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 Court's judgment and an opinion, in which JUSTICE HECHT joined, and in which JUSTICE WAINWRIGHT, JUSTICE JOHNSON and JUSTICE WILLETT joined as to Parts I & IV.

JUSTICE WAINWRIGHT filed a concurring opinion.

JUSTICE JOHNSON filed a concurring opinion, in which JUSTICE WILLETT joined, and in which JUSTICE HECHT joined as to Parts II and III-A, and in which JUSTICE WAINWRIGHT joined as to Parts I, II, and III-A.

CHIEF JUSTICE JEFFERSON filed an opinion concurring in part and dissenting in part, in which JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE LEHRMANN joined.

JUSTICE GUZMAN filed an opinion concurring in part and dissenting in part.

We grant the motion for rehearing, withdraw our previous opinion and judgment of August 28, 2009, and substitute the following in its place.

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

Statutes.[1] 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 certain 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 changed its mind and affirmed the trial court's judgment, with one justice dissenting. 229 S.W.3d 396. Because we agree that the underlying cause of action falls under the statutory definition of a health care liability claim, we affirm.

[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, amended by Act of May 18, 1979, 66th Leg., R.S., ch. 596, 1979 Tex. Gen. Laws 1259, amended by Act of May 26, 1989, 71st Leg., R.S., ch. 1027, §§ 27, 28, 1989 Tex. Gen. Laws 4128, 4145, amended by Act of March 21, 1991, 72d Leg., R.S., ch. 14, § 284, 1991 Tex. Gen. Laws 42, 222, amended by Act of May 25, 1993, 73d Leg., R.S., ch. 625, 1993 Tex. Gen. Laws 2347, amended by Act of May 5, 1995, 74th Leg., R.S., ch. 140, 1995 Tex. Gen. Laws 985,amended by Act of June 1, 1997, 75th Leg., R.S., ch. 1228, 1997 Tex. Gen. Laws 4693, amended by Act of June 2, 1997, 75th Leg., R.S., ch. 1396, §§ 44, 45, 1997 Tex. Gen. Laws 5202, 5249, amended by Act of May 13, 1999, 76th Leg., R.S., ch. 242, 1999 Tex. Gen. Laws 1104, repealed by Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

I

Irving Marks underwent back surgery at St. Luke's Episcopal Hospital. Seven days later, while still recuperating from his surgery, Marks fell in his hospital room. He alleges that this fall was caused by the footboard on his hospital bed which collapsed as he attempted to use it to push himself from the bed to a standing position.

Marks sued the hospital, alleging that its negligence contributed to cause his fall. He complained that the hospital was negligent in: (1) failing to train and supervise its nursing staff properly, (2) failing to provide him with the assistance 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 ("MLIIA"). *See* TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4) (defining health care liability claim).[2] Under the MLIIA, a health care liability claim must 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 our opinion in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex.

[2] 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.

2005), another case involving the scope of a health care liability claim under the MLIIA. After full briefing, we granted the hospital's petition without reference to the merits and remanded the case to the court of appeals for its reconsideration in light of *Diversicare*. *St. Luke's Episcopal Hosp. v. Marks,* 193 S.W.3d 575, 575 (Tex. 2006) (per curiam).

Following our remand, a divided court of appeals affirmed the trial court's judgment of dismissal for want of a timely filed expert report, 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 MLIIA. *Id*. at 403 (Jennings, J., dissenting in part). We granted Marks's petition for review to consider the issue.

II

Several of the allegations in Marks's trial court pleadings are similar to those in *Diversicare*, a case in which we concluded that a nursing-home patient's sexual assault by another patient was a health care liability claim under the MLIIA. *Diversicare,* 185 S.W.3d at 842. The allegations there were that the nursing home was negligent in failing to provide sufficient staff and supervision to prevent the assault. *Id.* at 845. The trial court held the claim barred by the MLIIA's two-year statute of limitations and granted summary judgment for the nursing home. *Id.* The court of appeals reversed, however, concluding the suit was not a statutory health care liability claim, but rather a common law negligence claim to which the MLIIA's limitations provision did not apply. *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, holding that the law suit was indeed a health care liability claim as determined by the trial court. *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 reasoned 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.

