IN THE SUPREME COURT OF TEXAS

NO. 07-0783

IRVING W. MARKS, PETITIONER,

v.

ST. LUKE'S EPISCOPAL HOSPITAL, RESPONDENT

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

Argued September 11, 2008

JUSTICE JOHNSON, joined by JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE WILLETT, dissenting.

The Court today allows a health care liability claim to go forward despite Marks's failure to comply with the Medical Liability Insurance Improvement Act (MLIIA or Act). It does so by (1) condoning the recasting of a claim by a patient based on an injury caused by specialized hospital equipment into a non-health care claim by artful pleadings; and (2) misconstruing plain, unambiguous statutory language. I dissent.

Marks underwent surgery at St. Luke's Hospital to implant a morphine pump into his spinal cord after multiple previous surgeries failed to alleviate his back problems. After surgery, the nursing staff made a notation in his medical records that he was at risk of falling because of his

limited mobility, his need for an ambulatory assistance device, and the fact he was on morphine, and "Safety/Fall Precautions" were being implemented. The hospital's Safety/Fall Precautions included provisions that there should be "no environmental hazards" in Marks's room, his hospital bed was to be "in a low position with the brakes applied," and the "side rails and safety devices" should be used as indicated. Marks alleges that seven days after his surgery and while still an inpatient, he and the footboard on his hospital bed fell when he placed his hand on the footboard and attempted to push himself from the bed to a standing position.

Marks sued St. Luke's. He alleged the hospital was negligent in the following respects: (1) failing to properly train and supervise hospital employees in how to prevent falls and injuries; (2) failing to provide Marks with the assistance he required for daily living activities; (3) failing to provide him with a safe environment in which to receive treatment and recover; and (4) providing him with a hospital bed that had been negligently assembled and maintained by the hospital's employees or nursing staff. The Court holds, and I agree, that the first three claims are health care liability claims that fall under the MLIIA. But, unlike the Court, I would hold that the entire suit is a health care liability claim subject to the procedures and limitations set out in the Act.

In order to preclude Marks's suit from being subject to the MLIIA, the Court must, and does, reach three conclusions with which I disagree. The first is that one injury based on a single set of facts can, by the manner in which pleadings are formulated, be both a health care liability claim and a non-health care liability claim. The second is that a hospital bed furnished to a post-surgery hospital inpatient is not an inseparable part of health care provided by the hospital. The third is that

accepted standards of hospital safety do not include providing safe hospital beds to patients confined in the hospital.

First, the Court's holding allows a cause of action by a patient against a health care provider to be both a health care claim and a non-health care claim, even though the action arises from a single injury based on a single set of facts. The Court concludes that because of the manner in which Marks pleads his suit, three of his liability theories are health care liability claims while the other is a premises liability claim that is not subject to the MLIIA. In *Diversicare*, the concurring and dissenting justices similarly concluded that the victim of sexual assault at a nursing home asserted a premises liability claim against the nursing home independent of her health care liability claim. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 857-58 (Tex. 2005) (Jefferson, C.J., concurring in part, and dissenting in part); *id.* at 861-66 (O'Neill, J., dissenting). The Court rejected that view because it "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." *Id.* at 854; *see also Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) ("[A] claimant cannot escape the Legislature's statutory scheme by artful pleading."); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004) ("Plaintiffs cannot use artful pleading to avoid the MLIIA's requirements when the essence of the suit is a health care liability claim."). The Court today circumvents explicit language the Court used in *Diversicare* and other cases rejecting this type of claim-splitting by pleadings. The holding will inevitably open the door to manipulated, inventive, and artful pleading designed to avoid the MLIIA requirements and limitations by recasting of claims.

Allowing this type of claim-splitting almost assuredly will lead to more extended and expensive trial court proceedings to determine whether a patient's pleadings assert health care liability claims subject to the MLIIA, non-health care liability claims, or both; and if both, which is which. As this appeal shows, there will be more extended and expensive appellate proceedings for the same purpose. Extended judicial proceedings and associated increased costs, including "economic" settlements to avoid litigation expense, are a significant part of what the Legislature intended to avoid through enactment of the MLIIA. *See* former TEX. REV. CIV. STAT. art. 4590i, § 1.02(b)(2);[1] *see also id.* § 1.02(b)(1).

