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Supreme Court of Texas.
Irving W. Marks, Petitioner-Plaintiff,
v.
St. Luke's Episcopal Hospital, Respondent-Defendant.
No. 07-0783.

September 11, 2008.

Appearances:
Nanccy Kimberly Hoesl, Doyle, Restrepo, Harvin & Robbins, L.L.P., Houston, Texas, for petitioner.
Jennifer H. Davidow, Vinson & Elkins, L.L.P., Houston, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. The court is ready to hear argument in 070783, Marks versus St. Luke's Episcopal Hospital.
COURT ATTENDANT: May it please the Court. Ms. Hoesl represent argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF NANCCY KIMBERLY HOESL ON BEHALF OF THE PETITIONER

MS. HOESL: Thank you. The case before the court today begin in this case at bed in which Irving Marks was sitting on and sent in to hospital in March of 2000. And in order to rise from the bed his pulling on a footboard. Twist himself into a standing position and the footboard fell off the bed. All one's crust to the floor in sustaining serious injuries. This bed was not medically prescribed from Marks.
There is no medical judgment for professional judgment involved in the assembly of the bed, in it's inspection or maintenance where it's used. And it's certainly no professional medical judgment involved in the footboard which is the part that broke.
JUSTICE MEDINA: So the term-- the determine of it's a medical ability claim, do you look at each specific allegation or do you look at the nature of the underlying claim? Or what do-- what do we mean-- whose the Court mean devoirs care when it says, "The Court-- Courts are

not bound by with the allegation's argument to the underlying claim."

MS. HOESL: The court means, your Honor, is that it's not the words used in the original petition that will determine the nature of the claim. The court looks to the underlying claim, meaning it looks to the facts alleged-- the type of breach allege. And it's looking specifically for two things. Whether or not: one, the claims assert a breach of a standard of cares specially or specifically applicable to the health care industry. This is court held on Strokewood versus Rodes. And two, whether or not the actor or mission complained of is inseparable from the rendition of medical care to that plaintiff.

JUSTICE MEDINA: But if you talk about improper training, improper supervision, improper assembly or an instruction have assembled this particular piece of equipment. Does that in itself invoke this medical liability claim?

MS. HOESL: No, your Honor, it does not. What we're talking about in this petition as you recognize are claims relating to the construction of a piece of furniture?

JUSTICE MEDINA: Uhmm.

JUSTICE MEDINA: It is not something that requires medical judgment or expertise. It is a standard, a care duty-- of ordinary care that the general public is more than able to understand how you put ...

JUSTICE BRISTER: Then the properly trained staff to prevent and protect patients faults. Fail-- failing to train your nurses and medtechs being that's got to be in health care.

MS. HOESL: Not in this case your Honor, the section of the petitioner they're referring to can't be read on isolation. Again, your not looking at the words you used. You're looking at the underlying nature of this claim. That claim ...

JUSTICE BRISTER: I mean how you going to prove that to trial? You recall a nurse expert to say, "They should have trained them supervise whose, whose-- what's that proof going to be?"

MS. HOESL: That exactly is the issue. In this case there is ...

JUSTICE BRISTER: No, no, no. You have place Attorney? What's the proof going to make?

MS. HOESL: The proof is going to be an ordinary care of building furniture doesn't require expert testimony. It is a duty or a negligence standard that they don't public understand. Where not ...

JUSTICE BRISTER: So you're not going to have any nursing expert?

MS. HOESL: In the claims that we're asserted in the original petition. No, I have call liability claims for asserted. So no, there is no requirement under those claims to have an expert.

JUSTICE BRISTER: And my question is, "Are you going to haven't that nursing expert?" Can you assure us today? You're not calling any nursing expert to trial.

MS. HOESL: Absolutely not, your Honor. This petition was amended. Never time.

JUSTICE BRISTER: Absolutely not. You're not going to call on?

MS. HOESL: No abso-- yes, there will be experts call because this petition was amended prior long before was dismissed. And later, did assert health care liability claims which will require expert testimony.

The claims in this appeal however, are only those asserted in the original petition not those health care liability claims that were asserted in the second amended petition in year later. To the claims in the original petition relate solely to the fact that the footboard fell off this bed. And because there is no professional judgment ...

JUSTICE BRISTER: Tell me about the amended petition that after the

Enlightore appeal, your amended petition to a-- add health care claims as expert report been file on him.

MS. HOESL: No's jud-- no, now, let me clarify, the petition was amended several times. The first amended petition was about four, five weeks after the original petition. And it followed correspondent from the respondents sending he sent drafts special exceptions to Marks, his counsel. And in those especial exception said, "When we realized that you asserted general claims that my ordinary negligence and you did not assert the claim under the health care liability act 4590(i)."

That they worth sure, even though they knew they had not been asserted, no health care liability claim have been asserted in the original petition. To make it absolutely clear, Marks amended his original petition shortly after that filing. And again, may that language crystal clear certain deed of ordinary care just as he said in the original petition, general negligence claims and promises liability claims, all based on this-- the facts allege which is that the footboard fell off the bed.

