw*, the court of appeals, following our decision in *Walden*, held that a plaintiff could not bring a claim for intentional elder abuse separate from his MLIIA claim for negligence because the alleged negligent administration of an overdose of sedatives to a nursing home resident constituted a breach of the standard of care for a health care provider. *Shaw*, 100 S.W.3d at 15. Shaw, a patient, was administered sedatives to restrain him from possible injury by wandering

around the facility. *Id.* at 10. He was hospitalized and a month later developed very high blood sugar levels and died. *Id.* at 10–11.

Shaw argued that the nursing home was negligent in allowing its nursing staff to administer chemical restraints to Shaw and that this conduct gave rise to two independent causes of action: one for negligence governed by the MLIIA and one for intentional elder abuse outside the scope of the Act. *Id.* at 14. The court of appeals held that the claim for intentional elder abuse was in substance a claim for breach of the applicable standard of care for a health care provider governed by the MLIIA. *Id.* at 15. Therefore, dismissal of the claim was proper because the plaintiff did not file an expert report as mandated by the statute. *Id.* The court noted that the facts which gave rise to Shaw's MLIIA claims were the same as those relied upon for his claim for intentional elder abuse, and both were based on breaches of the accepted standard of care for a health care provider. *Id.* The court of appeals correctly recognized that if the act or omission that gave rise to the claim is so integral to the rendition of medical services by the provider to be an inseparable part of those services, it constitutes a breach of the standard of care applicable to health care providers and is governed by the MLIIA. *See id.*

In *Waters*, Will Walton, a nursing home patient who required constant attention, fell from a second-story window. 844 S.W.2d at 252. He died four days later as a result of the injuries he sustained in the fall. *Id.* His sister, Ruby Mae Waters, brought suit against the nursing home under the Texas Survivorship statute and the Texas Deceptive Trade Practices Act for her brother's injuries on the ground that the nursing home failed to provide him with appropriate physical and medical care. *Id.* at 252–53. Waters's DTPA action was based on the nursing home's alleged express

warranty that it would provide, *inter alia*, adequate medical care evaluation and sufficient qualified personnel to properly supervise her brother. *Id.* at 254.

The court of appeals held that the MLIIA applied because the negligent supervision of a helpless resident was a claim for deviations from the applicable standard of care for the nursing home even if the claim is framed as a misrepresentation or failure to comply with an express warranty. *Id.* at 258–59. In *Waters*, the court of appeals rejected the contention that the legal disability of unsound mind contained in the general tolling statute tolls the two-year statute of limitations in MLIIA's section 10.01. *Id.* at 256. We apply these legal tenets to Rubio's claims.

B. Rubio's Claims

1. Health Care

For the reasons that follow, we conclude that Rubio's causes of action are claims for breaches of the standard of care for a health care provider because the supervision of Rubio and the patient who assaulted her and the protection of Rubio are inseparable from the health care and nursing services provided to her.

Rubio, in her amended petition, asserts that Goliad Manor held itself out to the public as a nursing home facility competent and qualified to provide nursing home services with all the necessary care and precaution expected of a nursing home facility. Rubio contends that Goliad failed to hire and train appropriate personnel to monitor her, failed to provide 24-hour nursing services from a sufficient number of qualified nursing personnel to meet the total nursing needs of Rubio, hired incompetent staff who were unqualified to care for her, and failed to establish and implement appropriate safety policies to protect its residents.

A nursing home provides services to its patients, often around the clock, which include supervising daily activities; providing routine examinations and visits with physicians; providing dietary, pharmaceutical, and routine dental services; monitoring the physical and mental conditions of its residents; administering medications; and meeting the fundamental care needs of the residents. *See* TEX. HEALTH & SAFETY CODE § 242.001; *see also* 42 U.S.C. § 1396r(b)(4)(A). These fundamental needs include, where necessary, feeding, dressing, assisting the resident with walking, and providing sanitary living conditions. *See* 40 TEX. ADMIN. CODE § 19.901(1). These services are provided by professional staff including physicians, nurses, nurse aides, and orderlies who care for the residents.

