# 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**

CHIEF JUSTICE JEFFERSON, joined by JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN, concurring and dissenting.

Irving Marks was a patient at St. Luke's Hospital, where he was recovering from back surgery. In the middle of the night, Marks attempted to get out of bed. He leaned on the bed's footboard, which came loose and collapsed beneath him, causing him to fall. The Court held in 2009 that Marks's lawsuit to recover for his resulting injuries targeted the negligent assembly and maintenance of the footboard—a premises liability claim. *Marks v. St. Luke's Episcopal Hosp.*, 52 Tex. Sup. Ct. J. 1184, 1185 (Aug. 31, 2009). The Court reasoned that the "safety" prong of the Medical Liability and Insurance Improvement Act (MLIIA)[1] is implicated only if the source of the

[1] *See* Medical Liability and Insurance Improvement Act of Texas, 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 Laws 2039, 2041, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex.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.

negligence is directly related to medical or health care services involving health care professionals and the exercise of medical or professional judgment. *Id*. at 1186-87. According to the Court, the alleged negligent assembly and maintenance of the bed's footboard was unrelated to professional judgment and was merely incidental to Marks's care. *Id*. at 1189. Because the case involved "ordinary negligence" that did not require for its resolution "the specialized knowledge of a medical expert," the Court rejected the hospital's contention that Marks's allegation was a health care liability claim. *Id*.

The Court changes course today. A plurality repeats our earlier holding that the safety prong is implicated only if the underlying claim directly relates to a patient's care and treatment. Now, however, the Court concludes that the hospital bed is an inseparable part of the treatment Marks received. But the footboard relates to a patient's health care in the same way that the stairs, walls, and utilities do: without access to the room, shelter from the elements, power to adjust the room's temperature and to run medical equipment, doctors would be unable to deliver medical services. Examples like these would easily fit within the definition of a health care liability claim, because they involve claimed departures from accepted standards of safety. The Court has rejected that view, however. In a prior case, I wrote that the Legislature's definition of "safety" forbids a premises liability claim against a health care provider, even if the claim is based on a "structural defect, criminal assault, or careless act." *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 861 (Tex. 2005) (Jefferson, C.J., concurring and dissenting). Had the *Diversicare* Court adopted that approach, the outcome of this case would not be in doubt. But the Court disagreed. It said that a patient may sue if a staircase gives way under her weight—a circumstance that would "give rise to

[a] premises liability claim[].” *Id.* at 854. The Court held that the touchstone for distinguishing between a premises and a health care claim is that the latter involves an act or omission that is “inseparable from the provision of healthcare.” *Id.*

Consistency in the law is difficult to achieve, of course, but we should strive to explain any discord our opinions generate. *Diversicare* holds that premises liability claims are viable against health care providers. *Id*. at 855. If that is so, then the Court must explain how a piece of wood at the end of a bed is integral to medical care. The Court’s previous opinion describes in great detail why the footboard was *not* integral to St. Luke’s delivery of health care services to Marks, and I have attached it as an appendix.

Marks’s complaint about how the footboard was maintained has nothing to do with the scope or degree of medical services he received, nor does it involve professional medical judgment about how the bed’s configuration might aid in his treatment. The footboard could as easily have been a chair in his room or a bedside table. If Marks leaned on his bedside table as support and it collapsed, would that be a health care liability claim? What if Marks fell down a “rickety staircase” while perambulating for the first time after surgery? The Court offers no explanation as to how the bed’s footboard differs from the “rickety staircase” described in *Diversicare*. *See id*. at 854.

The Court can approach this conundrum in one of two ways. The Court can either say that:

> Because the statute does not define “safety,” we must assign it its common meaning. Safety is commonly understood to mean 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.

*Id.* at 860-61 (Jefferson, C.J., concurring and dissenting) (emphasis added) (citations omitted). Had that view prevailed, we would no longer discuss these types of claims in terms of "premises liability."

