

Cause No. 08-0262

IN THE 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

Petitioner's Reply Brief

On Petition for Review from Cause No. 2-07-177-CV, from the
Second Court of Appeals at Fort Worth, Texas

Court of Appeals' Opinion by the Honorable Lee Ann Dauphinot
(Cayce, C.J., and Gardner, J., also sitting)

On appeal from the Denial of Petitioner's Motion to Dismiss in Cause No. 342-
218419-06 from the 342nd District Court of Tarrant County, Texas
The Honorable Bob McGrath, Presiding

References in Petitioner's Reply Brief are designated as follows:

"CR" for the Clerk's Record,

"Pet. B" for Petitioner's Brief on the Merits

"Res. B" for Respondents' Brief on the Merits

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ARGUMENT AND AUTHORITIES

The Friends' assertions in their brief to this Court that their remaining claims against Yamada are not health care liability claims underscore the need for this Court to intervene and offer guidance in this important area of state law.

The Friends' claims against Yamada are health care liability claims subject to Chapter 74's expert report requirements. [Pet. B, pp 1-2] The City of North Richland Hills consulted with Yamada in his capacity as emergency medicine physician. Had he not been a physician, Yamada would not have been qualified or authorized to so act.

Moreover, the Friends' own pleadings belie the arguments that they now advance in this Court. The Friends contend here, as they did in the court of appeals, that no health care liability claim can exist because there was no physician-patient relationship between Sarah Friend and Yamada. [Res. B. p. 18] This position is contrary to established precedent from this Court and is simply wrong. *See Garland Community Hosp. v. Rose*, 156 S.W.3d 541, 545-46 (Tex. 2005) (rejecting patient's assertion that negligent credentialing claims against hospital were not health care liability claims subject to predecessor statute). Likewise untenable is the Friends' assertion that no health care liability claim exists because the advice that Yamada allegedly gave regarding the placement of the AEDs occurred before Sarah Friend received medical attention at NRH20. This identical assertion was rejected by this

Court in *Rose*. 156 S.W.3d at 546. Finally, there is no support in the applicable statute for the Friends' apparent assertion that, in passing House Bill 4, the legislature intended such a narrowing of the scope of its protections. See TEX. GOV'T CODE ANN. § 312.005 (Vernon 2005) (in construing statute, courts should "consider at all times the old law, the evil, and the remedy."). Thus, the court of appeals' holding in this case violates the legislative objectives behind the codification, amendment, and passage of the Medical Malpractice and Tort Reform Act.¹

The Friends' predictions of broad, sweeping misapplications of the expert report requirement are not persuasive. Indeed, one need look no farther than the Friends' own pleadings to conclusively establish that their claims against Yamada are health care liability claims subject to Chapter 74. The Friends specifically alleged:

At all times mentioned in this petition, the Defendant 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, her parents, and

¹ Act of May 30, 1977, 64th Leg., R.S., ch 817, § 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (formerly TEX. REV. CIV. STAT. ANN. art. 4590i, section 1.03(a)(4) (Vernon Supp. 2003), *repealed and codified as amended* by Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.09, 2003 Tex. Gen. Laws 847, 864, 884 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13)) (hereinafter referred to as "former article 4590i")..

the general public as possessing that degree of knowledge and skill required of a competent medical doctor specializing in emergency medicine. . . . [CR 10, Pet. B. pp 1-3]

Thus, the Friends' representations to this Court that their claims against Yamada are analogous to claims that could possibly, maybe arise in the future regarding storm sirens, life preservers, smoke detectors, and panic buttons are disingenuous. Contrary to the Friends' slippery slope predictions, the issue before this Court is simple and clear: Are the Friends' claims against Yamada health care liability claims within the scope of Chapter 74? The answer is yes. Therefore, this Court should grant this petition and, in doing so, should reverse the decision of the court of appeals. See TEX. GOV'T CODE ANN. § 22.001(a)(2), (3), (6) (Vernon 2005).

