

NO. 07-0783

IN THE SUPREME COURT OF TEXAS

IRVING W. MARKS

PETITIONER

V.

ST. LUKE'S EPISCOPAL HOSPITAL

RESPONDENT

On Petition for Review from the
Court of Appeals for the First District at Houston

BRIEF OF *AMICUS CURIAE*
[filed by *Amicus Curiae* Tenet Healthcare Corporation]

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STATEMENT REGARDING DISCIPLINARY RULE 1.11

The judge who presided over this case in the trial court, Hon. Levi J. Benton, has since left the bench and is currently a partner in Strasburger & Price, LLP, counsel for the *amicus curiae*. Pursuant to Tex. Disciplinary R. Prof. Conduct 1.11, Judge Benton has taken no part in the representation of the *amicus curiae*, has been screened from participation in the matter, and will be apportioned no part of the fee therefrom.

TABLE OF CONTENTS

	<u>Page</u>
Statement Regarding Disciplinary Rule 1.11	i
Table of Contents	ii
Index of Authorities	iii
Interest of the <i>Amicus</i>	1
Argument.....	1
WHETHER A CLAIM AGAINST A HEALTH CARE PROVIDER INVOLVES A DEPARTURE FROM “ACCEPTED STANDARDS OF ... SAFETY” SHOULD NOT BE JUDGED BY THE STATUS OF THE ACTORS WHOSE CONDUCT GAVE RISE TO THE CLAIM.....	2
Prayer.....	9
Certificate of Service	10

INDEX OF AUTHORITIES

Cases

<i>Christus Health v. Beal</i> , 240 S.W.3d 282 (Tex. App. – Houston [1 st Dist.] 2007, no pet.)	3
<i>Cobb v. Dallas Fort Worth Medical Center – Grand Prairie</i> , 48 S.W.3d 820 (Tex. App. – Waco 2001, no pet.)	4
<i>Diversicare General Partner, Inc. v. Rubio</i> , 185 S.W.3d 842 (Tex. 2005)	passim
<i>Emeritus Corp. v. Highsmith</i> , 211 S.W.3d 321 (Tex. App. – San Antonio 2006, pet. denied)	3
<i>Hector v. Christus Health Gulf Coast</i> , 175 S.W.3d 832 (Tex. App. – Houston [14 th Dist.] 2005, pet. denied)	4
<i>Holguin v. Laredo Regional Medical Center, L.P.</i> , 256 S.W.3d 349 (Tex. App. – San Antonio 2008, no pet.)	3
<i>Marks v. St. Luke’s Episcopal Hospital</i> , ___ S.W.3d ___, 52 Tex. Sup. Ct. J. 1184 (2009)	2, 3, 7, 9
<i>Omaha Healthcare Center, L.L.C. v. Johnson</i> , 246 S.W.3d 278 (Tex. App. – Texarkana 2008, pet. filed)	3, 4
<i>Valley Baptist Medical Center v. Stradley</i> , 210 S.W.3d 770 (Tex. App. – Corpus Christi 2006, pet. denied)	3

Statutes

Tex. Civ. Prac. & Rem. Code § 74.001(13)	2
Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(3) (repealed 2003)	8
Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(4) (repealed 2003)	2

Administrative Materials

25 Tex. Admin Code § 133.41(d)(1)(C)(i) 5

25 Tex. Admin Code § 133.41(g)(2)(A) 5

25 Tex. Admin Code § 133.41(i)(2)(A) 5

25 Tex. Admin Code § 133.41(v)(1)..... 5

25 Tex. Admin Code § 133.41(v)(2)(J)(vi)..... 5

42 C.F.R. § 482.42(b)(1)..... 5

Rules of Court

Tex. Disciplinary R. Prof. Conduct 1.11 i

Secondary Sources

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www.redorbit.com/news/health/1671471/compirion_and_henrico_doctors_hospital_team_up_to_improve_quality/index.html) 6

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Hosp. & Community Psychiatry 639 (1983)..... 5

Joint Commission on Accreditation of Hospitals, *Comprehensive Accreditation Manual for
Hospitals* § PC.5.50 (2007)..... 5

