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Supreme Court of Texas.
Roy Kenji Yamada, M.D., Petitioner,
v.
Laura Friend, Individually and as Personal Representative of The Estate of
Sarah Elizabeth Friend, Deceased, and Luther Friend, Individually,
Respondents.
No. 08-0262.

March 10, 2009.

Appearances:
J. Kevin Kerry, Fort Worth, TX, for the petitioner.
Jeffrey H. Kobs, Fort Worth, TX, for the respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0262, Roy Kenji Yamada v. Laura Friend Individually and as Personal Representative of the Estate of Sarah Elizabeth Friend.

MARSHALL: May it please the Court, J. Kevin Kerry will present argument for the Petitioner. The Petitioner requests five minutes for rebuttal.

ORAL ARGUMENT OF J. KEVIN KERRY ON BEHALF OF THE PETITIONER

ATTORNEY J. KEVIN KERRY: Good morning, Your Honors. May it please the Court, again my name is Kevin Kerry and I represent Dr. Yamada. The question before this Court is whether the claims that have been asserted against Dr. Yamada constitute healthcare liability claims pursuant to Chapter 73 of the Civil Practice and Remedies Code. Very briefly, the events in question occurred in July of 2004. It is undisputed at that time that Dr. Yamada was a physician and that he was a Medical Director for the City of North Richland Hills Fire Department. There is an allegation that he was the Medical Director for the City of North Richland Hills as a whole and that he had a responsibility, according to the allegations, to make, to provide consultative advice as to the number of AED devices, that would be Automated External Defibrillator Devices, to be used at the city-run

water park. You see, in July of 2004, there was a young lady there at the park. She was on the second or third level of one of the water rides that they have in so many of these water parks. She collapsed unexpectedly. Eventually, it was determined that she had a congenital condition known as hypertrophic cardiomyopathy and died a short time after the collapse. The allegation is that the, that Dr. Yamada should have given advice as to the placement of those AED devices so that they would be readily accessible to first responders within the water park and as the allegation goes that would have made a difference in the outcome.

JUSTICE NATHAN L. HECHT: I was a little unclear. Are we just dealing with the pleadings in this case and there has not been any discover about what consultation services were provided?

ATTORNEY J. KEVIN KERRY: Your Honor, we are dealing with the pleadings in this case. However, as I understand the law, we are not just looking to the pleadings to determine the nature of the claim and that's the important point that we need to focus on, I believe, in this matter is we need to look beyond the artful wording of the pleadings to see what the allegations really are in the case.

JUSTICE NATHAN L. HECHT: But is there evidence about what he actually did and what consultation he provided and why he was hired.

ATTORNEY J. KEVIN KERRY: No, sir.

JUSTICE NATHAN L. HECHT: None of that anywhere in the record?

ATTORNEY J. KEVIN KERRY: No sir, no sir. To give you a little, a brief review of the procedural process that gets us here today. Initially, as you will see when you, as you review the information, the Plaintiff's allegations are very clear that they made the allegations in the form of a medical malpractice case. They indicated that at all times mentioned in the Petition, Dr. Yamada was and still is a medical doctor, duly licensed to practice medicine in the State of Texas. Dr. Yamada was and is engaged in the active practice of medicine as an emergency medicine physician. Dr. Yamada held and holds himself out to Sarah Friend and others that he has the degree of knowledge and skill as of an emergency physician. When the Plaintiff's failed to file an expert report in Curriculum Vitae according to Chapter 74 of the Civil Practice and Remedies Code, Dr. Yamada filed a Motion to Dismiss. Judge McGrath in Tarrant County denied the Motion to Dismiss and it went to the Second Court of Appeals. The Second Court of Appeals heard our argument and reversed Judge McGrath on those claims sounding in medical negligence.

JUSTICE HARRIET O'NEILL: Let me ask you this question. If this AEDs were manufactured by say Acne AED Company and you had the sales representative who went out to the water park and said I think they should go here, there, here, there, they're not a medical doctor, but they sell the device, would we have a healthcare liability claim?

ATTORNEY J. KEVIN KERRY: No, Your Honor, I don't believe you would.

JUSTICE HARRIET O'NEILL: Why not?

ATTORNEY J. KEVIN KERRY: Because in a, to have a healthcare liability claim, you have to trigger the use of medical judgment and in this case, I believe, the Plaintiff's through their allegations did trigger that.

JUSTICE HARRIET O'NEILL: Well, but I guess my point is if there's no medical judgment in deciding where on the site to place the AEDs, if the salesperson had made recommendations where to place them, if the doctor made those same recommendations, why would his the claim against him be a healthcare liability claim, but the claim against the sales

representative would not be?

ATTORNEY J. KEVIN KERRY: Well Chapter 74, of course, defines what a healthcare liability claim is and it speaks in terms of the physician's medical judgment in terms of safety issues and that's what we're trying to focus on.