After another year, after discovery was taken, after more information about the case was claim-- gathered in May of '03, in year later. The second amendment petition was filed. And in that petition for the first time were claims regarding the nursing care and monitoring and the general medical treatment for Mr. Marks.

JUSTICE GREEN: Well, I'm looking it would appears to be a reproduction of the original petition. And then allege is failure to properly trained others including a nursing staff. In that-- and you're saying that's not in the original?

MS. HOESL: That is in the original petition, sir.

JUSTICE GREEN: And that's, and that's what we're here about today?

MS. HOESL: Yes, just the original petition. That was only the claim who original petition that were the basis of the motion to dismissed in the trial court's order.

They again, you must look at these claims in the context of the facts allege, the breaches allege. It is the first Court of Appeals did correctly when it heard this case for the first time.

JUSTICE MEDINA: Well, let me say, "Yeah, for, for allegations that know original petition." Through on period to be clearly health care liability claims. The first one wrongful assembly of a bed. That's a negligence claim. Why can't that be severed and segregated from the rest and, and look that calls of action go for that. And I think that's what Justice Jennings said in his design.

MS. HOESL: That is what Justice Jennings said in his design. However, this first three causes of action are not health care liability claims ...

JUSTICE MEDINA: But if your wrong-- if, if your wrong and for whatever reason, does your entire claim fell? Or in, in those claims to be severed and the case be sent back for the last issue on. From this is liability or negligence in assembly of this bed be tried.

MS. HOESL: If that were the holding of this Court, yes they could be severed. However, again those first three claims are not read in isolation. The supervision monitoring type language there also nourished on the duty of the hospital and relating to the assembly of furniture-- the bed, not supervision and monitoring in the hey-- health care being provided to a patient.

JUSTICE MEDINA: And if you're right this seems to-- this seems to be-- it adds with the Diversicare.

MS. HOESL: The Diversicares-- what very distinguished from a couple of point. First of all, the Diversicare talked about supervision

and monitoring of the patients in the nursing home. Diversicare wasn't about a broken piece of furniture. It wasn't about is this Court recognized a rickety staircase and open window ah-- you know, a door that fell on somebody at two-- a ceiling file, file that fell on somebody. It was about whether or not professional medical judgments had been appropriately made regarding the caring supervision of the patients to protect them from each other.

In addition, the court recognized that those judgments are statutorily regulated for the nursing home. There was no regulation. And certainly none in this record for the assembly maintenance inspection building of a bed. There is no special regulations, there's no special standard of care. In the health care industry for the footboard on this bed.

JUSTICE GREEN: Well, in it's very traveling area and a lot of confusion in this agreement over it. But the fact on the matter is that the definition of health care liability claim includes a matters related to safety. Which is one of the issue came up in, in Diversicare. And, and it seems to me that if you-- in a hospital it's-- if a part of a bed breaks off injuring a part of that is a safety issue, is it not?

MS. HOESL: It is a safety issue but not a safety issue in this definition including any and every kind of safety related matter.

CHIEF JUSTICE JEFFERSON: And at bottom why is it not? Let me ask you just along those lines and, and didn't mean to interrupt Justice Green but could you read that statute that say, "Health care liability claim means, Claim-- a claim departure from accepted standard of safety which approximately results in injury or death of the patient."

MS. HOESL: You could read that way, your Honor but it still does not mean that any safety claim goes. Because in reading the statute analysis does not end with reading the word safety.

CHIEF JUSTICE JEFFERSON: In what, what part of the statute says, "You, you don't end at safety?"

MS. HOESL: First, the court instruction act tells us that we read provisions in context, in harmony with the entire statute and certainly in context with the legislative intent. This Court itself held that when there's an underlying term and in this case safety is undefying in the statute. It is not construed in isolation. It must be construed in harmony with the rest at this provision-- the rest of statute. Section 1.023 of the statutes lays out very clearly the legislatures intent here.

Two fall as we all know. To reduce the number of frivolous medical malpractice claims which the legislature determined were responsible for driving at the cause of malpractice insurance.

In order to achieve that goal, the institute of the procedural requirements and limitations of the statute. But it was also their express intent to do these-- to impose these limitations only to the extent necessary to address that crises. And in Section 1.02 layout very clearly that they are not intending to extend their restriction of the statute to any other area of Texas legal system or Tort law, Tort law.

And this case is about general negligence a piece of furniture. That is the Tort law that the legislature intended to exclude from the statute.

Claims about a broken bed do not affect or not the kind of claims that statute was intended to address. They are not the claims that fall under malpractice coverage. If this sort that actually risks just release in the your opinion. When to discuss this, this Court's holding

in Diversicare. And it acknowledges this interplay between commercial general liability policies and professional malpractice policies in the hospital, the crucial general liability policies offer non-care related liability on us. The professional policies are care related based in that decision that distinction on this Court's analysis of the statute in Diversicare versus Rubio.

JUSTICE MEDINA: You know, it's just-- it seems to me that this is either a health care liability claim or it's is not at this, this black and white that simple. What was the purpose of amending the complaint?

MS. HOESL: The first amendment of the complaint?

JUSTICE MEDINA: Any amendment and then to assert the health care liability claim.

