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 WAINWRIGHT, dissenting.

I join Justice Johnson's dissent for the reasons he cogently explains. I write to explain further my differences with the Court's opinion and to lament the Court's reversal of several precedents that precluded artful pleading of claims to circumvent legislative requirements to pursue medical malpractice cases.

Under article 4590i, section 1.03(a)(4) of the Medical Liability and Insurance Improvement Act (MLIIA),[1] there are three types of health care liability claims: claims arising from failure to satisfy the standards of care for medical care, for health care, or for safety. TEX. REV. CIV. STAT.

[1] In 2003, article 4590i was repealed, amended, and recodified in Chapter 74 of the Civil Practice and Remedies Code, which applies to health care liability claims filed on or after September 1, 2003. *See* Act of May 30, 1977, 65th Leg., R.S., ch. 817, 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 Laws 2039, 2041, *repealed* by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex.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 (current version at TEX. CIV. PRAC. & REM. CODE§§ 74.301–.303).

art. 4590i, § 1.03(a)(4) (defining "health care liability claim" as an action against a physician or other health care provider for a "claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient"). In *Diversicare General Partner, Inc. v. Rubio*, we held that an assault at a nursing home by a patient with reduced mental faculties on another mentally challenged patient was a health care claim. 185 S.W.3d 842, 849 (Tex. 2005). Citing statutory health care duties of nursing homes, we explained that nursing home residents were patients at those facilities not merely for shelter, as apartment residents, but also for health care and treatment. *Id.* at 850–51. We also concluded that the inclusion in 4590i of claims based on failure to provide adequate "safety" broadened the scope of the statute beyond medical and health care and, therefore, was another basis for concluding that the assault between patients was a health care liability claim. *Id.* at 855. It was not necessary in *Diversicare* to precisely define the scope of the "safety" component of a health care liability claim, and we did not.

The Court's opinion and the concurrence misconstrue *Diversicare*. The bulk of *Diversicare* construes "health care" under 4590i. Responding to the dissent and concurrence, the opinion in *Diversicare* noted that an injury to a patient resulting from a rickety staircase or an unlocked window does not implicate the "health care" prong of health care liability claims. *Id.* at 854. In this case, the Court and the concurrence erroneously cite those examples as exceptions to the scope of 4590i's "safety" prong in *Diversicare*. *Diversicare*'s only holding concerning the "safety" prong was that its inclusion expanded the reach of the statute and that it was broad enough to include Rubio's claim in that case. *Id.* at 855.

Different from *Diversicare*, this case concerns the circumstances that bring a hospital equipment failure within the scope of article 4590i. Marks underwent surgery at St. Luke's Hospital to implant a lumbar morphine pump catheter into his spinal cord to alleviate back problems. His medical records indicated that St. Luke's Hospital implemented extra safety and fall precautions due to his risk of falling, his limited mobility, his need for an ambulatory assistance device, and his morphine therapy. The hospital's instructions included that his hospital bed was to be "in a low position with the brakes applied," and a fall precaution sticker was placed on the outside door of his room and on his medical chart. The health care providers concluded that Marks required certain prescribed precautions to address his risk of falling as part of his post-surgical care. The Court ignores these and other medical judgments and concludes that the fall was a matter of ordinary negligence disconnected from his hospital treatment.

The Court's conclusion ignores the physician's expert report that Marks himself provided in connection with his claim for medical malpractice. *See* TEX. REV. CIV. STAT. art. 4590i, § 13.01(d) (requiring the substantiation of health care liability claims with a timely served expert report). Marks's expert opined that 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" and to "implement interventions to eliminate and reduce the patient's risk of falling." The physician concluded that the hospital violated "accepted standards of good nursing care" by failing to provide Marks with a safe hospital bed and, specifically, by failing "to ensure that the footboard was properly secured to the bed." Marks's own expert determined that, "to a reasonable degree of medical probability," breach of these nursing standards of care was the proximate cause of Marks's

fall from the hospital bed. Whether these conclusions are supported by sufficient evidence will be questions for the jury, but they unquestionably establish that Marks pled a health care liability claim and, at least in the amended pleadings, he acknowledged that.

The Court initially asks the right question—whether medical judgment was employed in the equipment's use and its importance to the patient's care. But the Court then inexplicably analyzes whether medical or professional judgment was involved in "the assembly of Marks's hospital bed." __ S.W.3d __. It is difficult to understand how the necessity of medical judgment in the assembly of equipment determines whether that equipment's use meets accepted standards of safety in the definition of a health care liability claim.[2] Under this approach for construing 4590i, a hospital's exoneration from or liability for a defective hospital bed would depend on whether assembly of the bed required the input of a medical professional.[3] Likewise, a claim for injuries caused by the improper operation of a surgical drill due to the failure to tighten the drill bit would give rise to a health care liability claim *if* knowledge of a physician is required to assemble the drill. The Court's reasoning also suggests, for example, that if a defective MRI scanner used to perform a magnetic resonance imaging scan causes injury to a person, the circumstance would not give rise to liability under 4590i unless medical judgment was required to assemble the scanner.