But the *Diversicare* Court rejected that approach, holding that health care liability claims must "implicate more than inadequate security or negligent maintenance." *Id*. at 854. It said that circumstances may "give rise to premises liability claims in a healthcare setting that may not be properly classified as healthcare liability claims." *Id*. at 854. We applied that conclusion in our first opinion in this case, stating that "when a piece of hospital equipment is unrelated to any professional judgment and is merely incidental to the patient's care, its alleged unsafe condition does not implicate article 4590i." *Marks*, 52 Tex. Sup. Ct. J. at 1189. The Court identified "several overlapping factors" to guide our determination, including whether the specialized knowledge of a medical expert may be necessary to prove the claim, whether a specialized health care standard applied, and whether the negligent act involved medical judgment related to the patient's care or treatment. *Id*. at 1189.

Nothing in the record or in the Court's new opinion establishes that a doctor's specialized knowledge is relevant here, nor that a the footboard was an integral component of Marks's treatment. Because I do not believe that the bed's footboard was integral to or inseparable from the health care services St. Luke's provided to Marks, I respectfully dissent from the Court's judgment affirming

the court of appeals' judgment on this ground.[2] I would affirm in part and reverse in part the court of appeals' judgment and remand the case to the trial court for further proceedings.

Wallace B. Jefferson
Chief Justice

Opinion Delivered: August 27, 2010

[2] I agree with the Court (as I did previously) that Marks's first three claims (involving negligent supervision, failing to provide Marks with the assistance he needed, and failure to provide a safe environment in which to receive treatment and recover) are health care liability claims and that the trial court did not abuse its discretion in denying Marks a grace period or in dismissing those claims.

**APPENDIX**

# 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 MEDINA delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE BRISTER, and JUSTICE GREEN joined.

CHIEF JUSTICE JEFFERSON filed a concurring opinion.

JUSTICE HECHT filed a dissenting opinion.

JUSTICE WAINWRIGHT filed a dissenting opinion.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, and JUSTICE WILLETT joined.

In this case we must decide whether a hospital patient's fall, allegedly caused by a negligently maintained hospital bed, is a health care liability claim under article 4590i of the Revised Civil

Statutes.[3] Article 4590i, also known as the Medical Liability and Insurance Improvement Act, provides that health care liability claims, not accompanied by an expert report, may be dismissed with prejudice 180 days after filing, although a grace period is available under limited circumstances. The trial court concluded that the hospital bed claim here was a health care liability claim, which it then dismissed because of the patient's failure to file a timely expert report. The trial court also denied the patient's request for a grace period. The court of appeals initially disagreed with the trial court, concluding that the patient's claim was not a health care liability claim. *See Marks v. St. Luke's Episcopal Hosp.*, 177 S.W.3d 255, 260 (Tex. App.–Houston [1st Dist.] 2005), *vacated*, 193 S.W.3d 575 (Tex. 2006). Following our remand of the case, however, the court affirmed the trial court's judgment. 229 S.W.3d 396. One justice dissented, arguing that the hospital bed claim was in the nature of a premises liability claim rather than a health care liability claim. *Id*. at 403 (Jennings, J., dissenting in part). We agree with the dissenting justice and accordingly reverse the court of appeals' judgment and remand the case to the trial court.

I

Irving Marks fell and injured himself during his recuperation from back surgery at St. Luke's Hospital. The fall occurred when Marks, while sitting on his hospital bed, attempted to use the bed's footboard to push himself up to a standing position. Unfortunately, the footboard came loose, causing Marks to fall. Marks sued the Hospital, alleging several acts of negligence, including: (1) failing to train and supervise the nursing staff properly, (2) failing to provide him with the assistance

[3] *See* Medical Liability and Insurance Improvement Act of Texas, 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.

he required for daily living activities, (3) failing to provide him with a safe environment in which to recover, and (4) providing a hospital bed that had been negligently assembled and maintained by the hospital's employees.

The trial court concluded that Marks's petition asserted health care liability claims as defined under the Medical Liability and Insurance Improvement Act. *See* TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4) (defining health care liability claim).[4] This Act requires that health care liability claims be substantiated by a timely filed expert report. *Id*. § 13.01(d). Because Marks failed to file a timely expert report, the trial court granted the Hospital's motion to dismiss.

The court of appeals initially reversed, concluding that Marks's allegations concerned "an unsafe condition created by an item of furniture" and thus related to "premises liability, not health care liability[.]" *Marks*, 177 S.W.3d at 259. The Hospital appealed, filing its petition for review a few days before we held, in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005), that a patient's claims against a nursing home for inadequate supervision and nursing services were health care liability claims.