Marks's first three claims—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—similarly involve patient supervision and staff training. As in *Diversicare*, this type of claim asserts a departure from the accepted standard of health care and is therefore a health care liability claim under the MLIIA.

Marks argues that his hospital bed claim is different, however. He alleges that the hospital was negligent either in the assembly or maintenance of the bed, or both, and that the defectively attached footboard presented an unsafe condition in the nature of a premises liability claim rather

than a health care liability claim. Marks submits that his defective bed claim involves ordinary negligence rather than a departure from accepted standards of health care or safety.

The hospital responds that Marks's hospital bed was an inextricable part of his care and treatment during his inpatient convalescence from back surgery. As such, the hospital submits that any defect in the bed, or any danger it posed to the patient, implicated a departure from accepted standards of health care or safety and was accordingly a health care liability claim under the MLIIA.

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 claim or cause of action sounds in tort or contract.

TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4). Under this definition, a health care liability claim consists of three elements. First, a physician or a health care provider must be the defendant. Second, the suit must be about the patient's treatment, lack of treatment, or some other departure from accepted standards of medical care or health care or safety. And, third, the defendant's act, omission, or other departure must proximately cause the patient's injury or death. The dispute here is over the second element, that is, whether the hospital's alleged failure to provide its patient a safe bed implicates certain accepted standards embodied in the definition of a health care liability claim.

The statute provides some information about these standards through its definitions of medical care and health care. The MLIIA defines "medical care" as the practice of medicine, including the diagnosis and treatment by a licensed physician, and "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." *Id.* § 1.03(a)(2),(6). These definitions indicate then that physicians provide medical care, and that health care providers, which includes hospitals and their employees, provide other health care services. A "claimed departure from accepted standards of medical care or health care" thus implicates the professional standards of these respective care givers. *See Diversicare*, 185 S.W.3d at 850 (noting that the "health care standard applies the ordinary care of trained and experienced medical professionals to the treatment of patients").

The statute, however, does not define the term "safety" and thus does not provide similar insight into the meaning of a "claimed departure from accepted standards of . . . safety." We noted this in *Diversicare*, while observing that the inclusion of accepted standards of safety nevertheless expanded the statute's scope beyond standards of medical care and health care. *Diversicare*, 185 S.W.3d at 855. How much it expanded the statute's scope we did not say because the claim there involved a departure from accepted standards of health care more so than safety. *Id.* Marks's present claim, however, focuses on the safety element, that is, whether a patient injury caused by an allegedly defective hospital bed represents a "claimed departure from accepted standards of . . . safety" within the statute's definition of a "health care liability claim." *See* TEX. REV. CIV. STAT. art. 4590i § 1.03(a)(4) (defining health care liability claim).

III

The nature of the safety-related claims the Legislature intended to include under the MLIIA is a matter of statutory construction, a legal question we review de novo. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 357 (Tex. 2000). When construing a statute, words and phrases are read in context and construed 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 unless a contrary intention is apparent from the context, or unless such a construction leads to absurd results. *City of Rockwall v. Hughes,* 246 S.W.3d 621, 625–26 (Tex. 2008). When possible, the Legislature's intent is drawn from the plain meaning of the words chosen, *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006), giving effect to all words so that 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). Our ultimate goal, however, is to understand the Legislature's intent and apply that intent according to the statute's purpose. TEX. GOV'T CODE § 312.005; *see also City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995) (referring to legislative intent as the "polestar of statutory construction").

The Legislature's stated purpose in enacting article 4590i was 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); *see also Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009) (per curiam) (noting that virtually all of the legislative findings expressed in the statute relate to the cost of malpractice insurance). The MLIIA, however, defines a health care liability claim not only in terms of the specific standards of medical care and health care, but also in terms of an apparently more general standard of safety. *Id*. § 103(a)(4).