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Richard L. Griffith & Dewey W. Johnston, *Texas Hospital Law: Administrative &
Regulatory Law* § 2.3 (3rd ed. 2003)..... 5

Stephen Allred, *The Healthcare Facility as Employer* § 2.1, in *Healthcare Facilities Law: Critical Issues for Hospitals, HMOs, and Extended Care Facilities* (Dellinger ed., 1991) 5

INTEREST OF THE *AMICUS*

Amicus Tenet Healthcare Corporation (“Tenet”) is a health care services company, headquartered in Dallas, whose subsidiaries and affiliates own and operate acute care hospitals and related ancillary health care businesses. Tenet’s affiliated companies own and operate ten hospitals in Texas:

Centennial Medical Center (Frisco)
Cypress Fairbanks Medical Center (Houston)
Doctors Hospital at White Rock Lake (Dallas)
Houston Northwest Medical Center (Houston)
Lake Pointe Medical Center (Rowlett)
Nacogdoches Medical Center (Nacogdoches)
Park Plaza Hospital (Houston)
Providence Memorial Hospital (El Paso)
Sierra Medical Center (El Paso)
Sierra Providence East Medical Center (El Paso)

Tenet has a vital interest in the proper application of Texas law to the liability of hospitals, and in particular in the articulation of the proper standards for determining whether a claim by a patient against a hospital is a health care liability claim.

The fee for preparation of this brief will be paid by Tenet.

ARGUMENT

The five opinions in this case employ several different lines of reasoning in analyzing the applicability of the Medical Liability and Insurance Improvement Act to the plaintiff’s claims. Tenet will address only one of those lines of reasoning in this brief, leaving the others to the parties and to other *amici*.

WHETHER A CLAIM AGAINST A HEALTH CARE PROVIDER INVOLVES A DEPARTURE FROM “ACCEPTED STANDARDS OF ... SAFETY” SHOULD NOT BE JUDGED BY THE STATUS OF THE ACTORS WHOSE CONDUCT GAVE RISE TO THE CLAIM.

A threshold question that the Court must decide in this case is whether the phrase “accepted standards of ... safety,” as used in Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(4) (repealed 2003), is limited to safety standards related in some way to patient care or treatment. Four members of the Court believe it is not. *Marks v. St. Luke’s Episcopal Hospital*, ___ S.W.3d ___, ___, 52 Tex. Sup. Ct. J. 1184, 1202-03 (2009) (Johnson, J., dissenting). Three current members of the Court believe it is. *Marks*, ___ S.W.3d at ___, 52 Tex. Sup. Ct. J. at 1187. An eighth member believes it should not be, but regards the issue as foreclosed by precedent. *Marks*, ___ S.W.3d at ___, 52 Tex. Sup. Ct. J. at 1192 (Jefferson, C.J., concurring), *citing Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005). The ninth member is new to the Court.

But whatever the outcome of that debate, it is critically important to establish a proper framework for analyzing the relationship between safety standards and health care. Whether or not such a relationship must exist under the language of the old statute¹ (“accepted standards of ... safety”), it is arguable that it must exist under the different language of the new statute² (“accepted standards of ... safety or professional or administrative ser-

¹Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(4) (repealed 2003).

²[Tex. Civ. Prac. & Rem. Code § 74.001\(13\)](#).

vices directly related to health care”).³ The question will thus inevitably recur, even after the old statute fades into history. And the standards developed under the “safety” prong of the statute may be used to guide interpretation of the “health care” prong.

Borrowing from *Diversicare’s* analysis of “accepted standards of medical care, or health care,” the majority opinion in this case holds that an “accepted standard of ... safety” is implicated when “the unsafe condition or thing is an inseparable or integral part of the patient’s care or treatment.” *Marks*, ___ S.W.3d at ___, 52 Tex. Sup. Ct. J. at 1187. This test focuses on the relationship – the logical nexus – between the injury-producing event or object and patient care. But in analyzing the logical linkage between the event or object and the patient’s care or treatment, the majority makes an unfortunate detour, focusing at several points on the status of the actors who were presumptively responsible for the unsafe condition encountered by the patient.