After full briefing, we granted the Hospital's petition. Rather than parse through Marks's claims, however, we vacated the court of appeal's judgment without reference to the merits and remanded for the court of appeals to consider the nature of these claims in light of *Diversicare*. *St. Luke's Episcopal Hosp. v. Marks,* 193 S.W.3d 575 (Tex. 2006) (per curiam). Following our remand, a divided court of appeals affirmed the trial court's dismissal for want of a timely expert report,

---

[4] Article 4590i was repealed after the filing of this case. *See* n.1 *supra*. Similar medical liability legislation is now codified in Chapter 74 of the Texas Civil Practice and Remedies Code, affecting actions filed on or after September 1, 2003. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.301-.303.

concluding that Marks had asserted only health care liability claims. 229 S.W.3d at 402. One justice dissented in part, urging that Marks's fourth claim concerning the defective footboard was a premises-liability claim rather than a health care liability claim under the Medical Liability and Insurance Improvement Act. *Id*. at 403 (Jennings, J., dissenting in part).

II

The Medical Liability and Insurance Improvement Act of 1977 was the Legislature's response to a crisis in the cost and availability of medical malpractice insurance in Texas. The Legislature perceived that an inordinate increase in the frequency and severity of health care liability claims had caused the crisis. TEX. REV. CIV. STAT. art. 4590i § 1.02(a)(1)-(5). The Legislature also found that this insurance crisis had adversely affected the cost and delivery of medical and health care in Texas. *Id*. § 1.02(a)(6)-(9). To address the problem, the Legislature sought to reduce the "frequency and severity of health care liability claims through reasonable improvements and modifications in the Texas insurance, tort, and medical practice systems[.]" *Id*. § 1.02(b)(1). The Legislature's modifications included a damages cap, a shortened limitations period, and heightened filing requirements for health care liability claims. *See Diversicare*, 185 S.W.3d at 846-47.

The Act defines a "health care liability claim" as "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" proximately resulting in a patient's injury or death. TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4). The Act does not define safety, although it does define other terms, including "health care provider," "physician," "medical care," and "health care." *Id*. § 1.03(a)(2)-(4), (8).

These definitions indicate that physicians provide medical care, and health care providers furnish other health care services. "Medical care" is defined as the practice of medicine, including the diagnosis and treatment by a licensed physician. *Id*. § 1.03(a)(6). "Health care" is defined more broadly to include "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." *See id.* § 1.03(a)(3). Hospitals are expressly included in the definition of "health care provider." *Id.* § 1.03(a)(3).

Although *Diversicare* primarily concerned a claimed departure from accepted standards of health care, we mentioned safety and the absence of any statutory definition for the term. *Diversicare*, 185 S.W.3d at 855. We observed that the inclusion of accepted standards of safety expanded the statute's scope beyond what it would have been had the statute only covered medical care and health care. Because the statute offered no definition of safety, we suggested its commonly understood meaning, that is, "'untouched by danger; not exposed to danger; secure from danger, harm or loss.'" *Id.* (quoting BLACK'S LAW DICTIONARY 1336 (6th ed. 1990)). The term's meaning, however, was ultimately unnecessary to our decision, and so we left unresolved its contextual meaning, as well as its relationship to the other defined terms of medical care and health care. *See id.* The meaning of this term is squarely presented here as the parties dispute what the Legislature intended to include as a health care liability claim involving a "departure from accepted standards of . . . safety[.]" TEX. REV. CIV. STAT. art 4590i § 1.03(a)(4).

Marks contends that safety must be read narrowly to include only safety concerns directly related to the patient's care or treatment. The Hospital, on the other hand, argues that the term should

be read broadly to include any patient injury negligently caused by an unsafe condition at a health care facility. Even if the definition is not this broad, the Hospital alternatively argues, it should include equipment used in the patient's care, such as the hospital bed here.