The most appropriate course in circumstances such as these is the course the Court has taken before today: when the substance of a patient's claim for injury comes within the statutory definition of a health care liability claim, then the MLIIA applies to all the plaintiff's claims against the health care provider based on that injury. Here, no matter how Marks pleads his case, the substantive facts implicate questions about whether St. Luke's met accepted standards of health care and safety. His injury arose during his hospital confinement and from his use of a hospital bed—a bed the nurses' notes show was a specialty bed being used for patient care—that was allegedly improperly assembled and maintained by hospital employees. For this reason, I would hold that Marks's injury and damages arise from a health care liability claim and that he cannot avoid application of the MLIIA by pleading otherwise.

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[1] Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, § 1.02, 1977 Tex. Gen. Laws 2039, 2040, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. While this case was pending, 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. Because article 4590i continues to govern this case, citations are to the former article rather than the Civil Practice and Remedies Code.

Next, I would hold that the hospital bed furnished to Marks was an integral and inseparable part of the health care he received from St. Luke's, so his allegations that the bed was negligently assembled and maintained fall within the provisions of the MLIIA. Thus, even if a plaintiff could recast a health care claim into another type of claim by artful pleadings, Marks has not done so.

In determining whether the MLIIA encompasses Marks's claims, the statutory construction rules are well established. When interpreting statutes, courts should ascertain and give effect to the Legislature's intent as expressed by the language of the statute. *E.g.*, *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006) ("[W]hen possible, we discern [legislative intent] from the plain meaning of the words chosen."). The prime principle to follow when construing a statute is "the words [the Legislature] chooses should be the surest guide to legislative intent." *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999). Only when those words are ambiguous do we "resort to rules of construction or extrinsic aids." *In re Estate of Nash*, 220 S.W.3d 914, 917 (Tex. 2007). We use definitions prescribed by the Legislature and any technical or particular meaning the words have acquired, but otherwise we construe the statute's words according to their plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to nonsensical or absurd results. *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008); *see also Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

St. Luke's asserts Marks's suit implicates accepted standards of both health care and safety as referenced by the MLIIA. The Court, however, focuses on St. Luke's safety argument and

summarily concludes Marks's hospital bed claim does not assert a departure from the accepted standards of health care. ___ S.W.3d at ___. I disagree.

The MLIIA defines a health care liability claim as follows:

> 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 claims or cause of action sounds in tort or contract.

TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4).[2] Under the statute, a cause of action is a health care liability claim if it (1) is against a health care provider or physician; (2) for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety; and (3) the alleged departure from accepted standards proximately results in injury to or death of the patient. The Act broadly defines "health care" 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.

TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2); *see Diversicare*, 185 S.W.3d at 847 (describing health care as "broadly defined" under the MLIIA).

As relevant here, health care includes *any act* that was or should have been performed by a health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement. Applying this broad definition, we have previously concluded that a cause of action alleges a departure from accepted standards of health care if the act or omission complained of is an

[2] Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, § 1.03, 1977 Tex. Gen. Laws 2039, 2041, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

inseparable part of the rendition of health care services. *Diversicare*, 185 S.W.3d at 848; *see Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995).

In this case, no one suggests Marks's hospital confinement while recovering from the latest of several back surgeries was not medically necessary. It logically follows that if his condition made hospitalization medically necessary, then the hospital had to provide him with a reasonably safe hospital bed. Indeed, the expert reports Marks eventually filed explicated that as an accepted standard of care. *See* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2). And, if a reasonably safe hospital bed was necessary for Marks's care and recuperation, it follows that the bed was an integral and inseparable part of his care and treatment, especially in this case in which it was an integral part of the hospital's Safety/Fall Precautions protocol. *See Diversicare*, 185 S.W.3d at 849-54.

Nevertheless, the Court focuses on the assembling of the bed as opposed to its use in patient care and determines that Marks's claim for negligent assembly and maintenance of the bed is not a health care liability claim because it is based on the breach of an ordinary standard of care and not on a discrete standard of care applicable to the health care industry. Under this holding, St. Luke's owed Marks the general duty of care owed by businesses to their invitees.[3] But although health care providers and patients may well be premises owners or occupiers and invitees, the Legislature has imposed requirements on how suits by patients against health care providers may be brought. Those requirements differ from general requirements for suits by invitees against premises owners or