We do not consider the term "safety" in isolation, however, but in the context of the statute. *City of San Antonio v. Boerne*, 111 S.W.3d 22, 25 (Tex. 2003). Moreover, the principle of ejusdem generis warns against expansive interpretations of broad language that immediately follows narrow and specific terms, and counsels us to construe the broad in light of the narrow. *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.,* 111 S.W.3d 75, 81 (Tex. 2003) (observing that when words of a general nature are used in connection with the designation of particular objects, persons, or things, the meaning of the general words should conform to the more particular designation). The principle is sound advice here as every patient injury in a hospital, regardless of cause, may be said to implicate patient safety in the broad sense of the word.

The Legislature, however, could not have intended that standards of safety encompass all negligent injuries to patients. Such a broad interpretation of the safety standard would render the statute's more specific standards of medical and health care unnecessary, and we do "not read statutory language to be pointless if it is reasonably susceptible of another construction." *City of LaPorte*, 898 S.W.2d at 292 (citing *Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987). Moreover, given the object of the statute and the Legislature's express concern, it is apparent that the Legislature did not intend for standards of safety to extend to every negligent injury that might befall a patient. *See* TEX. REV. CIV. STAT. art. 4590i § 1.02(b)(3) (reciting Legislature's intent that the statute operate to control medical malpractice insurance costs without unduly restricting a patient's rights). Applying the principle of ejusdem generis, we conclude that 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. We said as much in *Diversicare*.

We noted there 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 (suggesting that unsafe conditions unrelated to the provision of health care might not be a health care liability claim). We further observed that standards of medical care or health care were implicated when the negligent act or omission was 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 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.

The determination of whether a cause of action is a health care liability claim therefore requires an examination of the claim's underlying nature. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004). As we indicated in *Diversicare*, it is the gravamen of the claim, not the form of the pleadings, that controls this determination. *See Diversicare*, 185 S.W.3d at 854. Whether the underlying claim involves a health care provider's negligent act or omission, or the patient's exposure to some other safety risk, the relationship between the injury causing event and the patient's care or treatment must be substantial and direct for the cause of action to be a health care liability claim under the MLIIA. *See Garland Cmty. Hosp*, 156 S.W.3d at 544 (observing the complaint must concern an act or omission that "is an inseparable part of the rendition of health care services").

Marks alleges that his injury here was caused by the hospital's improper maintenance or assembly of his hospital bed. At its core, this claim alleges the failure of a piece of equipment provided during Marks's inpatient care. Medical equipment specific to a particular patient's care

or treatment is an integral and inseparable part of the health care services provided. When the unsafe or defective condition of that equipment injures the patient, the gravamen of the resulting cause of action is a health care liability claim.

IV

Although we conclude that Marks's claims here involve health care liability, a question remains concerning their dismissal. Marks argues that his complaint 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.

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.[3] After hearing the Hospital's motion to dismiss and Marks's motion for a grace period,

---

[3] 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

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 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 "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 up until the time he filed the amended pleading, he "believed that the case presented claims sounding only in ordinary negligence."

In our view, there is no significant difference between the original and the amended pleading. The underlying factual complaint in both concern the same set of circumstances: inadequate care

---

shall be considered timely if it is filed before any hearing on a motion by a defendant under Subsection (e) of this section.

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. It is not apparent from Doyle's affidavit 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 grace period under section 13.01(g) and did not err in dismissing Mark's health care liability claims. *See* TEX. REV. CIV. STAT. art. 4590i § 13.01(e)(3) (dismissal is "with prejudice to the claims refiling").

* * *

Because the provision of a safe hospital bed was an inseparable part of the health care services provided during Marks's convalescence from back surgery, we conclude that his cause of action for injuries allegedly caused by the unsafe bed is a health care liability claim under article 4590i. We further agree that the trial court did not abuse its discretion in refusing Marks's request for additional time to file the requisite expert report and accordingly affirm the court of appeals' judgment.

_____
David M. Medina
Justice

OPINION DELIVERED: August 27, 2010