III

To determine the meaning of safety in the context of this Act, we begin with established principles of statutory construction. The first and overarching principle is that we give effect to legislative intent. *See* TEX. GOV'T CODE § 312.005; *see also Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). When interpreting a statute, we read words and phrases in context and construe them according to the rules of grammar and common usage. TEX. GOV'T CODE § 311.011(a). Words that are not defined are given their ordinary meaning. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). When possible, all words are given effect and none of the statute's language is treated as surplusage. *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000). Thus, the terms medical care, health care, and safety should add meaning to the statute; none of the terms should be disregarded, discounted, or dismissed. *See Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 89-90 (Tex. 2001).

The Legislature's purpose in article 4590i is clearly stated, to remedy "a medical malpractice insurance crisis" in Texas and its "material adverse effect on the delivery of medical and health care services in Texas[.]" TEX. REV. CIV. STAT. art. 4590i § 1.02(a)(5)-(6). This concern pervades the statute, which is replete with references to medical liability, health care, and malpractice, all of which implicate medical or health care judgments made by professionals. *See*, *e.g.*, *id.* § 13.01(r)(5)-(6) (requiring expert to have knowledge of medical diagnosis, care, and treatment).

By comparison, neither the statute nor the historical background suggests that physicians or health care providers were similarly challenged when obtaining commercial general liability insurance coverage for ordinary, non-medical accidents on their premises. The Legislature was responding only to a medical-malpractice insurance crisis, and medical malpractice insurance generally does not cover premises liability claims. *See*, *e.g.*, *N. Am. Speciality Ins. Co. v. Royal Surplus Lines Ins. Co.,* 541 F.3d 552, 561 (5th Cir. 2008) (recognizing that commercial general liability insurance policies generally exclude professional breaches from coverage).

All patient injuries in a health care setting, regardless of cause, may be said to implicate patient safety in the broader sense, but not all patient injuries involve malpractice. Given the statute's objective and the Legislature's express concern, the Legislature evidently did not intend to define safety as broadly as the Hospital proposes. Moreover, such an expansive interpretation conflicts with the Legislature's express intent that the statute operate to control medical-malpractice insurance costs without unduly restricting a patient's rights. *See* TEX. REV. CIV. STAT. art. 4590i § 1.02(b)(3); *see also O'Reilly v. Wiseman*, 107 S.W.3d 699, 707 n.12 (Tex. App.—Austin 2003, pet. denied). We accordingly reject the Hospital's contention that a health care liability claim includes any patient injury negligently caused by an unsafe condition at a health care facility.

We said as much in *Diversicare*, noting that there could "be circumstances that give rise to premises liability claims in a healthcare setting" and that not every accidental injury to a patient in a health care setting would constitute a health care liability claim under article 4590i. *Diversicare*, 185 S.W.3d at 854 (indicating that a health care claim is determined by the nature of the claim, not the nature of the defendant). As noted, a health care liability claim is defined to include a "claimed

departure from accepted standards of medical care or health care or safety." TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4). Standards of medical care or health care are implicated when the negligent act or omission is an inseparable or integral part of the rendition of medical services. *Diversicare*, 185 S.W.3d at 848-49. Similarly, an accepted standard of safety is implicated under the Act when the unsafe condition or thing is an inseparable or integral part of the patient's care or treatment. *See id.* at 855.

In determining whether the plaintiff's claim is inseparable from the rendition of medical services, and thus a health care liability claim, we are guided by several overlapping factors. They include (1) whether the specialized knowledge of a medical expert may be necessary to prove the claim, (2) whether a specialized standard in the health care community applies to the alleged circumstances, and (3) whether the negligent act involves medical judgment related to the patient's care or treatment. *See Diversicare*, 185 S.W.3d at 847-52. Not surprisingly, these factors confirm the significance that medical or professional judgment plays in classifying the claim as one involving health care liability.

IV

Marks's original petition asserted four negligence claims against the Hospital. The first three—failing to properly train and supervise its agents, employees, servants and nursing staff when caring for him; failing to provide him with the assistance he required for daily living activities; and failing to provide him a safe environment in which to receive treatment and recover—are similar to those in *Diversicare*.