[3] As the Court did in *Diversicare*, I "note the irony" of this position. *Diversicare*, 185 S.W.3d at 853. In his brief, Marks asserts that the MLIIA should not apply to his claim because it is a premises liability claim based on ordinary negligence. But "[i]f we were to agree with [him], our decision would have the effect of lowering the standard from professional to ordinary care for [patients] in health care facilities under similar circumstances." *Id.* at 853-54.

occupiers. *See* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(3); *Diversicare*, 185 S.W.3d at 850 ("The obligation of a health care facility to its patients is not the same as the general duty a premises owner owes to invitees."). If Marks had been a guest in a hotel when his bed fell, his fall could well have given rise to a premises liability claim. But he was not a hotel guest; he was a patient receiving health care in a hospital. There is a difference because of the MLIIA. *Diversicare*, 185 S.W.3d at 850 ("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."). Further, the bed furnished to Marks was much more than a hotel bed. As indicated by the nurses' notes, the bed was intended to be and was being used as a specialized patient care bed. The nurses' notes referenced Safety/Fall Precautions that included keeping the bed in a low position with the brakes applied and using the bed's side rails and safety devices as indicated.

While Marks was a patient, the hospital provided him with a hospital bed as part and parcel—an integral and inseparable part—of actions "furnished, or which should have been performed or furnished, by [St. Luke's] for, to, or on behalf of [Marks] during [Marks's] medical care, treatment, or confinement." *See* TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2). And even if it were debatable whether a safe, specialized hospital bed was integral to and inseparable from health care St. Luke's provided to Marks, the Court need look no further than Marks's own expert reports for the answer. Marks eventually served expert reports from Dr. Jeffrey D. Reuben, an orthopedic surgeon, and Jan Zdanuk, a nurse practitioner. Although the reports were served too late to save his

health care claims from dismissal, they demonstrate what Marks contends is the proper standard of care.[4] Dr. Reuben opined:

> The accepted standard of care for nursing and hospital practice is *to provide the patient with reasonably safe medical equipment, including a hospital bed for in-patients, to receive and recover from medical treatment*. The accepted standard of good care for nursing and hospital practice is to evaluate each patient to determine if he/she is a risk to fall. . . . If a . . . patient may be a risk to fall, the accepted standard of good care for nursing and hospital practice is to implement interventions to eliminate and reduce the patient's risk of falling. . . .
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> . . . [St. Luke's] knows that patients would use the footboard on a hospital bed as support to get out of bed. It is for this reason that the hospital footboard should be firmly secured to the hospital bed. *[St. Luke's] staff violated the accepted standard of care by failing to provide [Marks] with a [footboard] that was properly secured to the hospital bed*. . . . Given [St. Luke's] staff's knowledge that [Marks] was a risk to fall, that he was on morphine, and that its patients use the footboard as support to get out of the hospital bed, [St. Luke's] nursing staff should have provided [Marks] with a footboard that was properly secured to the hospital bed, and as part of its ongoing duty to assess and identify potential fall hazards, should have identified and properly secured the footboard to the hospital bed.

(emphasis added).

Nurse Zdanuk's opinion was similar:

> Hospitals have a duty to provide a safe environment of care for all patients. *This includes equipment such as hospital beds that must be maintained in safe operating condition at all times.* It is a breach in the standard of care for a footboard to fall off a bed when a patient leans on it while attempting to get up resulting in a fall with serious injuries.

(emphasis added).

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[4] Marks asserts the Court should not consider the expert reports because the "experts were retained to opine as to the standards involved in the health care liability claims that were added in [Marks's] Second Amended Petition. They do not address the ordinary standards of care involved in Marks's other claims." But as the Court acknowledges, "there is no significant difference" between Marks's original and amended petitions. ___ S.W.3d at ___. Both petitions included claims based on the hospital bed, and both experts concluded St. Luke's violated the accepted standard of care for health care providers by providing Marks with an improperly assembled hospital bed.

This is not, as Marks asserts, a claim merely for "broken furniture;" it is a claim by a patient based on a bed that was more than a mere piece of furniture. A waiting room chair is a mere piece of furniture. Even a chair in Marks's hospital room for his guests to sit on, or a cot for them to rest on, might be classified as a mere piece of furniture. A specialized hospital bed that proof shows (1) has wheels and brakes so it can be used to transport patients as well as to allow patients to rest and recuperate, (2) is built so it can be raised and lowered to accommodate patients' needs, and (3) has side rails and other safety devices, cannot be so classified. The Legislature has prescribed and the expert reports filed in this case recognize that disputes such as the one before us involve standards of care owed by hospitals to patients.