Other Courts of Appeals' inconsistent interpretations of Chapter 74 require this Court's intervention.

Since Yamada filed his Brief on the Merits in this Court, the intermediate appellate courts have continued to struggle with the proper application of the expert report requirements of Chapter 74. The conflicting results and confusing rationale underscore the need for this Court's intervention in this and several other petitions

pending review.² This Court should grant this petition to clarify this important area of state law.

Currently pending before this Court are the following issues involving the proper interpretation of Chapter 74:

- Is a claim for injuries the plaintiff received during exercise classes prescribed by his physician to combat a work-related injury, a health care liability claim governed by Chapter 74? *McAllen Work Rehabilitation Center v. Gomez*, 2008 WL 2930306 (Tex. App.—Corpus Christi July 31, 2008, pet. filed).

The Corpus Christi Court of Appeals said no.

- Are a wheelchair-confined patient's claims against a care center, for injuries she sustained when care center employees improperly moved her, health care liability claims governed by Chapter 74? *Care Center LTD v. Sutton*, 2008 WL 1745862 (Tex. App.—Beaumont April 17, 2008, pet. filed).

The Beaumont Court of Appeals said yes.

- Are claims against a nursing home, for injuries a patient received when she was bitten by a spider at the nursing home, health care liability claims within the proper meaning of Chapter 74? *Omaha Health Care Ctr. LLC v. Johnson*, 2008 WL 339838 (Tex. App.—Texarkana, February 8, 2008, pet. filed).

The Texarkana Court of Appeals said no.

² This Court recently denied the petition for review in *Pallares v. Magic Valley Electric Cooperative*, 2008 WL 2525609 (Tex. App.—Corpus Christi May 8, 2008, pet. denied). At issue in *Pallares* was an employer's claim that the defendant physician had fraudulently billed the employer for treatment that his employee did not receive. *Id.* at * 5. The court of appeals' determination that such claims are not health care liability claims is consistent with this Court's prior decisions and thus not relevant to this Court's disposition of this case.

- Are a woman's claims for injuries that she received from a unrestrained mental patient at a hospital health care liability claims? *Jones Memorial Hospital v. Ammons*, 2008 WL 3867642 (Tex. App.—Dallas 2008, pet filed).

The Dallas Court of Appeals said yes.

- Are a patient's claims for injuries that he received when he fell from his hospital bed health care liability claims? *Marks v. St. Luke's Episcopal Hospital*, 229 S.W.3d 396 (Tex. App.—Houston [1st Dist.] 2007, pet. granted) (applying former article 4590i).

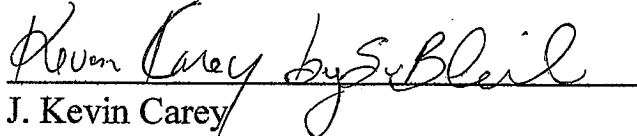
The Houston First Court of Appeals said yes.

By examining these and other cases pending this Court's resolution, it is apparent that this Court's intervention and guidance is needed in this important area of state law.

CONCLUSION AND PRAYER FOR RELIEF

Yamada prays as in his Brief on the Merits, and for such other and further relief, in law or in equity, to which he may show himself to be justly entitled.

Respectfully submitted,



J. Kevin Carey
State Bar No. 03791930

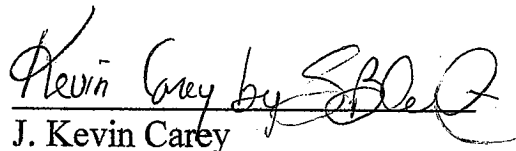
CAREY LAW FIRM
429 South Ballinger Street
Fort Worth, Texas 76104
817-698-0033
817-698-8090 fax

Susan Bleil
State Bar No. 14056720

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent to all counsel of record on this 28th day of October 2008.



J. Kevin Carey
State Bar No. 03791930