

No. 09-0563

IN THE SUPREME COURT OF TEXAS

DR. ARTHUR HADLEY,
Petitioner,

v.

WYETH LABORATORIES, INC.,
Respondent.

From the Fourteenth Court of Appeals at Houston, Texas
No. 14-07-01055-CV

WYETH LLC'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

In accordance with Texas Rule of Appellate Procedure 55.3(a), Respondent Wyeth LLC hereby supplements and corrects the list of parties included in Petitioner Dr. Arthur Hadley's brief.

On January 1, 1999, Wyeth Laboratories Inc. merged into Ayerst Laboratories Inc., which then changed its name to Wyeth-Ayerst Pharmaceuticals Inc. On March 22, 2002, Wyeth-Ayerst Pharmaceuticals Inc. changed its name to Wyeth Pharmaceuticals Inc. Wyeth Pharmaceuticals Inc. was a wholly-owned subsidiary of Wyeth, and it was Wyeth that responded to Petitioner's allegations in the courts below. During the pendency of this appeal, Wyeth was acquired by Pfizer Inc. ("Pfizer"). On November 9, 2009, Wyeth converted from a Delaware corporation to a Delaware limited liability company and is now known as Wyeth LLC (herein referred to as "Wyeth"), which is a wholly-owned subsidiary of Pfizer. Accordingly, the list of parties is corrected as follows:

RESPONDENT:

Wyeth LLC

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STATEMENT OF THE CASE

<i>Nature of the case:</i>	This appeal arises from a statutory indemnity action brought by Dr. Arthur Hadley (“Dr. Hadley”), a medical doctor, against Wyeth, a pharmaceutical drug manufacturer, under section 82.002 of the Texas Civil Practice and Remedies Code. The plaintiff in the underlying lawsuit, Patty A. Emig (“Emig”), sued Dr. Hadley, along with two other physicians and Wyeth, alleging that she suffered injuries as a result of taking medications prescribed by the doctors and manufactured by Wyeth. Emig asserted medical malpractice claims against the defendant doctors stemming from the doctors’ treatment of her, including (but not limited to) their decisions to prescribe the drugs. Emig also sued Wyeth under products liability theories. Dr. Hadley filed a cross-claim against Wyeth contending that he is entitled to statutory indemnity for his defense of the underlying medical malpractice claim because he qualifies as a “seller” of the medications that he prescribed. ¹
<i>Trial court:</i>	The Honorable John T. Woolridge, 269th Judicial District Court of Harris County, Texas.
<i>Trial court’s disposition:</i>	Dr. Hadley filed a traditional motion for summary judgment on his statutory indemnity claim. Wyeth filed a cross-motion for summary judgment on both traditional and no-evidence grounds. The trial court denied Dr. Hadley’s motion and granted Wyeth’s motion.
<i>Parties in the Court of Appeals:</i>	Appellant: Dr. Arthur Hadley Appellee: Wyeth
<i>Court of Appeals:</i>	The Fourteenth Court of Appeals at Houston, Texas.
<i>Participating justices:</i>	Opinion authored by Justice Leslie B. Yates and joined by Justices Eva Guzman and Kent C. Sullivan.
<i>Citation to opinion:</i>	<i>Hadley v. Wyeth Labs., Inc.</i> , 287 S.W.3d 847 (Tex. App.–Houston [14th Dist.] 2009, pet. filed).
<i>Court of Appeals’ disposition:</i>	The court of appeals affirmed the trial court’s judgment.

¹ Dr. Hadley’s references to other cases and indemnity claims in his Statement of the Case (Dr. Arthur Hadley’s Brief on the Merits (“Hadley’s Br.”) at vii, n.3) are outside the record and should be disregarded.

ISSUE PRESENTED

Is a physician who treats a patient and prescribes a medication as a part of the patient's medical care, and who later is sued by the patient for medical malpractice, a prescription drug "seller" engaged in the business of distributing or placing the medication in the stream of commerce for a commercial purpose?