The Court, however, says that Marks's hospital bed allegations can be distinguished from a health care liability claim because the maintenance staff "responsible for assembling Marks's bed . . . would not have been considered health care providers when doing so." ___ S.W.3d at ___. The Court misses the mark in two ways. First, Marks's Original Petition states that the hospital bed was negligently assembled by St. Luke's "employees, agents, servants or nursing staff." Nurses are specially-trained health care providers that exercise professional judgment. But second, and more importantly, the MLIIA does not limit "health care" to those actions taken by nurses or doctors. Rather, the legislative definition of health care includes "any act" which was or 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." TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(2). And, importantly, the Act defines "health care provider" as

> any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, *or an officer, employee, or agent thereof* acting in the course and scope of his employment.

TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(3)(emphasis added).

The definition plainly includes, without qualification, employees of health care providers so long as they are acting in the course and scope of their employment. The definition's course and scope language does not purport to address the *liability* of health care employers such as hospitals for the actions of their officers, employees, and agents, and it is not necessary to do so; employers are liable under general principles of agency law for the actions of their officers, agents, and employees acting in the course and scope of their employment. So, unless the phrase "course and scope of his employment" is construed to be what it must be—a description of which officers, employees, and agents are health care providers—the phrase is surplusage. But we presume the Legislature intended an entire statute to be effective, so we "try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible." *Phillips v. Bramlett*, ___ S.W.3d ___, ___ (Tex. 2009); *see* TEX. GOV'T CODE § 311.021(2). Properly construing the "course and scope of employment" language to define the types of employees who are health care providers avoids the type of strained analysis the Court undertakes today by dissecting and inquiring into nuances of language used to plead a cause of action; distinguishing between categories of health care provider employees based on duties, types of actions performed, and the type of judgment exercised; and speculating as to insurance coverages when there are no policies in the record. The Court distinguishes acts or omissions of hospital workers with specialized health care training from

hospital workers that do not have specialized health care training but are nevertheless necessary for a hospital to properly care for patients. The statute does not do so; it does the very opposite. The Court's interpretation contradicts the literal and plain statutory language despite the fact that the context of the language does not call for the Court's interpretation. Moreover, giving the language its literal meaning does not yield absurd or nonsensical results. The Court's "interpretation" violates long-established tenets of statutory construction. *See, e.g.*, *In re Jorden*, 249 S.W.3d 416, 423 n.32 (Tex. 2008) ("There are instances where the literal meaning of a statute may be disregarded. But it is only where it is perfectly plain that the literal sense works an absurdity or manifest injustice.") (quoting *Gilmore v. Waples*, 188 S.W. 1037, 1039 (Tex. 1916)).

The Court additionally states that Marks's claim for negligent assembly and maintenance of the bed is not a health care liability claim because expert medical testimony would not be necessary to prove the claim.[5] Yet, this Court has previously stated that such a circumstance does not preclude a claim from being subject to the MLIIA:

> The fact that in the final analysis, expert testimony may not be necessary to support a verdict does not mean the claim is not a health care liability claim. A claim may be a health care liability claim to which the damage caps and expert report requirements are applicable and yet not require expert testimony to prevail at trial.

Murphy, 167 S.W.3d at 838; *see also 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

[5] Marks, however, was not so sure. In the trial court he designated Dr. Reuben as an expert witness who "is expected to testify that St. Luke's violated the accepted standard of care of good nursing and hospital practice on March 25, 2000, by failing to provide the plaintiff with a reasonably safe hospital bed in which to receive and recover from medical treatment . . . [or] by providing the plaintiff with a hospital bed with a footboard that was not properly secured or attached to the hospital bed."

is plainly within the common knowledge of laymen). The legislatively-mandated expert report requirement merely establishes a procedural threshold over which a claimant must pass to continue the lawsuit. *Murphy*, 167 S.W.3d at 838.

A patient's medically necessary, specialized hospital bed is different from other property or parts of a premises not designed and intended primarily for use by and in the care of patients, such as a rickety staircase, a defective waiting room chair, or an unlocked window. The hospital's actions in providing Marks with a hospital bed are inseparable from the other medical and health care services it provided to Marks; a staircase, waiting room chair, an open window are not necessarily so. *See Diversicare*, 185 S.W.3d at 855.