In that case, a nursing home resident's daughter sued on her mother's behalf, alleging the nursing home had been negligent in failing to provide enough staff and supervision to prevent her

mother from falling on two occasions and from being sexually assaulted by another nursing home resident. *Id.* at 845. The trial court concluded that the allegations constituted health care liability claims, dismissing the case because the plaintiff had not filed the requisite expert report. *See* TEX. REV. CIV. STAT. art. 4590i § 13.01(d), (e). The court of appeals reversed, concluding that the sexual-assault claim did not fit the definition of a health care liability claim. *Rubio v. Diversicare Gen. Partner, Inc.*, 82 S.W.3d 778, 783-84 (Tex. App.—Corpus Christi 2002), *rev'd*, 185 S.W.3d 842 (Tex. 2005). We disagreed, however, concluding that all the plaintiff's claims were based on an alleged departure from accepted standards of health care. *Diversicare*, 185 S.W.3d at 849. We noted that nursing homes provide services to their residents that include supervision of daily activities, routine examinations, monitoring of the residents' physical and mental condition, administering medication, "and meeting the fundamental care needs of the residents." *Id.* We further noted that these services are provided by professional staff, and "[t]he level and types of health care services provided vary with the needs and capabilities, both physical and mental, of the patients." *Id.* at 849-50 (citing *Harris v. Harris County Hosp. Dist.*, 557 S.W.2d 353, 355 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ)). We then concluded that those services, including the monitoring and protection of the patient, as well as training and staffing policies, were "integral components of Diversicare's rendition of health care services[.]" *Id.* at 850. Similarly, Marks's first three claims here, involving patient supervision and staff training, are claims implicating professional expertise and the departure from the accepted standard of health care. Such claims are health care liability claims subject to the Act. TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4).

Marks's hospital bed claim is different, however, because it does not assert a departure from the accepted standards of medical care or health care. Instead, Marks alleges that the Hospital was negligent in the bed's assembly or maintenance, or both, and that a defectively attached footboard presented an unsafe condition. At its core, Marks's hospital bed claim involves the failure of a piece of equipment. Whether the failure of that equipment qualifies as a health care liability claim depends on whether that failure constitutes a departure from accepted standards of safety under article 4590i. *Id*. To assist us in answering that question, we consider the various factors indicative of professional judgment, that being the equipment's use and importance in the patient's care or treatment.

No evidence shows that the assembly of Marks's hospital bed involved any medical or professional judgment, or that the bed's footboard or its assembly were related to, or affected by, Marks's care or treatment. To the contrary, Marks presented some evidence that the assembly of the hospital bed was solely the responsibility of the Hospital's maintenance staff. Presumably, tasks performed by the maintenance staff do not require any specialized health care knowledge, and evaluation of whether those tasks were performed negligently would not require expert medical testimony. Other jurisdictions have, for the most part, found claims based on injuries incurred when a hospital fixture or piece of equipment breaks due to negligent assembly, maintenance, or repair to sound in ordinary, rather than medical, negligence.[5]

---

[5] *See, e.g., Williamson v. Hosp. Serv. Dist. No. 1 of Jefferson*, 888 So.2d 782, 789-90 (La. 2004) (holding that hospital's negligence in failing to repair and inspect wheelchair prior to returning it to service was ordinary not medical negligence to which state's medical malpractice statute did not apply); *Pluard v. Patients Compensation Fund*, 705 N.E.2d 1035, 1037-38 (Ind. App. 1999) (holding that injuries incurred when surgical lamp inadequately attached to the wall fell on patient not covered by Indiana's Medical Malpractice Act); *Harts v. Caylor-Nickel Hosp., Inc.*, 553 N.E.2d 874, 879 (Ind. App. 1990) (concluding that injury incurred when bed rail collapsed, causing patient to fall, were premises liability claims not covered by Medical Malpractice Act); *but see Prater v. Smyth County Cmty. Hosp.*, No. 93-4050, 1995 WL 1055761, at *2-3 (Va. Cir. Ct. Jan. 30, 1995) (not designated for publication) (holding that a bed rail collapse

A cause of action alleges a departure from accepted standards of safety within the Act's meaning when the unsafe condition is an inseparable or integral part of the patient's care or treatment. An unsafe condition, like a negligent act or omission, is inseparable from the rendition of medical or health care services when the relationship between the two is significant and direct, and thus involves professional judgment. The following cases illustrate this point.