JUSTICE DALE WAINWRIGHT: Well the Chapter also says the claim has to be against a healthcare provider or physician and in the example, there's no claim against a healthcare provider or physician, so that's pretty straightforward as to who you're suing. It takes you out of Chapter 74, but let me ask you about the Court of Appeals' opinion. You're about to say the what the Court of Appeals did on the second part of the case. On the ordinary negligence claim, the Court of Appeals said that claim can go forward on these facts, but on the very same facts, the Court of Appeals said this is not a, the healthcare liability requirements were not satisfied. So it allowed the alternative assertion of two different claims on the same facts--one a healthcare liability claim and one a non-healthcare liability framed as an ordinary negligence claim. That got my attention because we've said repeatedly that in the healthcare liability area where the Legislature has said there are hurdles that have to be surmounted in order to sue physicians and the Legislature's established that. We've said you can't take a healthcare liability case and plead it in alternative ways to get around that statute. Would you address the Court of Appeals' splicing of the claims here on the same, very same facts, not different facts, but the same facts?

ATTORNEY J. KEVIN KERRY: Yes, Your Honor, absolutely. And truthfully that's troublesome to me as well because it's the same underlying facts and in those facts, those allegations cast in terms of medically consultative advice are dismissed because there was no expert report, but those that were cast by the pleading maneuvers of the Plaintiff were then said to survive by way of ordinary negligence and that's what I was wanting to touch upon next in terms of how does one really determine whether or not it's a, it's a, it's a matter that calls upon medical judgment and then falls within Chapter 74.

JUSTICE DALE WAINWRIGHT: Right. If the case is really an ordinary negligence case, then it can proceed without satisfying Chapter 74, but if it's really a healthcare liability case, then it can't proceed without satisfying Chapter 74 and you're right, we're here to try to help provide guidance on which it is and then set principles that help provide guidance for the rest of the State.

ATTORNEY J. KEVIN KERRY: Yes, Your Honor, as I understand the law, the first thing that the Court must do is determine the nature of, the actual essence, the nature of the claim, not, to look beyond the words the lawyer used to couch the allegations against the doctor, in this case. The next thing the Court must do is evaluate the alleged wrongful conduct and the duties breached. And the third thing is whether or not proving the claim against, in this case a doctor, would require expert or specialized knowledge or testimony. In terms of the first issue, the nature or essence of the claim, I've already alluded to the allegations. The allegations by the Plaintiff in this case speak volumes and it speaks to a medical negligence case.

JUSTICE NATHAN L. HECHT: Do you think, do you think a non-healthcare liability claim?

ATTORNEY J. KEVIN KERRY: I'm sorry, I'm sorry.

JUSTICE NATHAN L. HECHT: Do you think a non-healthcare liability claim could be alleged against a physician in these facts?

ATTORNEY J. KEVIN KERRY: Well.

JUSTICE NATHAN L. HECHT: Just like the sales agent that Judge O'Neill asked about.

ATTORNEY J. KEVIN KERRY: Certainly a non-healthcare liability claim can be asserted against a physician given specific facts. But giving these facts ...

JUSTICE NATHAN L. HECHT: In these facts.

ATTORNEY J. KEVIN KERRY: I don't believe so.

JUSTICE NATHAN L. HECHT: Why not, if you could allege the same cause of action against a sales agent?

ATTORNEY J. KEVIN KERRY: Well, again, the statute, 74, defines what a healthcare liability claim is, defines it in terms of a physician or a healthcare provider, which we have undisputed in this case.

JUSTICE SCOTT A. BRISTER: But you're saying, but it's, the key is the essence of what they're complaining about.

ATTORNEY J. KEVIN KERRY: Yes, sir.

JUSTICE SCOTT A. BRISTER: Not the words they used, but the essence?

ATTORNEY J. KEVIN KERRY: That's right.

JUSTICE SCOTT A. BRISTER: But you're suing the water park, the city, for not having enough AED devices, right?

ATTORNEY J. KEVIN KERRY: Well, I'm not suing anybody.

JUSTICE SCOTT A. BRISTER: I mean the other side, sorry.

ATTORNEY J. KEVIN KERRY: The city is being sued for tangible use or misuse of tangible personal property, that being the AED devices.

JUSTICE SCOTT A. BRISTER: Well let's, wait a minute, let me take the sovereign immunity out of it. If it's just a, if it's Disneyland and you sued Disneyland because they didn't have enough AEDs around. Disneyland's not a doctor and that wouldn't be a healthcare liability claim right?

ATTORNEY J. KEVIN KERRY: Of course.

JUSTICE SCOTT A. BRISTER: And so the fact that Disneyland asked the doctor and the doctor says well this is how many you need, why does that turn it into, it's exactly the same claim. It wasn't a healthcare liability claim a minute ago.

ATTORNEY J. KEVIN KERRY: Yes, sir, if I may. Well, again, first of all, you have the definitional requirements of Chapter 74, but beyond that, you have the essence.

JUSTICE SCOTT A. BRISTER: All right, but let's get rid of that one first.

ATTORNEY J. KEVIN KERRY: Okay.