I would hold that Marks's claim that the hospital provided a negligently assembled and maintained hospital bed alleges a breach of accepted standards of health care. For this second reason, I would hold that Marks's suit is a health care liability claim subject to the MLIIA.

Finally, I would hold that accepted standards of hospital safety include providing reasonably safe hospital beds to patients, and Marks's claim is for a violation of that standard. For this third reason, I would hold that his claim comes under the MLIIA.

The MLIIA defines a health care liability claim to include "a cause of action against a health care provider or physician for . . . [a] claimed departure from accepted standards of . . . safety which proximately results in injury to or death of the patient." TEX. REV. CIV. STAT. art. 4590i, § 1.03(a)(4). Thus, a safety-related cause of action is a health care liability claim if it (1) is against a health care provider or physician; (2) is for a departure from accepted standards of safety; and (3) the alleged departure proximately results in injury to or death of the patient. *Id.*

Although the foregoing are the only elements required by the text of the statute, the Court adds a fourth element: a cause of action alleges a departure from accepted safety standards *when the unsafe condition is an inseparable or integral part of the patient's care or treatment.* The Court effectively adds language to the statute to justify its conclusion as to safety. Even so, there is no question the bed was an inseparable and integral part of Marks's care and treatment and meets even the narrowed safety standard erroneously adopted by the Court. Although analysis of the statute's language yields that conclusion, the nurses' notes in Marks's hospital chart referencing the implementation of Safety/Fall Precautions, which incorporated the hospital bed as part of the precautions, do not just yield the conclusion, they compel it.

Although the MLIIA does not define "safety," the statute specifies that legal terms or words of art used but not otherwise defined in the statute "shall have such meaning as is consistent with the common law." TEX. REV. CIV. STAT. art. 4590i, § 1.03(b). Thus, in interpreting the MLIIA, the Court has previously construed "safety" according to its common law definition as the condition of being "untouched by danger; not exposed to danger; secure from danger, harm or loss." *Diversicare*, 185 S.W.3d at 855 (quoting BLACK'S LAW DICTIONARY 1336 (6th ed. 1990)).

Our prior construction is consistent with the plain language of the statute, does not offend the purpose of the statute, is not inconsistent with its contextual meaning, and does not yield an absurd or nonsensical result. Because the Court does not determine otherwise, that should settle the question. Unfortunately, it does not. Instead, the Court justifies effectively adding language to the statute by concluding that a "broad" interpretation is at odds with the legislative purpose. ___ S.W.3d at ___ (citing TEX. REV. CIV. STAT. art. 4590i, § 1.02(b)(1),(3)). The Court reasons that

because a broad interpretation is not warranted, the statute's safety standard is implicated only when the unsafe condition or thing "is an inseparable or integral part of the patient's care or treatment." *Id.* at ___. This is in direct contravention of the MLIIA's explicit mandate that terms not defined by the statute be given their common law meaning, *see* TEX. REV. CIV. STAT. art. 4590i, § 1.03(b), and our previous interpretation of the MLIIA. *See Diversicare*, 185 S.W.3d at 847 (describing health care as "broadly defined" under the MLIIA). The statute quite clearly does not say what the Court interprets it to say, and I agree with Chief Justice Jefferson's choice of words in *Diversicare*:

> Because the statute does not define "safety," we must assign its common meaning . . . [of] protection from danger. . . . The specific source of that danger, be it a structural defect, criminal assault, or careless act, is without limitation. While it may be logical to read into the statute a requirement that a safety related claim also involve health care, there is nothing implicit in safety's plain meaning nor explicit in the MLIIA's language that allows us to impose such a restriction.

See id. at 860-61 (Jefferson, C.J., concurring in part, and dissenting in part) (citations omitted).

Further, en route to its unfortunate conclusion, the Court speculates about coverages of medical malpractice insurance policies and commercial general liability insurance policies that are not before us. It concludes the Legislature intended to exclude claims against health care providers that are covered by general liability insurance policies from the MLIIA. ___ S.W.3d at ___. Aside from the constitutional problem posed if the Legislature effectively delegated authority to insurance companies to determine operative statutory language by their contracts, *see Proctor v. Andrews*, 972 S.W.2d 729, 735 (Tex. 1998), and although the Legislature intended to relieve the malpractice insurance crisis by enacting the MLIIA, I simply do not agree that the MLIIA reflects intent by the Legislature to abdicate its legislative function by allowing claims against health care providers to be

excluded from the Act's provisions based on coverages provided by particular types of insurance policies.