In *Hector v. Christus Health Gulf Coast*, the court of appeals held that a patient's action for injuries in a fall from an operating table during surgery was based on "an alleged departure from accepted standards of safety" under article 4590i. 175 S.W.3d 832, 835-36 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). The patient argued that the operating table was under the hospital's control and that the accident involved an administrative or routine use rather than medical care. *Id.* at 836. The court of appeals agreed in theory with the "distinction between hospital workers that were health care providers, such as nurses and doctors, and hospital workers that were not, such as cooks or electricians." *Id.* But the court concluded the distinction was irrelevant because "any person in the operating room at the time of Hector's accident would necessarily have been considered a health care provider." *Id.* The distinction is relevant in this case, however, because the hospital workers responsible for assembling Marks's bed, identified by the hospital nurses as the maintenance team, would not have been considered health care providers when doing so.

In another case, a patient sued a hospital for a foot injury caused by stepping on a sharp paint chip while showering in preparation for surgery. *Shults v. Baptist St. Anthony's Hosp. Corp.*, 166

---

while taking patient's medical history was an integral part of the health care treatment and covered by Virginia's Medical Malpractice Act).

S.W.3d 502, 503 (Tex. App.—Amarillo 2005, pet. denied). The patient alleged negligence based both on the hospital's failure to maintain and keep safe its shower as well as on the hospital's treatment of his foot injury. The court rejected the argument that the negligence claims based on the condition of the hospital shower constituted claims resulting from departures from accepted standards of safety under article 4590i:

> We agree with [hospital's] characterization of [patient's] claims as involving two distinct theories of recovery, one based upon premises liability and the other on medical negligence. Personal injury claims resulting from departures from accepted standards of safety may be included within the scope of article 4590i, but such departures must be inseparable parts of the rendition of medical services and the standards of safety within the health care industry to be covered by the Act. We do not believe that the presence of a sharp paint chip in the shower of [patient's] hospital room could be considered in any way an inseparable part of the medical services rendered to [patient].

*Id.* at 505.

The shower was, however, taken in preparation for surgery at a physician's instruction. *Id.* at 503. In that sense, it was a functional part of the surgical services provided by the hospital, just as the footboard attached to the hospital bed here was a functional part of the morphine-treatment and recovery services provided to Marks. The source of the negligence in both cases, however, is not directly related to the rendition of any medical or health care services, but instead is incidental, occurring in the course of the Hospital's general maintenance duties which do not involve health care professionals or the exercise of any medical or professional judgment.

There are certainly circumstances in which the assembly or use of a hospital bed might involveprofessional judgment, the evaluation of which would likely require expert testimony. For instance, a health care provider might determine that a patient's condition called for restraints and that

side rails attached to the bed would suffice.[6] Thus, the failure of a part of a hospital bed specifically ordered by a physician or health care provider and integral to the patient's care or treatment might implicate article 4590i. *See, e.g., Espinosa v. Baptist Health System*, No. 04-05-00131-CV, 2006 WL 2871262 (Tex. App.–San Antonio Oct. 11, 2006, pet. denied) (mem. op.) (holding that patient injured while using an overhead bed-frame device or trapeze authorized as part of patient's medical care and installed by a nurse and orthopedic technician was a health care liability claim). But when a piece of hospital equipment is unrelated to any professional judgment and is merely incidental to the patient's care, its alleged unsafe condition does not implicate article 4590i. We conclude that the negligence claim based on the defectively assembled or maintained hospital bed in this case is not a health care liability claim to which article 4590i applies.

JUSTICE JOHNSON's dissent, however, questions that conclusion as permitting Marks to convert a health care liability claim into an ordinary negligence claim by mere pleading. The dissent submits that "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 [as to its patient]." ___ S.W.3d

---

[6] *See, e.g., Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 684 N.W.2d 864, 867 (Mich. 2004) (determining that claims based on nursing home's failure to recognize the risk posed by the configuration of bed rails on a hospital bed sounded in medical malpractice); *Bell v. West Harrison County Dist.*, 523 So.2d 1031, 1033 (Miss. 1988) (determining that a patient's claims arising from a nurse's failure to raise side rails on a hospital bed constituted medical malpractice, rather than ordinary negligence, claims because "[a] nurse's decision as to whether or not bed rails should be utilized entails a degree of knowledge concerning the subject patient's condition, medication, history, etc."); *Lenny v. Loehmann*, 433 N.Y.S.2d 135 (N.Y. App. Div. 1980) (concluding that a physician's alleged negligence in failing to instruct that bed's side rails be raised, or in failing to check condition of the side rails after they had been put up, or in failing to supervise patient's movements to and from bed sounded in medical malpractice rather than ordinary negligence); *cf. Gould v. N.Y. Cty. Health and Hosp. Corp.*, 490 N.Y.S.2d 87, 88-89 (N.Y. Sup. Ct. 1985) (concluding that a plaintiff's claim that hospital bed side railings "were defective and not properly raised" constituted an ordinary negligence claim).