The level and types of health care services provided vary with the needs and capabilities, both physical and mental, of the patients. *See Harris v. Harris County Hosp. Dist.*, 557 S.W.2d 353, 355 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). Nursing homes are required to assess each resident's needs and capabilities, including life functions and significant impairments. 40 TEX. ADMIN. CODE §§ 19.101(23), 19.801. The law requires these facilities to prepare a comprehensive care plan to address the resident's medical, nursing, mental, psychosocial, and other needs. *Id.* §§ 19.101(24), 19.802. This plan must meet "professional standards of quality." *Id.* § 19.802(d)(1). Some patients need psychological treatment, while others require none. Some patients require enhanced supervision and additional staff or physical restraints to protect them from injuring themselves and others or to protect them from other patients, while other patients do not require such protections. The nature and intensity of care and treatment, including professional supervision, monitoring, assessment, quantities and types of medication, and other medical treatment are

judgments made by professionals trained and experienced in treating and caring for patients and the patient populations in their health care facilities.

The supervision and monitoring of Rubio and other nursing home residents and nursing services provided to Rubio by Diversicare's staff were part of her health care. The nursing home provided for Rubio's fundamental needs including assuming care and custody of this elderly patient. Professional supervision and nursing services were provided to Rubio and the other residents. The staff at Goliad Manor was obligated to take care of Rubio and Goliad's patient population and to protect her and the patient population from harming themselves and each other. Contrary to Rubio's argument, this dispute concerns more than simply determining whether a person should be protected from a "known" attacker. This dispute between the parties is, at its core, over the appropriate standard of care owed to this nursing home resident; what services, supervision, and monitoring were necessary to satisfy the standard; and whether such specialized standards were breached. Diversicare's training and staffing policies and supervision and protection of Rubio and other residents are integral components of Diversicare's rendition of health care services to Rubio.

Rubio posits that if she had been a visitor to Goliad Manor when she was sexually assaulted, there would be no argument that the Act does not apply. The result in this case, she claims, should be no different simply because the victim was a resident of a nursing home and the sexual assault happened to occur in a health care facility. Rubio's hypothetical highlights the distinction between health care liability claims and premises liability claims. There is an important distinction in the relationship between premises owners and invitees on one hand and health care facilities and their patients on the other. The latter involves health care.

The obligation of a health care facility to its patients is not the same as the general duty a premises owner owes to invitees. Health care staff make judgments about the care, treatment, and protection of individual patients and the patient populations in their facilities based on the mental and physical care the patients require. The health care standard applies the ordinary care of trained and experienced medical professionals to the treatment of patients entrusted to them. *See Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 949 (Tex. 1998). Premises owners similarly owe a duty of care to their residents and invitees, but the duty is of ordinary care with no general medical duty to diagnose and treat their residents. *See Meeks v. Rosa*, 988 S.W.2d 216 (Tex. 1999). This distinction defeats Rubio's analogy. Residents are in a nursing home for care and treatment, not merely for shelter. *See*, *e.g.*, TEX. HEALTH & SAFETY CODE §§ 242.001, 242.151–.157, 242.401–.404; 40 TEX. ADMIN. CODE §§ 19.801–.1701.

In addition, we focus on the essence of Rubio's claim and consider the alleged wrongful conduct and the duties allegedly breached, rather than the unfortunate injuries she suffered. *Rose*, 156 S.W.3d at 543 ("Plaintiffs cannot use artful pleading to avoid the MLIIA's requirements when the essence of the suit is a health care liability claim."). It is well settled that a health care liability claim cannot be recast as another cause of action to avoid the requirements of the MLIIA. *MacGregor Med. Assoc.*, 985 S.W.2d at 38; *Gormley*, 907 S.W.2d at 450; *Soroklit*, 889 S.W.2d at 242. We "are not bound by niceties of pleadings, and a mere 'recasting' of a health care liability claim based on physician or health care provider negligence in the garb of some other cause of action is not sufficient to preclude the application of Article 4590i." Glen M. Wilkerson, David M. Davis, Wes Cleveland, & Michael P. Young, *Analysis of Recent Attempts to Assert Medical Negligence*

Claims "Outside" Texas's Article 4590i, 20 REV. LITIG. 657, 679 (2001). Rubio's claim is *not* that Diversicare, through its employees and agents, committed the sexual assault. Rubio claims that through lapses in professional judgment and treatment Diversicare negligently allowed the sexual assault to occur.