MS. HOESL: The, the first amendment was ...

JUSTICE MEDINA: Is in response to, to a motion to dismiss or is that because well, now I really think I have a health care liability claim on some other issues.

MS. HOESL: No. This is-- the petition started out based on the facts known at the time which is at the bed broke. After discovery, additional information was gathered from the hospital, from the records and claims were added. It was month later after all the petitions or all the amended petitions were filed. It was 18 months later the thing which filed the motion to dismiss.

After a year in a half of discovery battles, after joint motions to continue the case, it was only on the eve of trial. In January of '04, two years almost after the filing of this case that the motion to dismissed was filed. So all these amendments ...

CHIEF JUSTICE JEFFERSON: Which, which you used to be able to do?

MS. HOESL: Yes, your Honor. I'm not saying that they were not entitled the way itself the other time. But I thinks this is the way in the fact that again, 18 months of discovery motion practice and battles certainly indicative of the position that we take today that the only, their nature of the ordinary duty asserted in the original petition. The communication from those draft special exceptions were St. Luke's said, "Yes we know." You just said I meant here, "Ordinary duty ...

JUSTICE BRISTER: I'm just wondering's that catch of too finalize. You know, somebody dies in an operation. Can you-- you know, two years comes up you don't have an expert yet. Can you file a suit saying, "What were suing for defective pajamas. And they can be expert -

CHIEF JUSTICE JEFFERSON: Will that would be clearly frivolous?

JUSTICE BRISTER: - and they get an expert. And a year later-- amend to say, "Oh, when were-- nothing we done in discovery were also soon for the surgery and here's our expert report." That would defeat the whole purpose of the statute, wouldn't it?

MS. HOESL: That, that couldn't that example is a-- you know, frivolous in terms of pajamas but the facts in this case are undisputed at that part.

JUSTICE BRISTER: I, I was at the better points, attorney. I couldn't come up with a better example.

MS. HOESL: There's no dispute this is a fact of this case before he fell off the bed. And you-- and it is submitted as well that -

JUSTICE BRISTER: I know but, but ...

MS. HOESL: - that's what happen.

JUSTICE BRISTER: You know, peop-- people are creative.

MS. HOESL: Yes, they are creative.

JUSTICE BRISTER: And people are going to be able in almost any medical malpractice case, they're going to be able to imagine something they can plead. They don't really want to go to the ju-- remember I

don't want to go to the jury on it. I just want to delay given the expert report. And, and they said it isn't, isn't that what your arguing for?

MS. HOESL: No, your Honor. This was not a frivolous claim. It's filed to by time until we could come up with a health care claim.

JUSTICE MEDINA: And thisi in, in an insurance rules sometimes a, a plaintiff can artfully played themselves out of coverage. And it seems to me that what, what this, what these facts are isn't if whatever reason you may have plead your self out of a, a live in a potential valuable claim. If, if the statute is read that you put all these claims together in a two or three I won't see my health care liability claim and thrown all out. I mean that's certainly did seems to be equitable?

MS. HOESL: That would only be true, your Honor, if this Court holds that the safety standard of the only act basis on which the first Court of Appeals affirmed the dismissal of this case. Is read to include work in furniture. Is read to be that worker.

JUSTICE WILLETT: You have to do that is a, is a specialized piece of medical equipment. Is it not or?

MS. HOESL: No it's not, especially on this record. It's actually nothing ...

JUSTICE WILLETT: You has to go to some rooms together to furnished their hospital and say, "This is a specialize piece of equipment."

MS. HOESL: There's no evidence in this record that specialized but even if they were-- if I may answer the question.

JUSTICE WILLETT: Complete your talk.

MS. HOESL: It was the footboard that broke. It wasn't specialized piece like a, the [inaudible] was [inaudible] in Espinosa. It was a bed that Marks subdown [inaudible].

JUSTICE WILLETT: And he had back surgery. And isn't a bed-- if you had a back surgery especially part of the recovery, part of the recuperation process after back surgery.

MS. HOESL: It was not the order that way in this case. I can certainly see that the people would want to lay of that after the surgery. It was medically required, not medically deprive. No order for that in this record. It was again the place he slept down.

CHIEF JUSTICE JEFFERSON: Are there any further questions?

MS. HOESL: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you. The Court is ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Ms. Davidow 8present argument for the respondent.

ORAL ARGUMENT OF JENNIFER H. DAVIDOW ON BEHALF OF THE RESPONDENT

MS. DAVIDOW: Please the Court. Please start if I can with Justice Medina's question about severance. There's no need to separate the fourth claim all by itself. Even if you consider it all by itself, is a medical malpractice by it's a health care liability claim under Texas law.

JUSTICE O'NEILL: So what is, what's the affidavit going to say? Does it going to be from and what's it going to be say?

MS. DAVIDOW: The affidavit?

JUSTICE: The expert's report.

JUSTICE O'NEILL: The expert's report.

MS. DAVIDOW: I think it will probably say, "Most of what Mr. Marks expodurity" said, "Dr. Reuben is an Orthopedic surgeon." And he listed a bunch of 12 or 13 different things that a hospital suppose to look at to up-- to evaluate being or asses a patient for his risk to fall. You know, what are-- what's in the hospital for the first place?