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[2] This assumes the Court is correct that, to be a valid claim for inadequate "safety" under article 4590i, the claim must be an inseparable or integral part of the patient's care or treatment. *See* ___ S.W.3d ___.

[3] Marks based his negligence claim on the improper assembly or maintenance of the hospital bed. However, that does not mean that the determination of whether the claim is a health care claim should turn on whether the assembly of the bed required medical know-how or judgment. By focusing on the assembly rather than the use of the bed, Marks has directed the Court away from the evidence demonstrating the bed's medical purpose and use. The Court has taken the bait, despite our repeated warnings in several cases not to fall for artful pleading. *See* ___ S.W.3d ___.

If the hospital equipment is used in patient care and treatment, its operation at least implicates medical care and health care. But the Court fails to answer these questions and instead discusses whether the *assembly* of the hospital equipment was the responsibility of the hospital's maintenance staff or its medical staff. Concluding that the assembly of the equipment was the responsibility of maintenance staff, the Court, therefore, explains that the hospital bed was "unrelated to any professional judgment and is merely incidental to the patient's care." ___ S.W.3d ___. Would the Court also conclude that tightening a drill bit on a surgical drill was the responsibility of maintenance staff and therefore a patient's injury arising from negligent assembly of the drill or its use during surgery would not be a health care liability claim?

I further wonder if anyone else would agree that the type of bed in which we recuperate from back surgery is merely "incidental" to our care. If that were true, neither a sleeping bag on the floor nor a wooden board elevated on wheels would violate 4590i's treatment standards for a patient who had undergone back surgery. Under the Court's characterization of the hospital bed's role in Marks's care, the instructions in his medical records for specific settings for his bed to recuperate after the surgery are superfluous. And the Court has apparently decided, contrary to the trial court and with no controverting evidence, that the opinions of Marks's physician expert are wrong.

I am also concerned that the Court reverses several precedents. The Court holds that three of the four negligence claims against St. Luke's Hospital are health care liability claims. Those three claims are for 1) failure to train and supervise the nursing staff properly, 2) failure to provide Marks with the assistance he required for daily living activities, and 3) failing to provide him with a safe environment in which to recover. The Court decides that the fourth claim as pled by

Marks—providing a hospital bed that had been negligently assembled and maintained by the hospital's employees—was not a health care liability claim. Yet, all four claims arose from the same facts involving the hospital bed provided to Marks as part of recuperation from back surgery. The Court cites *Diversicare* for its conclusion that the first three claims are health care liability claims, but then fails to follow *Diversicare* and other precedents prohibiting claim-splitting to avoid the statutory limitations on medical malpractice suits.

This Court has repeatedly held that parties may not employ artful pleading to circumvent the requirements for filing a health care liability claim—e.g., shorter statute of limitations than other negligence claims, heightened filing requirements (providing expert reports within 120 days of filing the lawsuit), and caps on damages. *Diversicare*, 185 S.W.3d at 846–49. Negligence claims that are not health care liability claims are not subject to these requirements. To preclude creative recasting of health care liability claims as ordinary negligence claims to circumvent the statutory requirements, we have held that the underlying nature of the claim governs its categorization and not how the petition is worded. *E.g.*, *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994). In *Diversicare*, we reaffirmed the well established rule that "artful pleading and recasting of claims is not permitted" and warned that allowing claim-splitting in the pleadings to recast health care liability claims as something else "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." *Id.* at 854. In *Murphy v. Russell*, we reaffirmed that a "claimant cannot escape the Legislature's statutory scheme by artful pleading." 167 S.W.3d 835, 838 (Tex. 2005). In *MacGregor Medical Ass'n v. Campbell*, we prohibited a claimant from bringing a health care

liability claim veiled as a violation of the Deceptive Trade Practices Act, repeating that claimants may not thwart the express legislative intent of the MLIIA by recasting health care claims as DTPA claims to avoid the standards set forth in the MLIIA. 985 S.W.2d 38, 39–40 (Tex. 1998). And fifteen years ago we established in *Sorokolit v. Rhodes* that "[c]laims that a physician or health care provider was negligent may not be recast . . . to avoid the standards set forth in the Medical Liability and Insurance Improvement Act." 889 S.W.2d at 242.

The Court reverses these precedents and takes the position that three of Marks's claims assert health care liability claims and one does not, even though all the claims are of the same underlying nature. The Court allows a claimant to pursue both health care liability claims and non-health care liability claims based on the same facts involving a health care provider. Marks's claim for ordinary negligence in the alleged defective assembly of the hospital bed mirrors the health care liability claim. I would adhere to our precedents and again preclude artful pleading to circumvent the Legislature's objectives under article 4590i. Because the Court does not, I respectfully dissent.

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Dale Wainwright
Justice

OPINION DELIVERED: August 28, 2009