JUSTICE SCOTT A. BRISTER: I thought you said it was the essence of the claim and if the essence of the claim can be brought against Disneyland, it can't be the essence of the claim. All you're saying is well it's where you went to medical school.

ATTORNEY J. KEVIN KERRY: Well, again, I think we have to follow the statute and the first trigger is whether the Defendant's position.

JUSTICE SCOTT A. BRISTER: I agree.

ATTORNEY J. KEVIN KERRY: Beyond that, beyond that is we look at what is, what is the real complaint here and the complaint is, in this case, that the doctor did not use appropriate professional judgment, according to the Plaintiffs, in terms of advising how many AED devices to have and where to put those AED devices. That's, that is really the essence of the claim. Did the doctor breach the standard of care that applies to professional judgment as a doctor, if he was asked to provide in this circumstance.

JUSTICE DON R. WILLETT: Are there any regulations that govern the

placement of public AEDs?

ATTORNEY J. KEVIN KERRY: Current, I have no idea of whether there currently are or not. At the time, there were not and this is again July, 2004 timeframe. So it would be.

JUSTICE SCOTT A. BRISTER: Except that you had to have a doctor somewhere in the process.

ATTORNEY J. KEVIN KERRY: He did.

JUSTICE SCOTT A. BRISTER: Because you couldn't get one without him.

ATTORNEY J. KEVIN KERRY: That's correct, that's exactly right. A doctor would have to authorize the use of an AED or you couldn't have an AED on.

JUSTICE DAVID M. MEDINA: And how would a doctor make that analysis and where to place these devices? Do they do a study? Do they go out and look at the premises? How do you come to that conclusion? They look where the traffic flow is in that particular park? That is just, seems to me it would be a hit-or-miss situation where you place these and how would you know? How would you be able to foresee that someone's going to have an event like this anywhere, anytime, much less place these in a right, right part of the park so they can be used?

ATTORNEY J. KEVIN KERRY: Well, again, because of the procedural way that we got here in this matter, we don't have any evidence developed. However, we certainly know that AED devices, as a matter I think of common knowledge, are used to shock the heart back into a sustainable rhythm that hopefully will save one's life and so there's an analysis that would take place from a medical standpoint to determine how quickly an AED device should get to a victim of someone injured or someone in need of that device to be shocked back into a rhythm that could sustain life and there's a timing factor.

JUSTICE HARRIET O'NEILL: My understanding is the Legislature has enacted a law that allows school principals to determine where AEDs should be located within a school. Why would that not involve medical judgment? I mean, a principal would then not be protected by the Healthcare Liability Act.

ATTORNEY J. KEVIN KERRY: Right.

JUSTICE HARRIET O'NEILL: But a doctor, if he made the same decision would.

ATTORNEY J. KEVIN KERRY: I believe you're right. I sound like Johnny One Note here, but I go back to the statute and the statute qualifies it in terms of a physician's judgment on issues of safety and it doesn't talk about principals or AED salespeople. It talks about physicians.

CHIEF JUSTICE WALLACE B. JEFFERSON: Does the Act require at all--I'm right here in the middle--does the Act require at all a physician-patient relationship in order to be applicable?

ATTORNEY J. KEVIN KERRY: Absolutely not. Absolutely not. The portion of the healthcare liability claim definition that I think we should focus on is that part of the claim, it's again, some disputed he's a physician. Some disputed there was no physician-patient relationship in this situation. So I think what we should really focus on is the wording of that definition that says other claim departures from accepted standards of safety and so I--

JUSTICE HARRIET O'NEILL: Directly related to healthcare and that's one of the issues in this case.

ATTORNEY J. KEVIN KERRY: And that is one of the issues in that case and if I could speak to that briefly. Let's go back to the whole purpose of Chapter 74. The Legislature was very clear that, in their

minds, they saw at least two problems that existed at that time. High medical malpractice insurance and a lack of accessibility and affordability in health insurance. The way that they chose to try to address those issues was to try to reduce the number of liability claims. I believe when you look at the legislative history and we attach that as an Appendix, I believe Appendix 5, to our Petitioner's Brief, you'll see in that, in that section where Senator Ratliff was asked that very question whether or not directly related.

JUSTICE HARRIET O'NEILL: Well we look at the text. We don't need to go back and dig into legislative history. We need to look at the text and understand what it means and the way the safety issue is set off with commas seems to contemplate that as one phrase as one of our Courts of Appeals has found and that seems grammatically correct to me.

ATTORNEY J. KEVIN KERRY: The Texarkana Court has spent a great deal of time dissecting the grammar on that issue. I believe that there's been a dissent or a current, a concurrence in at least one opinion by one of the Justices that substituting the words directly related to healthcare after each one of those parentheticals or each one of those phrases would be cumbersome, redundant and not make a lot of sense. It makes more sense in terms of what Senator Ratliff was trying to say when he was answering that question and that is it was related to professional or administrative services because he was asked whether or not this Act covered nonmedical personnel and he said it did not and that was a clarification on that issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Kerry. The Court is now ready to hear argument from the Respondents.