JUSTICE O'NEILL: Wha-- what kind of expert or where you going to get can you get about the attachment of the footboard to the bed?

MS. DAVIDOW: I think again what, what Dr. Reuben said, "Which is that providing a hospital bed is part of a health care standard, it's part of what the, the hospital owns."

JUSTICE O'NEILL: How can you state the standard of care for footboard attachment?

MS. DAVIDOW: I don't know that it's appropriate a part of that finally as you said in the, in the previous case. A footboard -- I mean you talk about was the sheet not properly on the bed was the wheel of the hospital bed turns [inaudible].

JUSTICE O'NEILL: Turns, why-- if, if Marks-- his wife had been there visiting him and it link on the bed and it fall on off and she hated herself. With that be a health care liability claim?

MS. DAVIDOW: No, because she's not a patient. And their's a couple of cases about that in Texas which we've cited. A visitor in a hospital waiting and fell off the chair, nobody even suggested that was a health care claim. There's another one I think out of Dallas where patient's husband was on one of those contraptions, those fold out chair beds and hurt themself. And nobody suggested it was a health care claim 'cause he wasn't a patient.

JUSTICE O'NEILL: I still don't understand he's going to-- when you say, you can't forced that then, that is the allegation in this case. That the footboard fell off, it was negligently attach to premise his claim. That-- that's the whole claim here. And so I don't-- It doesn't seem forcing it then to ask what sort of expert is going to apply in terms of the attachment of the footboard to the bed.

MS. DAVIDOW: Well, I don't think it's the whole allegation and it is my, my upon [inaudible].

JUSTICE O'NEILL: Presume to me that it is.

MS. DAVIDOW: If that was simply the allegation I still think that, that is, it goes into safety of, of what's provided to a hosp-- to a hos-- to a post-operative hospital in patient recovering from back surgery. Now, I don't know-- I mean in any case it might have several experts talking about something and I don't know that for instance the Orthopedics surgeon who did his back surger props in her surgeon, I'm not sure. I don't know that, that person with no-- how exactly you put a footboard on. Same as that person that probably wouldn't know what's she's used on a bed in a particular situations. But I ...

JUSTICE MEDINA: That posses right. They don't know then it's not a health liabir-- bility claim. That they had no training it's not a simply premises liability claim.

MS. DAVIDOW: But I don't ...

JUSTICE MEDINA: Your scenario-- there would never be a calls of action against the hospital provider to a patient.

MS. DAVIDOW: Eh-- In the first situation, I'm sorry.

JUSTICE MEDINA: In your scenario you talked about. You just said, "Then if you're a patient and an equipment fails." Even if it's a symbol defectively or incorrectly it still falls under the health care liability claim act and there's no cause of action. How can that be so?

MS. DAVIDOW: I think it is-- it falls under the health care

liability care. I think their would be a, a cause of action. Maybe I'm not understanding the question correctly. You could-- I mean you could have ...

JUSTICE GREEN: But should have, but you'd have to good in expert. Come in, in like a furniture repair expert to describe how this was-- this chair and this bed or this device when you need her in a lot of different ways in the hospital.

And if a patient gets hurt on those things you've got to find an expert says, "Well, this is what's wrong with that chair."

MS. DAVIDOW: You may not and in, in ...

JUSTICE GREEN: That's the direction where we seen to be going with this kinds of faces.

MS. DAVIDOW: In 2005 in Murphy versus Russell, the Court explained the little bit about the difference between the expert report requirement under the health-- under the former sash in the article 4590i. And the difference between that and expert testimony at trial. And the Court said, "The expert report requirement is procedural." It is basically, an-- a blessing and affirmation by a qualified or knowledgeable member of the health care community. That this particular claim had-- may have enough merit to get off the ground. But they wouldn't necessarily need expert testimony at trial.

JUSTICE GREEN: No, I know that. The expert report, a, a patient sits down in a chair. And the chair falls apart. Well, under this statute the way it seems to be written and under Diversicares standard that, that was going it seems to me that the you will be-- in order to maintain this lawsuit you got to found expert report. Now who does it come from? It can't come from a nurse. A nurse don't know how to fixed furniture, how furnitures repair. So do you describe and found a, a furniture sales when it come in and keep your health care liability claim a lot.

MS. DAVIDOW: No I don't think so and I, I won't point out in the original petition on the broken bed claim. They actually do talk about nurses. And so just look on-- at the actual plain language at their petition, let me make talk about engineering staff and maintenance staff and nursing staff. But no I, I don't know that-- I, I mean I think what my, my [inaudible] counsels said is right. You have to look [inaudible] as a whole. And when you are ...

JUSTICE MEDINA: Those cases in a bound-- when a bound to just look at that-- we can look at the underlining cause of action. And if it's our view let say premises liability claim, why can't that be correct? Right?

MS. DAVIDOW: Yeah, I mean if, if ...

JUSTICE MEDINA: We had both ways.

MS. DAVIDOW: I, no, I think that the inclusion of safety in 4590i. And this is what Chief Justice Jefferson was saying in his concurrence that, "Safety captures both concepts." It captures a premises liability claim in certain situations in a, in a health care provider or a hospital. And it also captures medical malpractice. It's probably unique.