STATEMENT OF FACTS

The court of appeals' opinion correctly states the overall nature of the case.² Wyeth provides this section to briefly add background information pertinent to the points presented.

Dr. Hadley's Medical Treatment Of Patty Emig

In 1994 and 1997, Patty A. Emig ("Emig") sought medical treatment for her weight condition from three doctors, including Dr. Hadley. (3 C.R. 848:4-15, 834:8-11, 936:7-937:9, 971:1-15, 1083:3-18; App. at 63-64, 66, 68-69, 72).³ Emig considered herself overweight and was aware of the significant health risks posed by her condition, although her motive for wanting to lose weight was her appearance. (3 C.R. 936:7-937:9; App. at 68-69). At her appointment with Dr. Hadley, Emig completed patient history forms detailing her health problems and her family's medical history. (3 C.R. 935:10-12, 937:10-25, 1085:1-24, 1086:1-22; App. at 67, 69-71). Dr. Hadley personally examined Emig and performed an electrocardiogram (EKG). (3 C.R. 1082:1-12, 1083:21-23; App. at 65-66). He then prescribed diet medication for Emig, gave her instructions, and discussed possible side effects of the drugs. (3 C.R. 973:12-19; App. at 73). Emig claimed she later sustained injuries caused by taking Pondimin and Redux, two of the diet

² Pursuant to Texas Rule of Appellate Procedure 55.2(g), Wyeth notes only one minor correction unrelated to the issue on appeal. The court of appeals wrote that both "Wyeth and Dr. Hadley moved for summary judgment on the basis of limitations, which the trial court granted." *Hadley v. Wyeth Labs., Inc.*, 287 S.W.3d 847, 848 (Tex. App.–Houston [14th Dist.] 2009, pet. filed). Only Dr. Hadley sought and received summary judgment against Emig on limitations grounds. (1-2 C.R. 112-530; 2 C.R. 669-70; App. at 1-22, 23-24 (exhibits omitted)). After Dr. Hadley was dismissed, the underlying lawsuit was resolved and Emig non-suited all parties. (3 C.R. 1135).

³ The Clerk's Record will be cited as "C.R.," preceded by volume number and followed by page number(s), and the Supplemental Clerk's Record as "S.C.R." "App." refers to Wyeth's Appendix.

medications that Dr. Hadley and the other doctors had prescribed. (1 C.R. 135-36; S.C.R. 65, 67; App. at 26, 28, 53-54).

Emig's Lawsuit

In 2003, Emig sued Dr. Hadley and the two other doctors who treated her, alleging causes of action for medical malpractice. (1 C.R. 135-37; App. at 53-55). Emig's Petition assailed Dr. Hadley's medical judgment and treatment decisions on numerous grounds, and set forth five-and-a-half pages of health care liability claims. (S.C.R. 83-89; App. at 44-50). Specifically, Emig pled that Dr. Hadley:

- failed to determine whether it was medically necessary to prescribe the drug to Emig; (S.C.R. 85, ¶ 63 (h); App. at 46);
- “[f]ailed to perform an adequate physical exam and medical history before prescribing the drugs, each time the prescription was filled and/or after the prescription was completed;” (S.C.R. 84, ¶ 63 (d); App. at 45);
- “[p]rescribed the drugs for an excessively long period of time when the drug was intended to be taken for only a short period of time;” (S.C.R. 84, ¶ 63 (e); App. at 45);
- “[f]ailed to prescribe the drugs as a part of a regimen of weight reduction based on caloric restriction, behavior modification and prescribed exercise;” (S.C.R. 84, ¶ 63 (f); App. at 45);
- failed to properly test before prescribing the medication by having Emig undergo a cardiovascular examination or echocardiogram; (S.C.R. 84-85, ¶ 63 (g); App. at 45-46);
- failed to inform Emig that the weight loss from the drug might be temporary; (S.C.R. 84, ¶ 63 (c); App. at 45);
- failed to advise Emig that the information that accompanied the drug advised that the long term effects were unknown; (S.C.R. 84, ¶ 63 (b); App. at 45);