MARSHALL: May it please the Court, Mr. Kobs will present argument for the Respondent.

ORAL ARGUMENT OF JEFFREY H. KOBS ON BEHALF OF THE RESPONDENT

JEFFREY H. KOBS: Good morning. May it please the Court, I'm Jeff Kobs from Ft. Worth on behalf of the Respondents, Laura Friend in her capacities and her husband. The question I think that this Court must answer today is, of course, are the Friend's claims against Dr. Yamada more properly classified as ordinary negligence claims or healthcare liability claims. In answering that question, I think what the Court will do is answer the related question, must they be classified as one or the other. Can there be overlapping claims? Can and Justice Wainwright's question, can the same facts give rise to claims at both sound and general negligence and sound in healthcare liability fields. The way the claims were pled by the Plaintiff's Counsel in this case, they absolutely identified Dr. Yamada as a physician, described him as such, but when the negligence claims against him were asserted, they were asserted under two different standards of care--one, an ordinary standard of care and then one, a higher degree or a higher standard of care in the healthcare liability field by a physician and specifically an emergency room physician.

JUSTICE NATHAN L. HECHT: Is that Paragraph L of the Petition?

ATTORNEY J. KEVIN KERRY: It is. It's on Page 18, I believe.

JUSTICE NATHAN L. HECHT: Yeah, but it says, it does say ordinary but it says duty to exercise ordinary care and act as an emergency medicine physician of reasonable and ordinary prudence under the same or circumstances, similar circumstances. That sounds like a professional breach.

ATTORNEY J. KEVIN KERRY: That's a disjunctive because he is sued, he sued because he had the duty under Texas law to exercise ordinary care and a duty to act as an emergency medicine physician of reasonable and ordinary prudence. I added a word in there, but that's what the argument was before the Ft. Worth Court of Appeals, that this language in this pleading sets up two different standards of care.

JUSTICE NATHAN L. HECHT: Do you think if the pleading said has the duty under Texas law to and then the, there weren't the words exercise ordinary care and. It just said to act as an emergency medical physician of reasonable and ordinary prudence, that would be a healthcare liability claim.

ATTORNEY J. KEVIN KERRY: That would, that would sound, the essence of that would sound more in healthcare liability for the simple reason that that would set up a standard of care that relates to a healthcare provider as opposed to an ordinary standard of care, which we contend was also, was also inserted in there.

JUSTICE NATHAN L. HECHT: So it's the words exercise ordinary care and that you think make this also a non-healthcare liability claim.

ATTORNEY J. KEVIN KERRY: Yes, in that particular sentence and also there are also other factual allegations pled with respect to the AEDs and the equipment of the park and there were other defendants besides Dr. Yamada sued for these same facts. There were aquatic experts, risk managers, operations managers who also had input into the AEDs. It wasn't Dr. Yamada's sole decision. So there are other defendants like the salesman that Justice O'Neill asked about who are and remain in front of the Court because they don't have the protections of Chapter 74.

JUSTICE HARRIET O'NEILL: Well, I mean my, what I was going to ask was how do you prove an ordinary negligence claim against Dr. Yamada or against any of these defendants as a practical matter? You're going to have to show the characteristics of hypertrophic cardiomyopathy. You're going to have to talk about how many per people there should be and where they should be located and that just seems to require core medical judgment.

ATTORNEY J. KEVIN KERRY: That's, let me break that in half. With respect to the liability facts, I would, I would concede that proper placement of AEDs are outside the common knowledge of the ordinary layperson, but they are not peculiarly within the medical field. So there are architects. There are school principals. There are building managers that make decisions about AEDs and AED placements all the time. I suspect that this building has a number of AEDs. I doubt that a doctor was consulted with respect to where they were placed. I suspect the Supreme Court building in Austin has one or more AEDs, but I also suspect that they didn't consult with a doctor as to where to place them.

CHIEF JUSTICE WALLACE B. JEFFERSON: I wouldn't hold my breath.

JUSTICE PHIL JOHNSON: But if, in fact, they did and there may be a blending of these things because it may well be that someone with medical expertise who may have studied and not be a medical healthcare provider could do that, but it seems like the Legislature may well have drawn a line between those two people and on one side the manufacturer, you don't have to file an expert report. They don't come under this statute. On the other side, the physicians and the healthcare providers do come under the statute and we've already fought that battle and said that they could do that so.

ATTORNEY J. KEVIN KERRY: They do come under the statute and I know we're going to get to this, but they do come under the statute if they

make safety decisions that fall within the definition of healthcare liability because they directly relate to healthcare.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why would you not have complied with the statute? You're saying that you're pleadings present both ordinary and professional negligence, why would you not in terms of your professional negligence claim have complied, filed the expert report timely, etc.?