For example, the Court notes evidence “that the assembly of the hospital bed was solely the responsibility of the Hospital’s maintenance staff,” commenting that “[p]resumably, tasks performed by the maintenance staff do not require any specialized health care

³This language is ambiguous: does “directly related to health care” apply to “safety or professional or administrative services,” or does it apply only to “professional or administrative services?” Different answers have been given, and the issue pends on the shadow docket. Compare, e.g., *Diversicare*, 185 S.W.3d at 867 (O’Neill, J., dissenting) (under new statute, safety must be related to health care); *Harris Methodist Fort Worth v. Ollie*, 270 S.W.3d 720, 723 (Tex. App. – Fort Worth 2008, pet. filed) (“directly related to health care” modifies, *inter alia*, “safety”); *Omaha Healthcare Center, L.L.C. v. Johnson*, 246 S.W.3d 278, 281-84 (Tex. App. – Texarkana 2008, pet. filed) (same); *Christus Health v. Beal*, 240 S.W.3d 282, 289 (Tex. App. – Houston [1st Dist.] 2007, no pet.) (same); *Valley Baptist Medical Center v. Stradley*, 210 S.W.3d 770, 774-75 (Tex. App. – Corpus Christi 2006, pet. denied) (same), with, e.g., *Diversicare*, 185 S.W.3d at 861 n.4 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment) (“directly related to health care” modifies only “professional or administrative services”); *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 328 (Tex. App. – San Antonio 2006, pet. denied) (safety departure need not directly relate to health care, per *Diversicare*; language of new statute not analyzed); *Holguin v. Laredo Regional Medical Center, L.P.*, 256 S.W.3d 349, 354-55 (Tex. App. – San Antonio 2008, no pet.) (applying *Emeritus* in face of specific contention that new statutory language controls).

knowledge.” ___ S.W.3d at ___, 52 Tex. Sup. Ct. J. at 1188. Elsewhere the Court says that “the hospital workers responsible for assembling Marks’s bed, identified by the hospital nurses as the maintenance team, would not have been considered health care providers when doing so.” ___ S.W.3d at ___, 52 Tex. Sup. Ct. J. at 1189. According to the Court, the assembly of the bed occurred “in the course of the Hospital’s general maintenance duties which do not involve health care professionals” *Id.*

The majority is not alone in this focus on the “who.” Beginning with Justice Vance’s concurrence in *Cobb v. Dallas Fort Worth Medical Center – Grand Prairie*, 48 S.W.3d 820, 829 (Tex. App. – Waco 2001, no pet.) (Vance, J., concurring) (focusing on whether actor is a “health care provider” in his or her own right), some lower courts have been seduced by the simplicity of the assumption that health care is necessarily provided only by professionals. *See Hector v. Christus Health Gulf Coast*, 175 S.W.3d 832, 836 (Tex. App. – Houston [14th Dist.] 2005, pet. denied) (adopting Vance concurrence in dictum); *Omaha Healthcare Center, L.L.C. v. Johnson*, 246 S.W.3d 278, 287 (Tex. App. – Texarkana 2008, pet. filed) (taking *Diversicare* language out of context to limit safety claims to “judgments made by professionals trained and experienced in treating and caring for patients and the patient populations”).

But measuring the logical nexus between an injury-producing event or object and patient care by the status of the involved actors is at best an error-prone exercise that does not comport with the reality of modern hospital practice. What happens to a patient in a hospital depends on the complex interaction of members of an integrated team of hospital employees and other health care providers, often at widely disparate points on the spectrum of professional training and judgment. Indeed, to be accredited, hospitals *must* provide care,

treatment, and services “in an interdisciplinary, collaborative manner.” Joint Commission on Accreditation of Hospitals, *Comprehensive Accreditation Manual for Hospitals* § PC.5.50 (2007).