A factor we consider is whether expert testimony is necessary to prove these alleged lapses in professional judgment and treatment. Is expertise in the health care field required to determine the appropriate number, training, and certifications of medical professionals necessary to care for and protect patients in weakened conditions from injury by other patients in a health care facility? We think so. It is not within the common knowledge of the general public to determine the ability of patients in weakened conditions to protect themselves, nor whether a potential target of an attack in a healthcare facility should be better protected and by what means. The general public is not trained to evaluate whether a potential attacker admitted to a health care facility should be physically or chemically restrained to prevent harm to other patients or if other patients should be better protected through increased supervision. And the general public does not know whether physical restraint is required to prevent assaults by a resident, if certain types of medication are sufficient, or if a combination of the two may be required, and to what degree these determinations depend on the propensities and physical and mental characteristics of the resident. We note that federal law requires the judgment and written order of a physician to chemically or physically restrain a potential attacker in a nursing home. 42 U.S.C. § 1396r(c)(1)(A)(ii); *see Torres v. State*, 373 N.Y.S.2d 696, 697 (N.Y. App. Div. 1975) ("[T]he decision to place decedent under only limited restraints was a medical judgment . . . ."). Nor does the general public know the myriad of other questions that may

need to be asked, much less answered, in making such professional judgments. *See Sunbridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 246 (Tex. App.—Texarkana 2005, no pet.) (stating that standards for nursing home budgets and staffing levels are "issues not within the common knowledge or experience of the jury").

Two other state supreme courts that addressed this issue reached the same reasoned conclusion that claims for assault under similar circumstances implicate medical or health care under their applicable medical malpractice statutes. *Dorris v. Detroit Osteopathic Hosp.*, 594 N.W.2d 455 (Mich. 1999); *Smith v. Four Corners Mental Health Ctr., Inc.*, 70 P.3d 904 (Utah 2003). One supreme court reached a contrary conclusion. *See Afamefune ex rel. Afamefune v. Suburban Hosp., Inc.*, 870 A.2d 592, 599, 602–03 (Md. 2005) (holding that because "no active or direct" health care was being rendered when one patient raped or attempted to rape another patient, the case did not implicate state's medical malpractice act).

In *Dorris*, the Michigan Supreme Court considered a psychiatric patient's claims that during a hospital stay, a fellow patient pushed her to the floor and beat her. 594 N.W.2d at 458. The alleged victim of the battery sued the hospital, alleging that the hospital had inadequate staffing to supervise and monitor the behavior of its patients under psychiatric care. *Id.* The Michigan Supreme Court considered whether a hospital's alleged failure to supervise and monitor patients is a medical malpractice action, thus requiring the satisfaction of certain procedural, statutory requirements.[4] *Id.* at 464–66. The court held that "[t]he determination whether a claim will be held to the standards

[4] Michigan's statute imposes certain notice, affidavit, and other procedural requirements in actions "alleging medical malpractice against a health professional or health facility." MICH. COMP. LAWS § 600.2912b.

of proof and procedural requirements of a medical malpractice action claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Id.* at 465. The Michigan Supreme Court also determined that "[t]he ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric ward." *Id.* at 466. It concluded that the patient's suit was a medical malpractice action. *Id.*

The Utah Supreme Court considered whether a claim by a child placed in a foster home and sexually assaulted by another child placed in the same home, while both were receiving mental health care services from the same facility, was a health care malpractice claim. *Smith*, 70 P.3d at 913–14. The Court held that the assaulted child's lawsuit against the outpatient mental health care provider was a health care malpractice claim because the plaintiff's "allegations arise out of the fact that [a health care provider] provided mental health services directly to him." *Id.* at 914.