ATTORNEY J. KEVIN KERRY: Mr. Dural Keith in Ft. Worth was the Plaintiff's Counsel below. I assume that he made the decision he did not wish to proceed on the healthcare liability allegation and proceed only under the ordinary care simple negligence prudence liability claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: But there's going to have to be testimony as Justice O'Neill mentioned about what exactly the medical condition was, how quickly an AED had to be there in order to do the shock therapy or whatever.

ATTORNEY J. KEVIN KERRY: And let me return to the second part then of her question and my answer and that is, clearly causation testimony from a medical standpoint will be necessary in order to link up the proximate cause that they, in other words, a medical expert's going to have to testify had the AEDs been used properly, timely, had they been readily accessible, had a first responder used them in accordance with their instructions, then in reasonable medical probability is more likely than not that Sarah Friend would have survived. That type of testimony though comes in product liability cases and simple, in car wreck cases, in all kinds of cases other than and in addition to healthcare liability claims.

JUSTICE DALE WAINWRIGHT: That's true, Counsel, but the Legislature has not singled out car wreck cases like it has the medical profession to say if you sue a doctor for healthcare, medical care or safety, directly or not directly related, I know that debates pending, then you've got to satisfy Chapter 74. There's no Chapter 74 for auto wreck cases. This, you can plead alternatively in most any other area on the same facts, but is it or is it not different with medical cases? That's the question. Is this distinct?

ATTORNEY J. KEVIN KERRY: Medical cases are distinct. It is different. I really concede that there are additional hurdles and hoops that have to be addressed in order to prosecute one of those types of claims that you mentioned.

JUSTICE DALE WAINWRIGHT: Okay. Let me ask a specific question. You said clearly medical testimony regarding causation will be necessary in this case.

ATTORNEY J. KEVIN KERRY: Yes.

JUSTICE DALE WAINWRIGHT: If that's the case and a defendant is a doctor.

ATTORNEY J. KEVIN KERRY: Yes.

JUSTICE DALE WAINWRIGHT: As to the claim against the doctor, don't you have to satisfy Chapter 74?

ATTORNEY J. KEVIN KERRY: No and I'll tell you why I believe that to be the case. In this Court's analysis of these cases in the past, one of the statements that's made is if expert testimony is required, medical expert testimony is required, those statements are in the context of liability. If medical expert testimony is required in order to show breach or departure from the acceptable standard of healthcare liability, then that sounds more like, although the Court doesn't say it absolutely is, but it sounds more like a healthcare liability claim. My point was simply having conceded that a doctor will be necessary to

show causation and damages, but it does not mean that this is a healthcare liability claim because medical testimony will be needed. It's my.

JUSTICE HARRIET O'NEILL: Let me ask.

ATTORNEY J. KEVIN KERRY: I'm sorry.

JUSTICE DALE WAINWRIGHT: Can I hear that last part?

ATTORNEY J. KEVIN KERRY: Yes, just because medical testimony may be necessary to establish causation and damages doesn't put this in the box of cases where medical testimony is needed to establish liability because it's necessary for the standard of care breaches and things like that. So those cases that hold if medical testimony is needed, then it probably is a healthcare liability claim, don't apply to simply having a medical professional talk about damages and causation.

JUSTICE DALE WAINWRIGHT: So you think if, okay, there may be, I acknowledge, there may be different causation matters raised as to liability causation versus damages causation. For example, apportioning damages may be a different matter from establishing liability and the causation there. So if the medical testimony to see if I understand what you're saying, the medical causation testimony only comes in as to damages or apportioning damages, then that does, that is not a healthcare liability claim in your view, even if you sue a doctor?

ATTORNEY J. KEVIN KERRY: Yes and so, for example, in some of the cases where doctors have been sued for ordinary negligence in connection with premise cases that are not directly related to healthcare, so not wheelchairs coming out of the ramp of the hospital, but a patient parks in the parking lot, gets out and steps in a hole. That would be a premise case of ordinary care, duty to an invitee, and the doctor's liability for that conduct or for that condition would not require medical testimony, but, of course, the patient who once went to the hospital and had a broken leg, there's going to be medical testimony, yes, in all likelihood the step in the hole broke her leg and these are the damages that were proximally caused. These were necessary [inaudible].

JUSTICE DALE WAINWRIGHT: The Court of Appeals spends no time discussing that distinction.

ATTORNEY J. KEVIN KERRY: The Court of Appeals.

JUSTICE DALE WAINWRIGHT: Was that argument made to them?

ATTORNEY J. KEVIN KERRY: It was. It was made to them and the Court of Appeals references that and I believe.

JUSTICE DALE WAINWRIGHT: It's a very short opinion.

ATTORNEY J. KEVIN KERRY: It is page number 9, at the bottom; it says in the case before us, medical testimony is not required to establish the proper placement of AED devices. That's the argument that I'm making here. In the preceding sentence, they say, the fact that expert medical testimony may be needed at some point in a case does not perforce create a healthcare liability claim. So they are essentially writing what I am arguing. Medical testimony won't be needed in this case to establish liability. There will be other people to testify about how many AEDs were there placed, how much signage is necessary to alert first responders, but the fact that medical testimony may be needed on other issues doesn't perforce make this into a healthcare liability claim.