JUSTICE O'NEILL: But that's what a, that's what a, a concurrence and an evident of majority opinion they refer to rickety stairs and an unlocked window. How would this be different from rickety stairs if he had been entered on rickety stairs?

MS. DAVIDOW: If he had been injured on rickety stairs, ah-- I don't think-- I mean there maybe an argument and I'm sure again, more skilled plaintiffs or then I could do it. There maybe an argument that a hospital has this general supervisory will to take her of all this

patients all the time. And so their walking down the staircase then they needs to take care of them. I think that the line-- they may need to be a line drawn for safety. I don't think it needs to be drawn in this case.

JUSTICE O'NEILL: But it's going to ...

JUSTICE WAINWRIGHT: In rickety staircase were friends was to the health care portion of the statute. In that definition, is safety portion however, a tended to as I read it track them a lot of it the chief's concurrent was. Is it your view that safety is not limited by accepted standards that language is in the other part of that provision?

MS. DAVIDOW: Frankly yes, I agree-- I agreed with the ex-- the majority opinion that safety we should be used in it's ordinary context. Which is what the legislature told us to do for undefying terms. I believe that there's nothing in the context of 4590i that limits it. And I think it means not expose to danger.

JUSTICE WAINWRIGHT: So where is that health care liability or health care claim needs to have some connection to medical care treatment. Safety as you read the statute broadly covers anything that may impact the-- to use the term against safety of the patient. Is that to broad or do you believe it's that broad?

MS. DAVIDOW: I think it's certainly can be, can be read and construed that broadly. And again, I don't know that-- I don't think that today or this case is the case where you have to make that distinction. Because a hospital bed and allegedly broken hospital bed. No matter how tightly you connect health care and safety. No matter how nearly it's construed. I think a hospital bed fits within that definition. It's not ...

JUSTICE MEDINA: Hope it would made me a dash but what about the, the ineffective or defective assembly in the hospital bed by anyone. Certainly when assembled by a doctor. A doctor was assembled by a nurse. So how does, how does they negligence assembly of a hospital bed how do they act. I, I don't understand it, explained it to me.

MS. DAVIDOW: I think it fall-- it has to fall under both health care and safety. The assembly of the bed is how-- let me start over. The ta-- the statute talks about safety and health care. It doesn't define precisely. Is it safety from drugs, safety from humans, safety from equipment. It doesn't going to that at all. Simply says, "Safety". So I think assembly, I think maintenance, I think what kind of materials you used for the bed, I think you know solvents you used to clean the metal on the bed. I think that all falls under both the definitions of safety and health care because a, a working hospital bed in all of it's components and all of it's part. Is an inseparable part a health care.

The health care services rendered to ho-- post operative hospital in patient. Trickery one who has a sp-- a catheter of-- a pain pump in his spine.

JUSTICE GREEN: But if-- what if you-- what if I have back surgery in, in a, in a order way-- of a doctor prescribes a hospital bed in my house? And I get heard on that hospital bed. Is that a health care liability claim?

MS. DAVIDOW: Probably. I believed it is-- I mean it's-- if, if the hospital bed it was inseparable from a care provided whether it was or provided in the hospital or out of the hospital it still hospital ...

JUSTICE GREEN: What if it's a hospital bed and I have this 'cause I want it.

MS. DAVIDOW: Okay.

JUSTICE GREEN: And I like when it does makes me sleep better.

MS. DAVIDOW: How would you be sealing?

JUSTICE GREEN: Well, [inaudible] my, my question. Say, he heard on bed does sue that bed manufacturer. And if I do is that a health care claim or not?

MS. DAVIDOW: It's not because the bed manufacturer is not a health care provider. But if you word-- you know the ...

JUSTICE GREEN: It's in the hospital, let's do.

MS. DAVIDOW: If it's in the hospital and, and your alleging that the hospital was negligent for whatever reason either in failing to take care of you. Though it's nurses or failing to put your bed together correctly then it is health care liability claim.

JUSTICE MEDINA: Well, what about this little chairs that you see advertised on T.V., doctor's prescribes at so a patient with-- a this came get around like I used to get around uses only shares it falls off because of the because of will comes off. What kind of claim is that?

MS. DAVIDOW: I think it would depend on the facts-- I mean if a doctor ...

JUSTICE MEDINA: Their facts is was-- that was prescribed, are is he about it. And he's using it. So the manufacturer and the, and the service provider are all immune from litigation because it was prescribed by a doctor.

MS. DAVIDOW: No I don't think their immune from that. I think just the claim against those defendant's would not be health care liability claims. I mean I not sure if that you know, it would have to be separate out. If they have to have separate trials because of the different procedural hurdles or anything like that. But I mean a claim against ...

JUSTICE MEDINA: They okay on that scenario to several of the claim?

MS. DAVIDOW: I, I know that-- I mean there can't be a claim-- a health care liability claim against someone whose not a health care provider. It maybe that a manufacturer of a-- of this specialized medical devices perhaps and there some definition. It could be consider a health care provider, I'm not sure about that. But if it's not a claim against the health care provider then it's not a health care liability claim.

