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 WILLETT, and by JUSTICE HECHT as to Parts II and III-A, and by JUSTICE WAINWRIGHT as to Parts I, II, and III-A, concurring.

I fully join parts I and IV of the plurality's opinion and the Court's judgment. I agree with parts II and III of the opinion to the extent the plurality concludes Marks's claim is a health care liability claim because it alleges violations of accepted standards of health care and accepted standards of safety. However, I believe that the plurality too narrowly construes the language "accepted standards of . . . safety." I also believe that Marks's suit should be dismissed for reasons in addition to, and in some instances different from, those given by the plurality.

First, Marks's claim is based on a single incident and is substantively a health care liability claim in its entirety. This Court has consistently maintained that health care liability claims cannot be split into health care and non-health care claims by artful pleading. The claim for negligently

assembling, maintaining, and providing the bed should be dismissed along with Marks's other allegations that unquestionably assert health care liability claims.

Second, the claim for improper assembling, maintaining, and providing the bed is a claim for violating accepted standards of health care regardless of whether those actions also violated safety standards.

Third, the claim for improper assembling, maintaining, and providing the bed is a claim for violating accepted standards of safety regardless of whether the actions also violated accepted health care standards. The plurality reads the statute too narrowly and thus reduces the scope of actions covered by the term "safety" from that prescribed by the statute.

I. Background

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, of his need for an ambulatory assistance device, 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 eight 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.

Marks failed to timely file an expert report and the trial court dismissed his suit. The court of appeals affirmed. 299 S.W.3d 396. One justice dissented on the basis that the claim for negligently assembling, maintaining, and providing the bed was not a health care liability claim. *Id.* at 403 (Jennings, J., dissenting in part).

II. Artful Pleading

This Court, as did the trial court and the court of appeals, concludes that Marks's first three allegations of negligence are health care liability claims under the Medical Liability and Insurance Improvement Act (MLIIA). *See* former TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4).[1] That conclusion requires dismissal of Marks's suit entirely because the fourth allegation—that the bed was negligently assembled, maintained, and provided—is based on the same facts and the same damages as the first three. The Court has previously held that when a cause of action is essentially

[1] 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. While this case was pending, the Legislature repealed the MLIIA, amended parts of the previous article 4590i, and re-codified 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.

a health care liability claim and a timely expert report has not been served, the claim should be dismissed in its entirety regardless of how the claim is pled. That should occur here.

In *Diversicare General Partner, Inc. v. Rubio* the concurring and dissenting justices concluded that the victim of a sexual assault at a nursing home asserted a premises liability claim against the nursing home independent of her health care liability claim. 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."). I would adhere to the Court's holding and reaffirm the language the Court used in *Diversicare* and other cases rejecting claim-splitting by pleadings. Otherwise, the door will be opened to manipulated, inventive, and artful pleadings designed to avoid the MLIIA requirements and limitations.

By failing to address the claim-splitting aspect of this situation, the plurality's opinion may create uncertainty in the bench and bar as to whether claim-splitting is permissible. And such uncertainty almost assuredly will lead to more extended and expensive trial and appellate court proceedings to determine whether a patient's pleadings assert health care liability claims, non-health

care liability claims, or both; and if both, which is which. Extended 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* TEX. REV. CIV. STAT. art. 4590i, § 1.02(b)(2);[2] *see also id.* § 1.02(b)(1).

The Court should make clear it is not abandoning its position that when the substance of a patient's claim for damages 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 pleaded his case, the substantive facts are that his injury arises from a health care liability claim and he should not be allowed to avoid application of the MLIIA by finding another way to plead his claim for damages.

III. Health Care and Safety

The hospital bed furnished to Marks was an integral and inseparable part of the health care he received from St. Luke's. St. Luke's asserts that Marks's suit implicates accepted standards of both health care and safety as referenced by the MLIIA. I agree.

In determining whether the MLIIA encompasses Marks's claims, we use well-established statutory construction rules. 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 is

[2] 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.

"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).