Two other state supreme courts have likewise reasoned that professional decisions on supervising or restraining patients at health care facilities require medical judgment. *See D.P. v. Wrangell Gen. Hosp.*, 5 P.3d 225, 229 n.17 (Alaska 2000) ("[I]n so far as [plaintiff] intends to argue issues that involve specialized medical decisions—such as the appropriate level of physical restraints or medication"—she must fulfill the requirements of the malpractice act.); *Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 49 S.W.3d 107, 113 (Ark. 2001) ("[A] nursing home[] is required to consider the patient's capacity to care for himself or herself and to protect the patient from dangers created by his or her weakened condition. Providing a safe environment for patients

is within the scope of the professional services of a hospital or nursing home."). A number of other state appellate courts have applied the same logic. *See Bell v. Sharp Cabrillo Hosp.*, 260 Cal. Rptr. 886, 896 (Cal. Ct. App. 1989) ("[T]he competent selection and review of medical staff is precisely the type of professional service a hospital is licensed and expected to provide, for it is in the business of providing medical care to patients and protecting them from an unreasonable risk of harm while receiving medical treatment. . . . [T]he competent performance of this responsibility is 'inextricably interwoven' with delivering competent quality medical care to hospital patients."); *Ogle v. St. John's Hickey Mem'l Hosp.*, 473 N.E.2d 1055, 1059 (Ind. Ct. App. 1985) (holding that the malpractice act governed the alleged failure to protect a psychiatric patient from sexual assault because her confinement was integral to her diagnosis and treatment); *M.W. v. Jewish Hosp. Assoc. of St. Louis*, 637 S.W.2d 74 (Mo. Ct. App. 1982) (holding that a claim for improper supervision allowing a schizophrenia patient in a hospital neuro-psychiatric ward to engage in sexual relations with other patients is a claim for medical malpractice and not for failure to use ordinary care). *But see Sumblin v. Craven County Hosp. Corp.*, 357 S.E.2d 376, 378–79 (N.C. Ct. App. 1987) (holding that the alleged failure to protect a hospital patient from assaults by another patient does not involve the failure to render professional nursing or medical services).

We do not declare that health care providers have no duty to prevent assaults between inpatients. However, we recognize that judgments concerning health and medical care, including protection of patients, are made by health care professionals as part of the care and treatment of the patients admitted to their facilities. The Legislature has determined that alleged breaches of these standards are health care liability claims. *See* former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4).

In support of her argument that the MLIIA does not govern her claims against Diversicare, Rubio relies on several cases decided by courts of appeals holding that sexual assaults in health care facilities perpetrated by one patient against another are claims for ordinary negligence, not health care liability claims under the MLIIA. *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*, 39 S.W.3d at 670; *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.). Other Texas courts of appeals have reached the opposite result in analogous situations. *See*, *e.g.*, *Shaw*, 100 S.W.3d 8; *Waters*, 844 S.W.2d 250.

In the cases cited by Rubio, patients who were in weakened conditions or suffered from reduced mental capacities were sexually assaulted by other patients at the facilities. The victims' claims in these cases were based on inadequate monitoring, supervision, and health care. For the reasons explained, we disapprove of these decisions to the extent they hold that the patients' claims for assault by other patients are not health care liability claims, as the Legislature defined that term.

Finally, we note the irony in Rubio's position. She asserts that the MLIIA should not apply to her claim, which she contends is a premises liability claim based on ordinary negligence. If we were to agree with her, our decision would have the effect of lowering the standard from professional to ordinary care for residents in health care facilities under similar circumstances. While we make no general pronouncements in this case on the standard of care applicable to nursing home conduct toward their residents, we decline to lower the standard in Rubio's circumstances as we find no indication that the Legislature intended to lower it.