JUSTICE JOHNSON: And no one's should manufacture in this case. They've sued a hospital.

MS. DAVIDOW: That's right.

JUSTICE JOHNSON: And your hospital I presumed that [inaudible] about cleaning maintenance and all of that that the our subject to inspection about the joint commission on the hospital accreditation that they inspect all these staff. Don't the ...

MS. DAVIDOW: I would, I would presume so, yes.

JUSTICE JOHNSON: Okay.

JUSTICE O'NEILL: Could you tell me-- I'm having a problem with understanding the logic in a rule that anyone whose visiting him in the hospital who is injured by leaning in this bed can sue the hospital but the patient can't.

MS. DAVIDOW: Well, they can both sue the hospital. It's just that they would be subject to different procedural requirements.

JUSTICE O'NEILL: But explain to me the, the logic behind that.

MS. DAVIDOW: Logic I think we would have to ask the legislator in 4590(i). I mean that, that's what I've said.

JUSTICE O'NEILL: Do you agree that it doesn't appear logical? In this, in this instance when you got a premise's liability claim that

anybody else but the patient could bring it without falling in expert report. Their's be-- their's not much logic in that, that I can find. And if you can offer some of that that I think ...

MS. DAVIDOW: No-- I mean I, I think that it-- you know, it goes back to the policy of, of the health care liability act and you know, what was going on in the state-- in the-- in this [inaudible].

JUSTICE BRISTER: In the health care liability crisis was cause patients pursuing instead of third parties.

MS. DAVIDOW: Right, right.

JUSTICE BRISTER: Let me ask you this slightly different direction how this is going to play out. If we hope-- if a court order-- court order hold against you in this case say, "Well, now this is, this is just a fair to assemble it right and assembling it right is not a health care or safety."

So okay. So we go down to trial but as things go along the plaintiffs decide they think they also want to blame the nurses or the medtechs for not checking it ever so often to make sure it was right. And to make-- and argued that the hospital shouldn't got more expensive footboards which sounds like an allocation of health care dollars. In other words, this starts the morph into a health care liability claim.

What objection could a defendant R raise then to say, "No, wait a second. You said it was only assembly."

MS. DAVIDOW: That's a very good question. I mean we-- they had their's-- their second amended petition and, and a little bit of background is ...

JUSTICE BRISTER: So all you need to do is get first plead something to get back the health care claim. And then you can morph it later on.

MS. DAVIDOW: I mean I worried that's where it would go. And it, and it's akin to removal.

JUSTICE BRISTER: 'Cause their's nothing in the- in 74351 says you can't amend the petition later.

MS. DAVIDOW: Right, right. I want 4590(i) I was just to ...

JUSTICE BRISTER: And limits it to what you plead the first instance.

MS. DAVIDOW: Yeah. I mean in, in the removal context is to make an analogy. There is, there is a certain provision that basically if you cannot display the grounds for federal subject that to jurisdiction until a certain deadline has passed and then into ADinaudible] look no matter how clear it is.

CHIEF JUSTICE JEFFERSON: The statute is changed. Is that right? So that now safety has to be directly related to health care?

MS. DAVIDOW: That's-- that is what the word says. I read it from some of the new Court Appeal's opinion. There's still some debate about exactly what ...

CHIEF JUSTICE JEFFERSON: I'm not convince. Let me in-- let me -

MS. DAVIDOW: I have studied that careful enough.

CHIEF JUSTICE JEFFERSON: - let me take my-- concurrent to the extreme and their patient is in the hospital bed and the live wire falls from the ceiling and electrocutes the patient. Is that a health care liability claim because it has to do with safety?

MS. HOESL: If-- I think if they we're alleging that the nurses should have been watching him or someone which ...

CHIEF JUSTICE JEFFERSON: Now, now that I'm alleging that, all their ...

MS. HOESL: Alleging that?

CHIEF JUSTICE JEFFERSON: No. There just-- it's a patient in a

hospital bed was electrocuted because a wire falls down from the ceiling. Is that a health care liability claim under, you know, the extreme-- you know, if you, if you took my concurrent that says when you read what the statutes says it says that, "Standard of care," You know, relating to safety.D

MS. DAVIDOW: Yeah. Under your concurrent, yes. It's a health care liability claim.

CHIEF JUSTICE JEFFERSON: And you're suing the hospital. Right?

MS. DAVIDOW: I'm sorry?

CHIEF JUSTICE JEFFERSON: And you're suing the hospital by the contract.

MS. DAVIDOW: Yes, yes.

CHIEF JUSTICE JEFFERSON: And that that make sence or do we look at the code construction act to the purpose of the, the, the statute to begin with to, to prevent previous claim? I mean does that really make sense or is that just how you read it because that's what the word said?

MS. DAVIDOW: Well, I mean I think when you look at the purpose of not just like the health liability act but the purpose of health care is, is to protect patients. And similarly that in Rubio. You know, nursing home patients are, you know, particularly vulnerable and they need sort of extra services perhaps that a 25-year old in the hospital for an appendectomy not necessarily wouldn't need-- I do think that hospital in patients need different kinds of services and different levels of protection then someone just going to their doctor's office for instance.