“In a medical setting, in which cooperation is not only desirable but essential to ensure adequate patient care, the ability of professional and nonprofessional staff to work together becomes critical.” Stephen Allred, *The Healthcare Facility as Employer* § 2.1, in *Healthcare Facilities Law: Critical Issues for Hospitals, HMOs, and Extended Care Facilities* (Dellinger ed., 1991). Texas licenses at least 21 different categories of health care professionals that practice in a hospital setting.⁴ And there are literally dozens of categories of nonprofessional employees who assist in one way or another with the provision of patient care. Although these nonprofessionals may or may not have received formal postsecondary health care education, many receive specialized on-site training to enable them to carry out their responsibilities in the hospital’s health care delivery function.⁵

As the costs of health care continue to rise, hospitals have explored creative ways to provide patient services using teams of professional and nonprofessional personnel. For example, Mercy Hospital and Medical Center in Chicago employs “clinical partners,” nonpro-

⁴Physicians; dentists; pharmacists; physician’s assistants; nurses; advance practice nurses; certified registered nurse anesthetists; midwives; chiropractors; nurse midwives; physical therapists; podiatrists; occupational therapists; psychologists; optometrists; speech-language pathologists; audiologists; dieticians; perfusionists; respiratory care practitioners; and surgical assistants. Richard L. Griffith & Dewey W. Johnston, *Texas Hospital Law: Administrative & Regulatory Law* § 2.3 (3rd ed. 2003).

⁵See Bruce D. Forman & Brian J. Hagan, *A Brief Training Program for Nonprofessional Staff* 34 *Hosp. & Community Psychiatry* 639 (1983); [25 Tex. Admin. Code § 133.41\(d\)\(1\)\(C\)\(i\)](#) (training for administrative and technical personnel in food and dietetic service); [42 C.F.R. § 482.42\(b\)\(1\)](#) & [25 Tex. Admin. Code § 133.41\(g\)\(2\)\(A\)](#) (hospital-wide training programs addressing infection control problems); 25 Tex. Admin. Code §§ [133.41\(i\)\(2\)\(A\)](#) (training for employees engaged in transporting, processing, or handling clean or soiled linen), [133.41\(v\)\(1\)](#) (staff responsible for sterilization of supplies and equipment must participate in continuing education program), [133.41\(v\)\(2\)\(J\)\(vi\)](#) (training for staff using chemical disinfectants).

professionals who are trained to provide a variety of nursing assistant and technical tasks essential to basic patient care, working in a team with a registered nurse. Office of the Inspector General, Department of Health & Human Services, *Enhancing the Utilization of Nonphysician Health Care Providers: Three Case Studies* 19 (1993).⁶ St. Joseph's Hospital in Atlanta uses a "service associate" program to expand the skills of workers such as aides, food service workers, and housekeepers so that they can provide basic patient care. *Id.* at 11. Henrico Doctors' Hospital in Richmond is using a team of administrators, physicians, nurses, housekeeping staff, and others to reduce delays in emergency room treatment. "Compirion and Henrico Doctors Hospital Team Up to Improve Quality of Care," PRNewswire (Apr. 15, 2009).⁷ And Phoenix Memorial Hospital has used a team of nurses, administrators, and nonprofessional staff to ensure that surgical instruments are efficiently and properly sterilized. Marlene Bell, *Hospital Uses Team Approach to Improve Processes, Reduce Costs*, AORN J. (July 1988).⁸ See also Carol A. Tuttas, *Decreasing Nursing Staffing Costs in a Hospital Setting Development and Support of Core Staff Stability*, 18 J. Nursing Care & Quality 226 (2003) (advocating "decentralization and prudent expansion of cross-training for nonprofessional hospital personnel").

The interdisciplinary team approach to hospital care means that a particular adverse event in a hospital setting often results from a series of acts and omissions by professional and nonprofessional employees alike. For example:

⁶Available at oig.hhs.gov/oei/reports/oei-01-90-02071.pdf.

⁷Available at www.redorbit.com/news/health/1671471/compirion_and_henrico_doctors_hospital_team_up_to_improve_quality/index.html.

⁸Available at findarticles.com/p/articles/mi_m0FSL/is_n1_v68/ai_20921002.

- A patient's nosocomial (hospital-originated) infection may result from a combination of neglect by the hospital's professional infection control officer, failure by the professional nursing staff to follow infection control protocols, failure of the nonprofessional housekeeping and maintenance staffs to follow proper procedures, and failure of the professional quality control officer to follow up on previous incidents.
- A patient's allergic reaction when given a drug may result from combined errors by professional medical house staff, professional nurses, professional pharmacists, quasi-professional pharmacy technicians, and nonprofessional medical records clerks.
- A psychiatric patient's escape from a secured ward may result from the neglect of professional nurses, nonprofessional security guards, non-professional maintenance staff, and even the hospital's architect.
- Injury from a malfunctioning imaging machine may result from the combined negligence of the nonprofessional maintenance staff, the quasi-professional imaging technician, and the professional supervisor of the imaging center.