at ___ (Johnson, J. dissenting). We disagree, and our disagreement concerns the essence of a health care liability claim.

JUSTICE JOHNSON's dissent assumes that a patient's claim against a hospital must implicate accepted standards of health care and safety by definition. But it is not the identities of the parties or the place of injury that defines the claim. *See Diversicare,* 185 S.W.3d at 854 (refusing to distinguish patient claims "'simply because the landowner is a health care provider'"). Rather, it is the cause of the injury and its relationship to medical or professional judgment that determines the claim's nature and the application of the Medical Liability and Insurance Improvement Act. *See* TEX. REV. CIV. STAT. art 4590i § 1.03 (a)(2), (4) (defining "health care" and "health care liability claim" as act or omission during patient's medical care, treatment or confinement that departs from accepted standards). Thus, injury caused by a failure to train and supervise the hospital's nursing staff or by a failure to supervise and assist the patient implicates the Act; that is, it involves a departure from accepted standards during a patient's medical care, treatment, or confinement. A claim involving a defective footboard, on the other hand, does not appear to implicate any medical or professional judgment[7] and was not in this case directly related to the patient's care, treatment, or confinement. Hence, we conclude in this case that the injury allegedly caused by the defective footboard was not a health care liability claim under the Act.

[7] JUSTICE WAINWRIGHT's dissent agrees that *Diversicare* did not define safety and that the proper focus when addressing standards of safety should be on "whether medical judgment was employed in the equipment's use and its importance to the patient's care." ___ S.W.3d at ___ (Wainwright, J. dissenting). His apparent disagreement with the Court concerns the defective footboard's significance in the patient's care and treatment and its relationship to the medical or professional judgments made in the case. JUSTICE HECHT's dissent similarly views the defective footboard as an inseparable part of the professional negligence claim.

JUSTICE JOHNSON's dissent also accuses the Court of "conflating standards of safety with standards of health care," but our intention is just the opposite. ___ S.W.3d at ___ (Johnson, J. dissenting). "Standards of medical care or health care or safety" should each add something to the definition of "health care liability claim." None of these standards should be read so broadly as to subsume the others. Thus, standards of medical care and health care implicate the acts or omissions of physicians and other health care providers, respectively, while standards of safety concern a patient's exposure to unreasonably dangerous or defective conditions or things in the course of treatment. The dissent, however, reads safety so broadly as to subsume all duties—not only standards of medical care and health care, but also the breach of any other duty regardless of its connection to patient care or treatment. *See* ___ S.W.3d at ___ (Johnson, J. dissenting) (noting that "a safety-related cause of action is a health care liability claim" whenever a patient sues a health care provider or physician for a breach of duty involving safety). As we indicated in *Diversicare*, the focus must be on the gravamen of the claim, which is not determined merely by the defendant's status as a health care professional or the place of injury. *See Diversicare*, 185 S.W.3d at 854. We accordingly disagree that article 4590i makes every patient's claim against a health care professional a health care liability claim.

V

Although we have concluded that Marks's other negligence claims involving patient supervision and staff training are health care liability claims, a question remains concerning their dismissal. Marks argues that these claims should not have been dismissed because he was entitled to additional time to provide an expert report. Article 4590i generally requires a claimant to furnish

an expert report within 180 days after the filing of a health care liability claim. TEX. REV. CIV. STAT. art. 4590i, § l3.0l (d). If a claimant fails to comply with this requirement, the court is directed, on motion, to award appropriate costs and fees and to dismiss the health care liability claim with prejudice. *Id.* § 13.01(e). The 180-day period can be extended, however, for good cause and enlarged for accidents and mistakes. *Id*. § 13.01(f), (g). The latter enlargement is referenced in the statute as a grace period. *Id.* § 13.01(g).