And so I'm-- you know, I wouldn't be prepared to say that a live wire falling down wouldn't be a safety claim under the health care liability claim not just because that safety doesn't have an express limitation in the statute but because they're in a hospital in recovering because they can't take care of themselves.

JUSTICE HECHT: If, if you read safety like that you really don't need any of the other words, do you? To define what a health care liability claim is? I mean there's unsafe treatment, unsafe operations, there's unsafe post operations treatment?

MS. DAVIDOW: Yeah, I mean ...

JUSTICE HECHT: Unsafe getting in a, a wheel chair-- out of a wheel chair in es-- in essence, safety might be read just mean any in the [inaudible] in that while you're under care.

MS. DAVIDOW: Yeah. I think in that case, you know, there could be an argument that, that health care for instance would be sort of [inaudible] or medical care because if you give someone the wrong drug, you know, clear typical, traditional medimal-- medical malpractice the wrong drug is generally going to be unsafe for the body system. By the same token though, I think that if you don't read safety broadly then it's superfluous because if safety has to mean safety related to health care then why wouldn't it just be a claim about a health care? So it got to be something out of the [inaudible] ...

JUSTICE WILLETT: Looking at the language, is it, is it safety or is it accepted medical standards of safety?

MS. DAVIDOW: I'm sorry, could you repeat beginning of the question?

JUSTICE WILLET: I'm looking at the, at the definition of a health care claim. Do you have it in front of you?

MS. DAVIDOW: I do. You get it to which I have ...

JUSTICE WILLET: Departure from accepted medical standards of medical care or health care or safety and of course, it's always

unclear in list in this case-- I mean what modifies what but could, could it not simply be accepted medical standards of safety? Well, the notion of safety is, is cabined a little bit by the early language of medical standards of-- medical standard of medical care, medical standards of health care, medical standards of safety.

MS. DAVIDOW: This would be embarrassing if I don't have the right word. But my statute just has accepted standards of medical care or health care or safety. And so the medical care just-- medical just modifies care and health just modifies care and safety just by itself.

JUSTICE WILLET: Well, what I'm reading is different. Maybe what I have is off base.

MS. DAVIDOW: Okay. Well, let me-- definitely let me check and if there's-- the problem I won't remedy it.

JUSTICE WILLET: Let, let me ask you this. So you're looking at the original petition 'cause it talks about-- as we just talked about in your safety in the definition of the claim. And when you're looking at the cause of action in the original petition by failing to an act of measurement you're going to say by failing to provide Mr. Marks with a safe environment in which to receive treatment and recovere.

MS. DAVIDOW: Yeah. But his whole claim is that the, the bed was necessary for his safe environment. That the nurses looking in on him and making sure that he was safe for, for whatever reason. Falling out of his bed, you know, not being comfortable whatever was his original claim. And so you can't look at the bed claims simply an isolation. But even if you were to, it independently is inseparable from standards health care and standards of safety no matter how broadly or how narrowly construed safety.

I don't know that the court has any issues at all about the grace period issue in this case. That the petitioner didn't get a chance to talk about it. but I will say that there was no abuse of discretion in denying grace period. Of course, she only get through it if you find that the claim is a health care liability claim which it is either independently or in the aggregate. We would stand to publish in our brief on that. And unless the court has any other questions, I'll sit down.

CHIEF JUSTICE JEFFERSON: No further questions. Thank you, Counsel.

MS. DAVIDOW: Thank you for your time.

JUSTICE JOHNSON: Before you've done discovery and then she said there was [inaudible] discovery. Did the hospital have any procedures or rules about inspecting it's bed and the facilities in the hospital in providing maintenance?

REBUTTAL ARGUMENT OF NANCCY KIMBERLY HOESL ON BEHALF OF PETITIONER

MS. HOESL: Your Honor, what's in the record is, is very-- in response in that area, the-- in response to a certain discovery questions in that area and this is a second supplement-- supplemental of record, the hospital said that there were no special standards of care in those special procedures relating to the bed. They're just part of-- in general, everybody observed some and they're part of a general maintenance scheme. So they haven't been presented any specific hospital policies or standards relating to that inspection and certainly there's, there's nothing in the record to, to sustain down. I'd like to address if I may to the court a couple of-- I think he

issues here. First for all, we have our questions today talked about the health care section of the definition of health care liability claim: medical care, health care or his departure from standard of safety. The first Court of Appeal's opinion only found that the claims for health care liability claims because they alleged the departure from the standard of safety. They did not find that there were health care claims.

JUSTICE HECHT: All right. I, I, I'm a little confused about the procedural posture of the case. But if, if the case is that now stand does involve health care claims?

MS. HOESL: Yes, it does. And that ...

JUSTICE HECHT: And, and there are out of the same incident, the same fall?

MS. HOESL: Out of the same set of events? Yes, your Honor.

JUSTICE HECTH: So your position is that those events can and do give us to health care liability claims?

MS. HOESL: No-- not quite, your Honor. The original petition claims again concerning hospital's duty of care in providing furniture that works-- footboards that don't break.