The present case provides an excellent illustration of this point. Marks alleges that his fall resulted not only from a garden-variety "broken bed," but also from the hospital's failure to properly train and supervise its staff, from its failure to provide him with assistance for daily living activities, and from its failure to provide him a safe environment. *Marks*, ___ S.W.3d at ___, 52 Tex. Sup. Ct. J. at 1187. These alleged shortcomings necessarily resulted from the acts and omissions of a wide range of professional and nonprofessional hospital employees.

Allowing the status of a claim as a health care liability claim to turn on the involvement of employees who are not themselves exercising professional judgment ignores the fact that the hospital as an institution exercises overall professional judgment in *all* of its patient care functions. Moreover, it invites endless hair-splitting, with profound differences often resulting from trivial distinctions. Suppose, for example, that in *Divesicare*, a nonprofessional security guard had been aware of the ongoing sexual assaults and had turned a blind eye to

them. Would that claim have been allowed to proceed outside the MLIAA? Or in the present case, what if a professional nurse had noticed the broken footboard a week before, and neglected to inform the maintenance staff? Would the claim against the hospital based on the nurse's conduct be barred while the claim against it based on the maintenance staff's conduct was allowed to proceed?

A focus on the nonprofessional status of particular actors will drive claims toward allegations of neglect by those actors, as plaintiffs seek escape from the strictures of the health care liability statute. Health care litigation against institutional defendants will become a game of "Where's Waldo?" in which litigants search for the nonprofessional actor among the mélange of hospital employees involved in some way in the injury-producing event. Ironically, the Court's overall focus – on the logical nexus between the unsafe condition or event and patient care – will be diminished in favor of a subsidiary focus on the status of the actors.

The statute wisely makes no distinction among hospital employees on the basis of their knowledge, training, or professional or nonprofessional status – *all* hospital employees in the course and scope of their employment are "health care providers." Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(3) (repealed 2003). Neither should this Court. If a mechanism is needed to differentiate safety-based health care liability claims from other safety-based claims, let it be found in the relationship of the event to health care, not the status of the actor. It may be that injuries caused by, for example, a rickety staircase⁹ or a broken waiting

⁹See *Diversicare*, 185 S.W.3d at 854.

room chair¹⁰ do not give rise to safety-based health care liability claims, but if so, it is because they do not relate to patient care, *not* because the persons most directly responsible for them – artificially isolated from the rest of the hospital team – have no health care degrees or licensure.

PRAYER

Amicus Curiae Tenet Healthcare Corporation respectfully prays that this honorable Court consider the matters set forth in this brief in making its decision on rehearing in this case.

Respectfully submitted,



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¹⁰*See Marks* ___ S.W.3d at ___, 52 Tex. Sup. Ct. J. at 1200 (Johnson, J., dissenting).

CERTIFICATE OF SERVICE

I hereby certify that this Brief of *Amicus Curiae* has been served on all parties to this appeal by mailing copies thereof to: James Eloi Doyle, Esq., and N. Kimberly Hoesl, Esq., Attorneys for Petitioner Irving W. Marks, Doyle Restrepo Harvin & Robinson, L.L.P., 4700 Chase Tower, 600 Travis, Houston, Texas 77002; Michael P. Doyle, Esq., Attorney for Petitioner Irving W. Marks, Doyle Raizner LLP, 4100 One Houston Center, 1221 McKinney, Houston, Texas 77010-3038; L. Boyd Smith, Jr., Esq., Attorney for Respondent St. Luke's Episcopal Hospital, Sedgwick, Detert, Moran & Arnold LLP, 1111 Bagby Street, Suite 2300, Houston, Texas 77002; and Craig Smyser, Esq., and Kristen E. Adler, Esq., Attorneys for *Amicus Curiae* Memorial Hermann Hospital, Smyser Kaplan & Veselka, L.L.P., 2300 Bank of America Center, 700 Louisiana, Houston, Texas 77002; all on this 7th day of January, 2010.



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