- failed to provide Emig with adequate warnings about side effects and risks of the drugs, although they were known to Dr. Hadley (S.C.R. 84, ¶¶ 62, 63(a); S.C.R. 86-87, ¶ 68; App. at 45, 47-48);
- failed to recommend diagnostic testing for Emig to determine if the medication had injured her; (S.C.R. 84-85, ¶ 63 (g), S.C.R. 87 ¶ 69; App. at 45-46, 48);
- failed to exercise “the ordinary care and diligence exercised by other physicians in the same or similar circumstances;” (S.C.R. 85, ¶ 65; App. at 46);
- failed to act as a reasonably prudent physician; (*Id.*);
- failed to meet the appropriate medical standards for the community; (*Id.*);
- and otherwise was “negligent in the care and treatment” of Emig. (*Id.*).

Emig alleged no claim against Dr. Hadley (or the other doctors) based on any vicarious liability or products liability theory. (S.C.R. 64-91; App. at 25-52). Nor did Emig allege that Dr. Hadley sold or gave drugs to her, or that he otherwise placed drugs into the stream of commerce, or that he was in the business of commercially distributing drugs. (*Id.*). Thus, those parts of Dr. Hadley’s brief in which he characterizes the claims against him as limited to his act of writing a prescription (Hadley’s Br. at 3-6), or as “products liability” claims (*id.* at 31), or as founded on allegations that he dispensed a “defective product” (*id.* at 16-17), are incorrect. Emig’s claims against Dr. Hadley were based solely on the theory that he was negligent in rendering professional medical services.

In the same lawsuit, Emig sued Wyeth, the manufacturer of Pondimin and Redux, under products liability theories. (1 C.R. 135-37; S.C.R. 73-83; App. at 34-44, 53-55).⁴

⁴ Wyeth initially removed the case to federal court, asserting that Emig’s health care liability claims against the doctors were barred by the medical malpractice act’s strict statute of limitations. (1 C.R. 69-102). Without opinion, the federal court remanded the case back to the trial court. (1 C.R. 103).

Dr. Hadley filed a summary judgment motion stating that Emig’s claims against him were “nothing more than garden-variety malpractice claims,” (1 C.R. 130; App. at 19), and contending that they were barred by the absolute two-year statute of limitations contained in former article 4590i of the Medical Liability and Insurance Improvement Act. (1-2 C.R. 112-530; App. at 1-22 (exhibits omitted)). Article 4590i’s strict limitations period applied exclusively to “health care liability claims,” defined as “a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, whether the patient’s claim or cause of action sounds in tort or contract.”⁵ The trial court granted the motion and dismissed Emig’s claims against Dr. Hadley. (2 C.R. 669-70; App. at 23-24).

Dr. Hadley’s Indemnity Claim

Dr. Hadley filed a cross-claim for statutory indemnity against Wyeth under section 82.002 of the Civil Practice and Remedies Code. (1 C.R. 104-107). Two months after Dr. Hadley obtained summary judgment against Emig based on his contention that he was entitled to the protections exclusively afforded to “health care provider(s)” and “physician(s)” under former article 4590i, Dr. Hadley sought summary judgment against Wyeth on his indemnity cross-claim by arguing that he was an innocent commercial “seller” of the medications he prescribed. (3 C.R. 698-711). Wyeth filed both traditional and no-evidence summary judgment motions regarding the indemnity claim, because the

⁵ See Act of May 30, 1977, 65th Leg., R.S., ch. 817, §§ 1.03(4), 10.01, 1977 Tex. Gen. Laws 2039, 2041, 2052 (amended 1993 and 1995), *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, 865, 872, 884 (current version at Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001(a)(13), 74.251 (Vernon 2005)) (herein referred to as “article 4590i”).

evidence established that Dr. Hadley was a provider of professional medical services to Emig and not a drug “seller,” and because he had no evidence that he was engaged in the business of distributing drugs or placing them into commerce for a commercial purpose as required by section 82.002. (3 C.R. 1051-94). The trial court granted Wyeth’s motion for summary judgment and denied Dr. Hadley’s motion. (3 C.R. 1137-38). The court of appeals affirmed. *Hadley v. Wyeth Labs., Inc.*, 287 S.W.3d 847 (Tex. App.–Houston [14th Dist.] 2009, pet. filed) (App. at 56-60).