JUSTICE HARRIET O'NEILL: We have a lot of cases that are bubbling up on different things that seem to sort of dance on the head of a pin in terms of is it medical healthcare liability case or is it not. We've got a bed that fell apart in a hospital. The example you posed of someone falling in a hole in a parking lot and there are different

shades and phases in between. In light of the Act's purpose to drive down the cost of healthcare, when they're close, isn't it a better policy choice just to say get a report. Get an expert report that says this is a violation of the standard of care.

ATTORNEY J. KEVIN KERRY: I understand.

JUSTICE HARRIET O'NEILL: That arguably is a medical standard of care.

ATTORNEY J. KEVIN KERRY: I understand the logic and argument behind that from a safety standpoint for a practitioner, but there's still going to have to be a resolution to whether these cases are healthcare liability claims or not and I would, it's probably a timely point to bring up, your dissent in the Diversacare case where you talk about the danger of over inclusion of claims that could be healthcare liability claims, could be ordinary negligence and if you want too many of those ordinary negligence claims in the healthcare field, then you have malpractice policies, professional malpractice policies covering what really ought to be covered by premise liability or commercial general liability policies.

JUSTICE HARRIET O'NEILL: But in terms of those that are really sort of are very close, shouldn't we just default to the position of well just get an Affidavit. It's the easier course than trying to parse through when in trial, you've got to keep evidence out because you didn't properly screen it with an Affidavit. I mean, isn't that just the safe harbor?

ATTORNEY J. KEVIN KERRY: In having already, yes, I can understand that point having already mentioned I wasn't the Counsel at the time in the Trial Court, I would see great difficulty in this case with obtaining an expert report because placement of AEDs is, I mean, it can be a medical decision. I suppose medical doctors at the hospital probably make those decisions about where they will be in the hospital, but it's really not within the parameters of the medical field or.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well why isn't it? Why isn't it? Wouldn't wouldn't a doctor testify that within so many minutes of the onset of a heart attack or some other heart condition, the AED would be appropriately used and then can say you know at least there ought to be one available within five minutes walking distance or three or two, why wouldn't that be a medical judgment?

ATTORNEY J. KEVIN KERRY: The first part, I think, would be. The application of an AED within so many minutes would likely have resulted in the nondeath. Five minutes walking, five minutes running, are there signs that alert the general public where they are. Many people are trained in AEDs that aren't healthcare providers. Lots of people know how to use them.

JUSTICE DAVID M. MEDINA: Now you may have already answered this question. I don't recall the answer, but are these mandated anywhere in public schools or state-run buildings, these type devices?

ATTORNEY J. KEVIN KERRY: I agree with Counsel, not that I am aware of. Now I know Justice O'Neill mentioned that school principals can now make that decision.

JUSTICE DAVID M. MEDINA: No, I'm talking about the requirement to have these available.

ATTORNEY J. KEVIN KERRY: I am aware from research kind of anecdotal research that there are some jurisdictions who require them and so, for example, I think Orange County, California has a relatively.

JUSTICE DAVID M. MEDINA: Let's talk about Texas. Are there any requirements here in Texas?

ATTORNEY J. KEVIN KERRY: Not that, not that I am aware of.

JUSTICE DAVID M. MEDINA: So if this law school decides for whatever reason we need to have one of these available because one of these Justices suffered a myocardial infraction two years ago and they don't have it, is the school negligent for not having it? I mean where does this go? It seems to me that if a premises owner takes it upon himself to provide these safety devices, then it subjects itself to litigation such as this. That seems to me it would have a chilling effect in providing these. Why not just forget about it so you don't have to worry about litigation?

ATTORNEY J. KEVIN KERRY: I think anytime there's a new product, a new safety product that comes on the market whether it's an AED or whether it's a fire extinguisher, whether it's a sprinkler system in a public building that hasn't been mandated by the City yet. Anytime something like that occurs, some landowner, some property owners will be an early adopter of that and some will be a later adopter and there's a way, certainly in this case, I don't think it's terribly problematic to say that the operators of the water amusement park with slides and rides and high-speed and opportunities for drowning and the necessity for reviving people who suffered some type of drowning injury that the standard of care for water parks such as NRH20 both in Texas and across the country, mandates the use of AEDs and not just the use, but the proper use and I think it's that standard that would be applicable in this case from a liability standpoint, not only for Dr. Yamada but for all the people who part of that decision in the process.

JUSTICE SCOTT A. BRISTER: Well me ask you on that returning to Justice O'Neill's first question about if this had been a salesman that had recommended, your client wouldn't have any suit against the salesman. The salesman might have suit against the manufacturer, but you wouldn't have any cause of action against the salesman because the salesman owes no duty.

ATTORNEY J. KEVIN KERRY: I think that would be true unless like in a products case where privity is not required. The salesman made misrepresentations, for example. If the sales.