What the MLIIA *does* reflect is legislative intent to broadly, not narrowly, include within the statute's coverage claims made by patients against their health care providers. If policy considerations support excluding subcategories of claims from the MLIIA when the unambiguous statutory language includes the overall category, as it does here, then incorporating those exclusions into the statute is a Legislative prerogative, not a judicial one. *See* TEX. CONST. art. II, § 1; *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991) ("A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute."); *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). It is our duty as judges to ascertain the Legislature's intent from the specific language it used, if possible, and to refrain from looking for extraneous reasons to read into laws unexpressed intentions. *Gov't Pers. Mut. Life Ins. Co. v. Wear*, 251 S.W.2d 525, 529 (Tex. 1952).

Additionally, by conflating standards of safety with standards of health care, the Court negates the Legislature's intent to include within the MLIIA's coverage a separate category of claims based on safety. If a health care provider furnishes unsafe materials or creates an unsafe condition as an integral and inseparable part of a patient's health care or treatment, the health care provider's acts or omissions would already fall within the category of claims based on departures from accepted standards of medical care or health care and there would be no need for the Act to include the word "safety." *See Diversicare*, 185 S.W.3d at 848 ("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."). Applying the Court's "inseparable or integral part of the patient's care or treatment" standard to "safety" effectively reads safety out of the statute instead of properly giving it meaning as adding a category of claims. *Id.* at 855 ("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."). As noted previously, this Court has consistently construed statutes based on the presumption that the Legislature intended an entire statute to be effective, so we "try to give effect to all the words of a statute, treating none of its language as surplusage when reasonably possible." *Phillips*, ___ S.W.3d at ___; *e.g.*, TEX. GOV'T CODE § 311.021(2); *Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005) ("We must avoid, when possible, treating statutory language as surplusage."); *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995) ("We will not read statutory language to be pointless if it is reasonably susceptible of another construction."); *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963) ("[E]ach sentence, clause and word is to be given effect if reasonable and possible."). Accordingly, the Court should construe the Legislature's inclusion of "safety" claims in the MLIIA as expanding the scope of health care liability claims beyond what it would be if the statute only covered medical and health care claims. *Diversicare*, 185 S.W.3d at 855 ("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."). Instead, the Court cites case law from other jurisdictions to support the proposition that claims arising from negligent assembly or maintenance of hospital equipment generally sound in ordinary negligence and are not health care liability claims. ___ S.W.3d at ___

& n.3. But the MLIIA is different from most, if not all, statutes in other states that regulate medical malpractice claims: it specifies that it extends to claims involving breaches of accepted standards of safety. *See Diversicare*, 185 S.W.3d at 860 n.3 (Jefferson, C.J., concurring in part, and dissenting in part) ("Though many states have statutes regulating medical malpractice claims, the MLIIA is unique in that it apparently is the only statute of its kind that by definition extends to claims involving safety."). Examination of the statutes underlying the cases cited by the Court reveal their differences from the MLIIA. *See* LA. REV. STAT. ANN. § 40:1299.41 (providing statutory protections for "malpractice" claims based on "health care or professional services rendered"); IND. CODE 34-18-2-18 (providing statutory protections for "malpractice" claims based on "health care or professional services" provided). Because the MLIIA extends to claims for injuries to patients based on breaches of accepted standards of safety, many claims by patients that might be considered claims for ordinary negligence or premises liability in other states are health care liability claims in Texas. Marks's claim is one of them.

In sum, I would affirm the trial court's dismissal of Marks's claims for failure to file an expert report in accordance with requirements of the MLIIA. I would hold that Marks's suit falls within the MLIIA for three separate reasons: (1) the entire claim is based on alleged violations of accepted standards of health care and safety and cannot be recast by artful pleading into both health care and non-health care claims; (2) the claim for negligently assembling, providing, and maintaining a hospital bed is a health care liability claim because it alleges a breach of accepted standards of health care; and (3) the claim for negligently assembling, providing, and maintaining a hospital bed is a health care liability claim because it alleges a breach of accepted standards of safety.

Phil Johnson
Justice

OPINION DELIVERED: August 28, 2009