SUMMARY OF THE ARGUMENT

Dr. Hadley frames this as “a case of first impression.” (Hadley’s Br. at 7). But the issue of whether health care providers qualify as “sellers” of products used as part of their patients’ medical treatment is well settled. For more than forty years, Texas courts consistently have held that doctors and hospitals who use medical devices or pharmaceutical products as an inseparable part of their medical care are not “sellers” of those products. The common law requires that sellers be “engaged in the business” of selling, distributing, or placing a product in the stream of commerce for some commercial purpose. Physicians generally are not “in the business” of commercially distributing items such as prescription drugs; their “business” instead is to provide professional medical services.

Chapter 82 of the Civil Practice and Remedies Code likewise limits statutory indemnity protection in products liability cases to “sellers” who are “engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.” Tex.

Civ. Prac. & Rem. Code Ann. §§ 82.001(3), 82.002(a) (Vernon 2005) (App. at 77-78). The plain language of Chapter 82's indemnity scheme aims to protect innocent sellers who are drawn into products liability litigation because of the vicarious nature of their potential liability.

The record in this case is clear that Dr. Hadley was not "engaged in the business" of distributing drugs for a "commercial purpose" when he prescribed medications to treat Emig's weight condition. Rather, he was engaged in the practice of medicine, and he wrote the prescriptions in the context of a professional medical relationship with his patient, not a "commercial" one. Dr. Hadley conceded as much in the trial court when he characterized Emig's causes of action against him as "garden-variety malpractice claims," and obtained summary judgment based upon the statute of limitations applicable exclusively to malpractice claims where the alleged tortious act or omission is an inseparable part of health care services. Having claimed these protections afforded to health care providers under Texas law, and having secured an implicit judicial finding that he was acting in his professional capacity of a physician, Dr. Hadley cannot now recast himself as an innocent commercial "seller" of the medications he prescribed in order also to obtain the benefit of indemnity.

The only novel aspect of this appeal is that a medical doctor – who previously urged in the trial court that his written prescription for a medication was an inseparable part of professional medical services – now seeks to portray himself as nothing more than a commercial "conduit" for the drugs he prescribes in an effort to bring himself within the class of persons subject to indemnity. The court of appeals properly rejected this

contrivance. The court's holding that Dr. Hadley is not a "seller" of the medicines he prescribes was required by established principles of statutory construction, which mandate that the court give effect to all the language included in the codified definition of that term. The court properly characterized Dr. Hadley as a professional engaged in the practice of medicine, not someone "engaged in the business" of distributing drugs for a "commercial purpose." This Court thus should deny or refuse the petition for review. Alternatively, if the Court grants the petition, it should affirm the court of appeals' judgment.

ARGUMENT

I. Standard Of Review

Dr. Hadley's explanation of the standard of review generally is accurate, with the exception that he fails to acknowledge that Wyeth filed a no-evidence motion for summary judgment pursuant to Texas Rule of Civil Procedure 166a(i) in addition to a traditional motion for summary judgment. (3 C.R. 1051-59). Because the trial court did not specify the grounds on which it granted summary judgment for Wyeth, an appellate court "must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious." *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

A no-evidence motion for summary judgment must be granted if (1) the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial; and (2) the respondent produces no summary judgment evidence raising a genuine issue of material

fact on those elements. *See* Tex. R. Civ. P. 166a(i). In reviewing a no-evidence motion for summary judgment, a court must view all of the summary judgment evidence in a light most favorable to the non-movant, “crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The non-moving party need not marshal its proof, but it must present evidence that raises a genuine fact issue on the challenged elements. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

II. The Courts Below Correctly Held That Dr. Hadley Is Not Entitled To Indemnity Under Chapter 82 Because He Is Not A “Seller” Of The Medicines He Prescribes.