JUSTICE SCOTT A. BRISTER: If you make misrepresentations, then you're always personally liable, but let's assume no misrepresentations. He didn't make any representations to your clients. He just said this is how many you need. If it was the salesman, your clients would have no cause of action because there's no duty.

ATTORNEY J. KEVIN KERRY: That's correct and my clients would simply have a cause of action against.

JUSTICE SCOTT A. BRISTER: So then doesn't this have to be a medical malpractice case because the only reason he has a duty is because he's a doctor.

ATTORNEY J. KEVIN KERRY: No, that's incorrect. I believe that that the cause of action would lay and still does before the Trial Court against all of those persons who made these decisions. There's 24 defendants in this case, but some are lifeguards and others.

JUSTICE SCOTT A. BRISTER: Right, but I mean if this was a city employee, you would have no cause of action against the city employee individually.

ATTORNEY J. KEVIN KERRY: The city employee who did what?

JUSTICE SCOTT A. BRISTER: If it's the city employee that said this is how many we need at the water park, you would have no cause of action against the city employee individually.

ATTORNEY J. KEVIN KERRY: Well that depends upon 101, 106 Texas Tort Claims Act issues with respect to.

JUSTICE SCOTT A. BRISTER: No, I don't think so.

ATTORNEY J. KEVIN KERRY: Okay.

JUSTICE SCOTT A. BRISTER: I mean when would you ever have a, it's not a doctor, I mean it's true when the doctor is a city employee or government employee you have an individual cause of action because they're a doctor and doctors have a duty, but if you're just a city employee, I don't think there's a cause of action. What would it be? Contract or tort?

ATTORNEY J. KEVIN KERRY: Well it would be, it would be in tort because Dr. Yamada along with these other people that were hired to consult and provide consulting services to NRH20 about their water park were negligent, but you raised an interesting point and it's one that gets back to Justice Hecht's very first question in this case. We're here on pleadings and Justice Hecht asked just pleadings and the answer to that was yes and there were no special exceptions filed in this case and there was no evidence presented. The motion dismissed. It became an affidavit. There was no testimony at the hearing and so we are here at a very early stage. Now it's common for judges to resolve duty questions. What's the duty here at some rejection stage? We don't have the benefit of that. We don't have the discovery. We don't have the testimony. We don't know whether there was an assumed duty. We don't know whether there's a contractual duty.

JUSTICE DALE WAINWRIGHT: The statute precludes all that. No discovery until the expert report with very limited exceptions when you sue healthcare providers and so you have to get that all resolved within 120 days plus the time it takes to file a motion here and rule on it. So you're right, but that's because that's what Chapter 74 sets up.

ATTORNEY J. KEVIN KERRY: I understand that, but, of course, the issue becomes when at a threshold level this Court is de novo reviewing whether this is a healthcare liability claim or not and they have pleadings that are not subject to special exceptions and have no evidence before the Court with respect to these issues, it makes it very difficult and you wind up in a situation where you very well may have both kinds of claims, but you're not sure.

JUSTICE HARRIET O'NEILL: But if that's the case, that just encourages vague pleading.

ATTORNEY J. KEVIN KERRY: This is a long, lengthy and specific pleading, but it still, it sets up two different claims, but the problem is is when there's questions about what the duty is, is it contractual or is it tort, sometimes it's too soon to know when you're going to take on something like this as a threshold issue in a case.

JUSTICE PHIL JOHNSON: Counsel, you mentioned a question of professional liability policies of insurance as opposed to CGL policies and coverage like that. Are the policies of insurance introduced anywhere? Are they considered in this in any manner.

ATTORNEY J. KEVIN KERRY: They are not.

JUSTICE PHIL JOHNSON: And in regard to coverage, it seems as though when we get into whether this is covered by professional malpractice or a general liability policy, we'd look at the pleadings, I think we've said that before. We look at the underlying cause of action and if unless someone pleads themselves completely out and says I am not suing you for professional negligence here, then the professional policy, the coverage question seems to me like it's going to be pretty murky if we start analyzing the cases in regard to that.

ATTORNEY J. KEVIN KERRY: And I'm not suggesting that this case be analyzed. This case hasn't been briefed or there's no evidence on that.

I was simply pointing out Justice O'Neill's dissent in Diversacare what the danger is in over-lumping claims and healthcare liability claims because that overburdens then the healthcare liability insurance carriers.

JUSTICE PHIL JOHNSON: Well how do we know that?

ATTORNEY J. KEVIN KERRY: Because Justice O'Neill said it.

JUSTICE HARRIET O'NEIL: Because I said it.

JUSTICE PHIL JOHNSON: In a dissent as I recall. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counselor. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF J. KEVIN KERRY ON BEHALF OF PETITIONER

JEFFREY H. KOBS: I'd like to go back for a moment to the essence questions. Why, according to the Plaintiff's pleadings why did they ask Dr. Yamada for his judgment? They asked him not because he's a nice guy or because he was in the wrong place at the wrong time. They asked him for his judgment because he's a medical doctor. According to the Plaintiff's pleadings, they asked him for his judgment because he's trained as an emergency medicine physician and a Medical Director. If this case were to go forward, the question then would then become who can testify against this emergency medical doctor on whether or not his judgment, the judgment they asked him to make as an emergency medical doctor was good or not. Is that an architect? Is that an engineer? Or does it have to be another physician someone similarly qualified?