Marks contends that he was entitled to this grace period because his failure to file the expert report on time was an accident or mistake within section 13.01(g)'s meaning. That section provides for a thirty-day grace period if, after a hearing, the court finds that the claimant's failure to file a timely expert report was a mistake or accident rather than intentional or the result of conscious indifference.[8] After hearing the Hospital's motion to dismiss and Marks's motion for a grace period, the trial court found that Marks's failure was not an accident or mistake and dismissed the suit. We review that dismissal under an abuse of discretion standard. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001).

In support of Marks's motion for a grace period, Marks's attorney, James E. Doyle, provided his affidavit. Doyle averred that he was Marks's second attorney, becoming lead counsel about seven months after the first attorney filed the case. Doyle further averred that he and Marks's first attorney

---

[8] Section 13.01(g) of article 4590i provides:

> Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline [for filing the expert report] established by Subsection (d) of this section and after hearing the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection. A motion by a claimant for relief under this subsection shall be considered timely if it is filed before any hearing on a motion by a defendant under Subsection (e) of this section.

"understood the case to be an ordinary negligence case, not a health care liability claim" at that time. According to Doyle's affidavit, it was only after discovery that he determined that Marks also had a potential health care liability claim, causing him to amend the pleadings and provide an expert report. This report was provided more than 500 days after the filing of Marks's original petition.

The amended petition divided Marks's claims under headings of "Negligence" and "Premises Liability." The original petition had lumped all claims under a single negligence heading. In the amended pleading, Marks included complaints about his bed, his care, and his supervision under the "Negligence" heading. Under the "Premises Liability" heading, Marks complained about the condition of the hospital bed. Doyle avers that he "believed that the case presented claims sounding only in ordinary negligence" until the time he filed the amended pleading.

In our view, no significant difference exists between the original and the amended pleading. The underlying factual complaint in both concern the same set of circumstances: inadequate care and supervision by the Hospital's professional staff and a dangerous hospital bed. "It is well settled that a health care liability claim cannot be recast as another cause of action to avoid the requirements of [article 4590i]." *Diversicare*, 185 S.W.3d at 851. Determining whether a pleading states a health care liability claim thus depends on its underlying substance, not its form. Doyle's affidavit does not clearly indicate what caused him to recognize for the first time that his client had a health care liability claim.

Equally significant, however, is the absence of any evidence explaining the first attorney's failure to furnish an expert report during the first seven months he represented Marks. Doyle's affidavit suggests that the first attorney also mistakenly believed that the original petition did not

implicate article 4590i. According to the affidavit, Doyle's belief is based on his review of the case file he inherited. Affidavits, however, must be based on personal knowledge, not supposition. *See* TEX. R. EVID. 602 ("A witness may not testify to a matter unless . . . the witness has personal knowledge of the matter."). An affidavit not based on personal knowledge is legally insufficient. *Kerlin v. Arias*, 274 S.W.3d 666, 668 (Tex. 2008) (per curiam). Because Doyle had no personal knowledge of the first lawyer's intent, and the first lawyer did not provide his own affidavit explaining his failure, there is no evidence of mistake or accident and thus no basis for the requested grace period. Accordingly, the trial court did not abuse its discretion in denying Marks's motion for a grace period under section 13.01(g) and did not err in dismissing Marks's health care liability claims. *See* TEX. REV. CIV. STAT. art. 4590i, § 13.01(e)(3) (stating that dismissal is "with prejudice to the claims refiling").

* * *

To summarize, article 4590i does not apply to Marks's claim concerning the defective hospital bed footboard because that claim concerns ordinary, not medical, negligence and thus is not a health care liability claim. Marks's other claims alleging negligent care and supervision are health care liability claims to which article 4590i does apply. Finally, Marks is not entitled to have the period for filing an expert report enlarged under the grace period provision of article 4590i because he has not established that the failure to comply with the statute was a mistake or accident.

The judgment of the court of appeals is affirmed in part and reversed in part, and the cause is remanded to the trial court for further proceedings consistent with our opinion.

_____
David Medina
Justice

OPINION DELIVERED: August 28, 2009