2. Response to Concurrence and Dissent

In his concurrence, CHIEF JUSTICE JEFFERSON disagrees that Rubio's allegations fall within the MLIIA's definition of health care. __ S.W.3d __, __. CHIEF JUSTICE JEFFERSON would characterize some of Rubio's claims—specifically, Rubio's allegations concerning Diversicare's failure to protect her from sexual assault, failure to implement adequate safety precautions, and failure to establish appropriate safety and staffing procedures—as premises liability claims or "claims for 'inadequate security'" that are "'independent of any medical diagnosis, treatment, or care.'" *Id.* (quoting *Robinson v. W. Fla. Reg'l Med. Ctr.*, 675 So.2d 226, 228 (Fla. Dist. Ct. App. 1996)). To the contrary, Rubio's claims implicate more than inadequate security or negligent maintenance. Rubio is not complaining about an unlocked window that gave an intruder access to the facility or a rickety staircase that gave way under her weight. All of her claims arise from acts or omissions that are inseparable from the provision of health care. *See Walden*, 907 S.W.2d at 448. We do not distinguish Rubio's health care claims from premises liability claims "simply because the landowner is a health care provider" but because the gravamen of Rubio's complaint is the alleged failure of Diversicare to implement adequate policies to care for, supervise, and protect its residents who require special, medical care. __ S.W.3d at __. The dissenting and concurring justices contend that Rubio alleged a common law claim for premises liability independent of her health care liability claim. Their position would open the door to splicing health care liability claims into a multitude of other causes of action with standards of care, damages, and procedures contrary to the Legislature's explicit requirements. It is well settled that such artful pleading and recasting of claims is not permitted. *See MacGregor Med. Assoc.*, 985 S.W.2d at 40; *Gormley*, 907 S.W.2d at 450;

Walden, 907 S.W.2d at 448; *Sorokolit*, 889 S.W.2d at 242. There may be circumstances that give rise to premises liability claims in a healthcare setting that may not be properly classified as health care liability claims, but those circumstances are not present here.

CHIEF JUSTICE JEFFERSON also takes issue with the Court's conclusion that specialized knowledge of health care is necessary to physically and psychologically evaluate an inpatient population and determine the types of precautions and staffing levels that are appropriate for use in a particular health care facility. *Id.* at __. Instead, he would conclude, as does Rubio, that the occurrence of a patient assault establishes the health care facility's duty and breach of that duty without any specialized analysis of what treatments, policies, or procedures are appropriate to the circumstances and whether they were breached. We have explained at length the medical diagnosis, treatment, and care that nursing homes are required by law to provide to their residents. We recognize that the care will vary with the different physical, mental, and psychosocial conditions presented by the inpatients. The general public is hardly equipped to medically diagnose these inpatients and treat their ailments and infirmities, or determine how to protect the patient population.

3. Safety

We also conclude that Rubio's claims may be characterized as departures from accepted standards of safety. Former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4). Because the statute does not define safety, we apply its meaning as consistent with the common law. *Id.* at § 1.03(b). The commonly understood meaning of safety is the condition of being "untouched by danger; not exposed to danger; secure from danger, harm or loss." BLACK'S LAW DICTIONARY 1336 (6th ed. 1990). Because the supervision of Rubio and the patient who assaulted her are inseparable from the

accepted standards of safety applicable to the nursing home in this case, Rubio's claims are MLIIA claims under the safety element of the statute. *See Walden*, 907 S.W.2d at 448. Certainly, the Legislature's inclusion within the scope of the MLIIA of claims based on breaches of accepted standards of "safety" expands the scope of the statute beyond what it would be if it only covered medical and health care. Professional supervision, monitoring, and protection of the patient population necessarily implicate the accepted standards of safety under the MLIIA, just as those duties in this case are included in the term health care.

IV. Conclusion

Rubio claims that Diversicare failed to provide adequate supervision and nursing services to meet her fundamental needs and to protect her. The Legislature broadly defined health care liability claim in the MLIIA, and the definition includes her claims. *See* former TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4). Accordingly, the statute of limitations is not tolled by section 16.001(b) of Texas Civil Practice and Remedies Code. Because Rubio filed suit in 1999 and the sexual assault occurred in 1995, Rubio's claims are barred by the two-year statute of limitations in the MLIIA. We reverse the decision of the court of appeals and render judgment for Diversicare.

_____

J. Dale Wainwright
Justice

OPINION DELIVERED: October 14, 2005