The second amended petition added claims for the responsibility of the nurses and doctors in performing their-- the specialize duty of care towards the patient. And that all ...

JUSTICE HECHT: And with respect to-- with respect to the fall or not?

MS. HOESL: With, with respect to the fall, with respect to the re-- response to the fall, with respect to the treatment.

JUSTICE HECTH: I'm just trying, I'm just trying to get in one thing and that is does the fall which you say gives rise to a non-health care liability claim also give rise to health care liability claim in your view?

MS. HOESL: Not quite, your Honor. The broken footbar-- footboard gives rise to an ordinary duty claim. The nurses' responses to the treatment of Mr. Marks gave rise to a health care liability claim. It's not the fall.

JUSTICE MEDINA: Is the treatment after the fall? Is that-- I just still not understand how can be both.

JUSTICE O'NEILL: But let me-- it's that my understanding of the record that and I think this goes to Justice Medina's questions was that there was no response to the fall for an hours or so or some extended period of time after the fall?

MS. HOESL: There was-- the record is not clear on that. As, as you said there is some response to the fall after the fall Mr. Marks was discharged from the hospital less than 48 hours later. And within a couple of days he was back and that he is unable to breath, unable to move his arms and barely injured. So there is an issue as to his treatment. There's also an issue as to-- as was mentioned some of the fall precautions that were part of the nurses duty of care but none of those precaution involved simply in bed through routine maintenance on the bed.

JUSTICE BRISTER: Back to my question to both of counsel. Can you, can you-- if all of that had involved but you only filed the non-health care, non-safety part and then you waited here into a bunch of discovery and then you have your health care claims and I suppose an expert report. Doesn't that defeat the statute?

MS. HOESL: No, your Honor. And you ...

JUSTICE BRISTER: Or and then we-- we're about do that. Everybody who can't come up with report in other 20 days, they just plead

something else and then add it later.

MS. HOESL: That is a certainly concerned reports but in this case, the facts and the claims originally plead were not claims about the nurses' conduct in providing health care. The nurses as was mentioned were simply identified as along with other employees.

JUSTICE BRISTER: That it fi-- that it filed at outside the limitations period?

MS. HOESL: No. Everything was filed within a two-year limitation period.

JUSTICE BRISTER: Include all the amendments in those staff?

MS. HOESL: No, Sir. The original petition was filed within the two year amended period.

JUSTICE BRISTER: Right. So all your amended staff-- you're arguing to the court is not by, by limitations 'cause it's related to the same, arises from the same transaction or current because you have to. But then for purposes of the expert reports and said, "Oh no, no. It's different transaction occurrence."

MS. HOESL: No. I, I think that ...

JUSTICE BRISTER: [inaudible] like that's in both ways.

MS. HOESL: Not quite, your Honor. And I think that, that the issues that's raised earlier is there are two kinds of standards going on here and nothing in that 4590(i) eliminates the duty of ordinary care that hospital owes to it's patients.

JUSTICE BRISTER: I agree with that. But nothing in the statute suggest well look this plead something that's not health care. Wait for year or two, then plea the health care pardon and had the report. That would defeat the whole purpose of the statute. Would it not?

MS. HOESL: No, your Honor. The facts that were known and the original petitions filed was that the bed broke. There were no facts known at that time on which the base-- the health care liability claim that came after discovery rebuild those facts. And under the falls case that was valid for 4590(i), that kind of amendment is appropriate and when that amendment added reports were timely filed. In my few remaining seconds, I'd like to remind the court that when we're talking now about the posture of this case, the claims that were health care liability claims had reports filed. There's no argument as to approach the court. They're there already. And well, I'm-- the time has run I believe and if there's [inaudible] further questions in behalf of entertainment.

CHIEF JUSTICE JEFFERSON: No any further questions. Just point around.

JUSTICE WAINWRIGHT: And they [inaudible]. In your initial petition in short that there's a period explained that supervise nursing staff from caring from Mr. Marks to prevent and protect him from falls and injuries. What training should the nurses have been given?

MS. HOESL: The same training that then the hospital gives to everybody and its employee. The training to exercise or expert duty of ordinary care to make sure that doors aren't falling off their hingens-- hinges. Things aren't falling off the board.

JUSTICE WAINWRIGHT: In this case -

MS. HOESL: In this case? What they had ...

JUSTICE WAINRIGHT: - what training should the nurses have been given to care for Mr. Marks to prevent and protect him from injury?

MS. HOESL: They should have had the same training that a maintenance staff and make that text staff.

JUSTICE WAINWRIGHT: You said that -

MS. HOESL: Right.

JUSTICE WAINWRIGHT: - and in specific as to the nurses -

MS. HOESL: Toward his bed.

JUSTICE WAINWRIGHT: - specific as to Mr. Marks and specific as to the bed-- the-- this bed.

MS. HOESL: If you look at the bed and determine if there was a problem with that. But that's not a medical standard of care. And in fact the nurses testified that wasn't their duty. And didn't do that. That was the maintenance staff's duty and that's in the record.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The call was submitted and the court will take a brief recess.

COURT ATTENDANT: All rise.

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