

# CAREY LAW FIRM

J. KEVIN CAREY  
ATTORNEY AND COUNSELOR  
3600 Hulen St., Ste. B-3  
Fort Worth, Texas 76107  
jkcarey@jkcarey.com

Board Certified Personal Injury Trial Law  
Texas Board of Legal Specialization  
American Board of Trial Advocates

Local: 817/698-0033  
Toll-Free: 877/926-9944  
Facsimile: 817/698-8090

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Post Submission letter brief:

Clerk, Supreme Court of Texas  
205 W. 14<sup>th</sup> Street  
Austin, Texas 78711

Re: Cause No. 08-0262; *Roy Kenji Yamada v. Laura Friend, Individually and as Personal Representative of the Estate of Sarah Elizabeth Friend, Deceased, and Luther Friend, Individually*; In the Supreme Court of Texas.

Dear Clerk:

The above referenced cause was argued before this Court on March 10, 2009. Since that time, on August 28, 2009, this Court issued its opinion in cause number 07-0783; *Irving W. Marks v. St Luke's Episcopal Hospital*. Because this Court's decision in *Marks* is necessarily intertwined with this Court's pending disposition of *Yamada*, Petitioner respectfully requests leave of court to file this post-submission letter brief. Please distribute this to members of the Court. I have enclosed \$10 for the filing fee.

In *Marks*, this Court astutely observed that the underlying Legislative purpose in passing article 4590i was to remedy a "medical malpractice crisis." *Marks*, slip op. at 4. The majority in *Marks* thus held that, as a premises liability claim covered under the hospital's commercial general liability insurance, Marks' claim regarding the faulty assembly of his hospital bed was not part of the medical-malpractice insurance crisis that the Legislature sought to remedy. *Id.*

By contrast, the Friends' claims against Yamada are precisely the types of claims that the Legislature sought to control in passing both 4590i and later chapter 74. Unlike the hospital in Marks, the Friends only sued Yamada as a physician, for services and advice he provided as an emergency medical physician.

Additionally in *Marks*, this Court held that a claim for the faulty assembly of a hospital bed involves the failure of a piece of equipment which does not constitute a departure from accepted standards of safety under article 4590i. The Friends' remaining claims against Yamada likewise involve the use of a piece of equipment. However, the similarity ends there. Unlike the bed in *Marks*, the Friends' claims against Yamada do not hinge on whether the equipment in question, external automated external defibrillators, were properly assembled, or maintained. Instead, their claims are that Yamada, as a physician, gave bad advice on their placement. These claims necessarily involve professional medical judgment, and thus are factually and legally distinguishable from the assembly of Marks' hospital bed.

Moreover, this Court should not allow the Friends to proceed on some of their claims against Yamada while dismissing others arising out of the same set of facts. To do so would encourage just the sort of artful pleading to circumvent the requirements for filing a health care liability claim Justice Wainwright warns against in his *Marks* dissent.

Respectfully submitted,



J. Kevin Carey

JKC/jlf  
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CC:

Darrell L. Keith  
Keith Law Firm, PC  
The Keith Building  
1705 W. 7th St.  
Ft. Worth, TX 76102

**via facsimile**  
817/870-2448

cc:

George Staples  
Taylor, Olson, Adkins, Sralla & Ellam, LLP  
6000 Western Pl., Ste. 200  
I-30 at Bryant Irvin Rd.  
Ft. Worth, TX 76107-4654

***via facsimile***  
817/332-4740

Russel Ramsey  
Ramsey & Murray, PC  
800 Gessner, Ste. 1100  
Houston, TX 77024-4257

***via facsimile***  
713/613-5414