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 GUZMAN, concurring and dissenting.

I join CHIEF JUSTICE JEFFERSON'S concurrence and dissent for the reasons he explains, namely that (1) our holding in *Diversicare* requires a health care liability claim to involve an act or omission that is inseparable from the provision of health care, *see Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005), and (2) the footboard on Marks's hospital bed was not an integral part of St. Luke's delivery of health care services to Marks. I write separately, however, because of an additional concern I have with the Court's judgment. The Medical Liability and Insurance Improvement Act (MLIIA) was enacted to remedy a medical malpractice insurance crisis

in Texas. TEX. REV. CIV. STAT. art. 4590i, § 1.02(a)(5)–(6) (repealed 2003).[1] By sweeping even simple negligence claims under the umbrella of medical malpractice insurance policies, the Court risks broadening the class of claims that medical malpractice insurance companies must cover. This, I fear, will thwart the very purpose of the MLIIA, which is to reduce the cost of medical malpractice insurance in Texas so that patients can have increased access to health care. *See id.* § 1.02(a)(4)–(5).

Health care providers generally carry both a malpractice policy to cover health care liability claims and a general liability policy to cover ordinary negligence. *See Diversicare*, 185 S.W.3d at 862 (O'Neill, J., dissenting) (citing *Cochran v. B.J. Servs. Co. USA*, 302 F.3d 499, 502 (5th Cir. 2002)). As the dissent explained in *Diversicare*, when courts determine that a claim is a health care liability claim, expenses related to that litigation likely will fall under the malpractice policy instead of the general liability policy. *Id.* Thus:

> the adoption of an overly broad interpretation of "health care liability claim" could . . . 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.

Id. at 863.

As CHIEF JUSTICE JEFFERSON notes in his dissent, a variety of fixtures in a hospital enable doctors to provide medical services, many of which are merely incidental to the provision of health

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[1] Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, § 1.02(a)(5)–(6), 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. Similar medical liability legislation is now codified in Chapter 74 of the Texas Civil Practice and Remedies Code.

care services. In holding that even a hospital bed footboard is an integral and inseparable part of the delivery of health care services, it is unclear what acts of ordinary negligence occurring in a health care setting, if any, might still fall within the scope of premises liability rather than health care liability. The Legislature did not intend for the MLIIA to convert an ordinary, nonmedical negligence claim, like the one here, into a health care liability claim. Because the Court's interpretation of the statute contradicts this express intent, I join CHIEF JUSTICE JEFFERSON in concurring and dissenting from the Court's judgment.

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Eva M. Guzman
Justice

OPINION DELIVERED: August 27, 2010