A. Health Care

The MLIIA 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 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). As the plurality notes, 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 . . . 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) (emphasis added); *see Diversicare*, 185 S.W.3d at 847 (describing health care as "broadly defined" under the MLIIA). Applying this broad definition, the Court has 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 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 disputes that Marks's hospital confinement while recovering from the latest of several back surgeries was medically necessary. If his condition made hospitalization medically necessary, then it logically follows that the hospital had to provide him with a hospital bed. And, if a 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. *See Diversicare*, 185 S.W.3d at 849-54.

Marks focuses on the assembling and maintaining of the bed, as opposed to its use in patient care. He argues that his claim for negligent assembly and maintenance is not a health care liability claim because it is based on the breach of an ordinary standard of care, not on a discrete standard of care applicable to the health care industry. His position, as to the bed claim, is that St. Luke's owed him the general duty of care owed by businesses to their invitees.[3]

Although health care providers and patients may well be premises owners or occupiers and invitees, the Legislature has imposed requirements on suits by patients against health care providers

[3] As the Court did in *Diversicare*, I "note the irony" of this position. *Diversicare*, 185 S.W.3d at 853. Marks asserts that the MLIIA should not apply to his claim because the claim is a premises liability claim based on ordinary negligence. But his position, if adopted, would have the effect of lowering the standard of care owed by health care providers to patients in health care facilities. *See id.* at 853-54.

that differ from general requirements for suits by invitees against premises owners or 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.").

Marks's own expert reports affirm that the hospital's provision of the hospital bed was an integral and inseparable part of actions that were "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). 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. Dr. Jeffrey D. 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. . . .
>
> . . . [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.

Nurse practitioner Jan 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.

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.

To the extent the plurality says or implies that a claim for a departure from accepted health care standards depends on allegations concerning acts or omissions of hospital workers with specialized health care training—as opposed to hospital workers without specialized training who are nevertheless necessary for a hospital to properly care for patients—I disagree. Marks's Original Petition states the hospital bed was negligently assembled by St. Luke's "employees, agents, servants or nursing staff." 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). 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.

Id. § 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.

There is no need to dissect and inquire into or distinguish between categories of health-care-provider employees based on duties, types of actions performed, and the type of judgment exercised. The literal and plain statutory language includes all officers, employees, or agents of the provider acting in the course and scope of their employment. *Id.* Giving the language its literal meaning does not yield absurd or nonsensical results. *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))). Marks's claim as to the hospital bed is a claim that the hospital violated accepted standards of health care.

B. Safety

I agree with parts II and III of the plurality's opinion to the extent those parts conclude that providing a reasonably safe hospital bed to Marks involved accepted standards of safety. However, I believe the plurality construes the "accepted . . . standards of safety" language too narrowly.

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). The plurality says that under the statute

> standards of safety must be construed in light of the other standards of medical and health care, standards that are directly related to the patient's care and treatment. . . . [A]n accepted standard of safety is implicated under the MLIIA when the unsafe condition or thing, causing injury to the patient, is an inseparable or integral part of the patient's care or treatment.

___ S.W.3d at ___. The statute does not so limit its provision as to safety standards. The plurality's construction constricts the application of the statute by effectively adding language to 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)).

The Court's prior broad construction of the safety standard 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. *See id.* at 847 (describing health care as "broadly defined" under the MLIIA). 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). Statements the plurality makes today depart from the Court's prior reading of the statute, and I would not do so. The MLIIA reflects legislative intent to broadly, not narrowly, cover claims made by patients against their health care providers. If policy considerations support limiting or excluding subcategories of claims 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).

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 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 plurality'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 an additional category of claims. *See 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."). 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 v. Bramlett*, 288 S.W.3d 876, 880 (Tex. 2009); *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 La Porte 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, not confining those claims to be the same as claims already coming within the statute's coverage as health care claims. *Diversicare*, 185 S.W.3d at 855.

IV. Conclusion

I agree that Marks's suit should be dismissed in its entirety. However, I would hold that the entire suit, including the allegations concerning the hospital bed, falls within the MLIIA and is barred for three reasons: (1) the suit is substantively a health care liability claim and part of it cannot be recast into a non-health care claim; (2) the claims are for departures from accepted standards of health care; and (3) the claims are for departures from accepted standards of safety.

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Phil Johnson
Justice

OPINION DELIVERED: August 27, 2010