CHIEF JUSTICE WALLACE B. JEFFERSON: Maybe the answer would be the Plaintiff would concede I can't question on his medical judgment because I didn't pursue this as a medical malpractice case. I didn't follow Chapter 74. So the only question has to do with negligence and without expert testimony on anything medical relating to liability. Maybe that's the answer.

JEFFREY H. KOBS: Well I believe, that may be an answer that they might give, but I think the more correct answer is you should have filed a report because you're asking about whether or not this particular healthcare professional exercised appropriate judgment in terms of matter of safety that falls right within the healthcare liability claim definition and to judge him by any.

JUSTICE NATHAN L. HECHT: I suppose the issue is not really the report is it? I mean that's the issue here, but if you file a report, you sort of concede it's a healthcare liability claim and then you concede the caps and if you don't file an expert report, you can still take the position that it's not a healthcare liability claim and therefore it's not capped. Isn't that part of the position that's being asserted?

JEFFREY H. KOBS: Yes, sir, it sure is. And, of course, that, that gets us back to the obligation that we have to evaluate what this really is all about rather than a matter of artful pleading and why I keep going back to the essence of the claim, the alleged conduct, that being breach of his appropriate judgment of the circumstances and the specialized knowledge that I believe would be required to show that his judgment, it was apparently sought according to these allegations was wrong. They saw it as a doctor.

JUSTICE PAUL W. GREEN: Let's take an example of, let's say, a private ambulance service and you have a driver obviously who's working for this presumably healthcare provider, private, so the immunity issues aren't there. Summoned in a situation, a case to take to the

hospital and obviously there's some perhaps you could argue that well the defense you would have would be, of course, well this is a healthcare liability case because since he's a, it's an ambulance, maybe an EMT trained driver, you know, what route do you take to the hospital to get the patient there quickly enough and distance and so forth. No report's filed. Why couldn't the Plaintiffs say well, this is a negligence case? Can you parse it out like that? Is it driver was negligent in operating a vehicle.

JEFFREY H. KOBS: The first thing I would do in that situation is I would go to Chapter 74 and I'd read the definition of a healthcare provider. Now, I have to admit my ignorance. I don't know whether an EMT falls within that definition or not. If, however, it does, the definition of a medical provider includes an EMT, then they might want to argue that this is a matter of ordinarily negligence to get around the cast, to get around the expense and the requirement of a report. I just don't think they can do that because the Legislature has told us what they want us to do to try to reduce these number of claims.

JUSTICE PAUL W. GREEN: Well so that would mean so if Dr. Yamada operating his own car is involved in an accident, he's a healthcare provider.

JEFFREY H. KOBS: But he's not operating, he's not using his medical judgment under those circumstances.

JUSTICE PAUL W. GREEN: Right.

JEFFREY H. KOBS: So.

JUSTICE PAUL W. GREEN: And so maybe an ambulance driver may not be either.

JEFFREY H. KOBS: Well I guess it's fact specific, but if the ambulance driver is taking an injured victim to the hospital and chooses to go through Sonic instead of go to the emergency department, then it seems like he's in the course of delivering medical care and you'd probably get you a report on that.

JUSTICE PHIL JOHNSON: Does the statute say that we limit it to cases in which they're using medical judgment or is that something from somewhere else?

JEFFREY H. KOBS: Specifically, the healthcare liability claim definition that I'm focusing on says or other claimed departure from accepted standards, accepted standards and then, in this case, of safety. Well accepted standards of what? It has to be judgment I would believe.

JUSTICE PHIL JOHNSON: But that's an interpretation of the statute.

JEFFREY H. KOBS: That is an interpretation of the statute.

JUSTICE PHIL JOHNSON: Okay, is that, do you take that from any of the cases we've written anywhere?

JEFFREY H. KOBS: Yes.

JUSTICE PHIL JOHNSON: I think that's one of the factors that was mentioned in Diversacare, but I don't recall that we have hinged the accepted standards to be on judgment.

JEFFREY H. KOBS: Well there's a number of cases, Diversacare would be one of them, that talks about, I guess, judgment in terms of whether or not that nursing home, in that case, exercised appropriate assessment of the patient, that the individual that performed or did the sexual abuse. So it all goes back to judgment even though the conduct might be assessment or planning care, that kind of thing in terms of medical context. I don't think you can get away from judgment.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor. The cause is submitted. That concludes the oral arguments for this morning. The Court is going to take a brief recess

and then return for a question-and-answer session. So we will see you in just a few minutes, but, for now, all the arguments are closed and the Clerk will adjourn the Court.

MARSHALL: All rise.

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