Chapter 82 limits the scope of persons eligible to seek indemnity protection to a product’s “seller.” Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a) (Vernon 2005) (App. at 78); *see Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999) (“Anyone who qualifies as a ‘seller’ may seek indemnification, subject to the limitations of section 82.002(a).”). “‘Seller’ means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.” Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3) (App. at 77). Dr. Hadley does not meet these criteria. As the court of appeals concisely explained, and as decades of Texas common law make clear, “[w]hen doctors prescribe medication as part of their medical services, as opposed to offering goods for sale to the general public, they are not selling the

medication for commercial purposes but are engaged in the business of providing professional medical services.” *Hadley*, 287 S.W.3d at 850 (citations omitted).

A. Chapter 82’s requirement that a seller be “engaged in the business” of placing a product into commerce for a “commercial purpose” forecloses Dr. Hadley’s claim.

The indemnity statute must be construed in accordance with the plain meaning of the legislature’s words:

In construing a statute, our objective is to determine and give effect to the Legislature’s intent. *See Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). We first look to the statute’s language. Tex. Gov’t Code § 311.011(a); *Allen*, 15 S.W.3d at 527. Indeed, we consider it “a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.” *Fitzgerald*, 996 S.W.2d at 866. If the statute’s language is unambiguous, its plain meaning will prevail. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003).

Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc., 251 S.W.3d 481, 493-94 (Tex. 2008). Furthermore, when possible, all words are given effect and none of the statute’s language is treated as surplusage. *Cont’l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2002).

Viewed within this well-established framework, Dr. Hadley’s indemnity claim fizzles. The court below recognized that classifying prescribing physicians like Dr. Hadley as drug sellers “ignores the statutory language that a seller must ‘be engaged in the business’ of distributing or placing the product in the stream of commerce and that the purpose of doing so must be a ‘commercial purpose.’” *Hadley*, 287 S.W.3d at 851 (quoting Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3)). Those phrases should be read so as to add meaning to the statute. *See Meritor Auto., Inc. v. Ruan Leasing Co.*, 44

S.W.3d 86, 90 (Tex. 2001). But Dr. Hadley brushes them aside. He focuses instead on the statute’s “otherwise placing” language, to the exclusion of these other express eligibility requirements for indemnity, and thereby seeks to extend indemnity protections to “all persons involved in placing products into the stream of commerce.” (Hadley’s Br. at 8).⁶ The court of appeals, however, correctly held that established principles of statutory construction required it to give effect to Chapter 82’s full definition of “seller.” *See Hadley*, 287 S.W.3d at 849. Because Dr. Hadley was not “engaged in the business” of “commercial[ly]” distributing drugs, he is ineligible for indemnity.

B. Decades of Texas jurisprudence establishes that health care providers are not “in the business” of distributing medical or pharmaceutical products provided to patients as an inseparable part of their medical care.

The term “seller” and its definitional components are familiar concepts in Texas products liability law. Since 1967 when this Court first adopted section 402A of the Second Restatement of Torts, *see McKisson v. Sales Affiliates*, 416 S.W.2d 787, 789 (Tex. 1967), numerous appellate decisions have construed what it means for a seller to be “engaged in the business” of selling, distributing, or placing into commerce a product so as to be vicariously liable under a strict liability theory. *See, e.g., New Texas Auto Auction Servs., L.P. v. Gomez de Hernandez*, 249 S.W.3d 400, 403-04 (Tex. 2008) (discussing line of Texas cases interpreting who qualifies as a “seller” at common law for

⁶ Dr. Hadley just wrote Emig a prescription – an authorization to buy the medication. He did not provide or supply the drug itself to Emig. Wyeth submits that a doctor’s writing a prescription – giving authorization to acquire the drug – does not qualify as “placing” the drug in the stream of commerce. *See New Texas Auto Auction Servs., L.P. v. Gomez de Hernandez*, 249 S.W.3d 400, 404-05 (Tex. 2008) (holding auctioneers not strictly liable as sellers of products sold at auction because they do not “place” product into commerce). The Court need not reach this issue, however.

purposes of strict liability). The legislature thus was not working on a blank slate when it codified the definition of “seller” in Chapter 82, and the Court must presume that the legislature “acted with knowledge of the common law and court decisions.” *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999).

Among the relevant common law decisions are forty years of Texas cases examining the question of whether health care providers qualify either as “sellers” or “merchants” of allegedly defective products when those products are provided to patients as part of their medical care. Those cases, discussed below, consistently have held that physicians and hospitals are *not* “in the business” of selling or distributing those products; rather, health care providers’ “business” is to provide professional medical services. *See, e.g., Walden v. Jeffery*, 907 S.W.2d 466, 448 (Tex. 1995) (per curiam); *Barbee v. Rogers*, 425 S.W.2d 342, 346 (Tex. 1968). When a doctor uses a medical or pharmaceutical product as an inseparable part of his medical treatment, it does not change the nature of the professional relationship at issue, or the services that the physician provides, or the “business” in which the doctor is engaged. Accordingly, health care providers acting in their professional capacities are not vicariously liable as “sellers” of the products used to treat their patients’ medical needs – they may be liable only for their own professional negligence.

Given that Chapter 82 uses the same terms to delineate the scope of who qualifies as a “seller,” it follows that these health care professionals also are not “engaged in the business” of distributing medical products, or placing them into commerce for a “commercial purpose,” within the meaning of the indemnity statute. Nothing in the

statute's language or history suggests that the legislature ever intended to change this understanding. *Cf. Owens & Minor, Inc.*, 251 S.W.3d at 488 (holding legislature showed no intention in section 82.002 to change common law understanding that a manufacturer need only indemnify an innocent seller for claims related to the manufacturer's own products, and that if legislature had meant to alter this understanding, "it would have done so expressly."). Rather, as the court of appeals observed, "the language of the statute is entirely consistent with the common law definition of seller as applied to doctors, and we see no legislative intent to depart from that standard." *Hadley*, 287 S.W.3d at 850.

1. *This Court consistently has distinguished between the "business" of selling goods and the provision of professional medical services.*

Only a year after adopting the Second Restatement's strict products liability scheme in *McKisson*, this Court drew a clear distinction between the business of selling or distributing goods and the business of providing professional medical services. In *Barbee v. Rogers*, a personal injury plaintiff sued a group of licensed optometrists who prescribed, fitted, and sold contact lenses that the plaintiff claimed did not properly fit and injured his cornea. 425 S.W.2d at 343. Among other theories, the plaintiff alleged that the optometrists were liable for his injuries under strict products liability. *Id.* at 344. The plaintiff contended that the optometrists were merchants selling a good, noting their many offices around the State from which they sold contact lenses, their advertising and sales techniques designed to promote the sale of the lenses at a predetermined and advertised price, and the standardization of procedures and methods used in fitting lenses.

Id. at 346. But the *Barbee* court disagreed that the optometrists were “mere merchant[s]” and rejected the plaintiff’s theory as a matter of law. The court explained that the optometrists’ provision of contact lenses involved a “professional relationship” and that “prescription and fitting [of contact lenses] are described as an art with many variables and call for an exercise of judgment by the practitioner.” *Id.* at 345-46. Thus, although the plaintiff couched his claim in terms of products liability and argued that the optometrists “manufactured and sold an unfit product,” *see id.* at 344, the nature of this professional relationship prevented the application of strict liability:

In our opinion, . . . the rule of strict liability is inapplicable. Respondents and the licensed optometrists in their employ exercise skill and judgment in the examination, prescription and fitting process whereby it is sought to remedy visual abnormalities by the use of curved lenses or prisms. The failure here is not attributable to the product itself, i.e., the contact lenses, but to the professional and statutorily authorized act of ‘measuring the powers of vision’ of Petitioner’s eyes and ‘fitting lenses . . . to correct or remedy . . . [his] defect or abnormal condition of vision.’ . . . It is the act of one deemed in law to have the competence to remedy a visual defect by furnishing particularly prescribed contact lenses.

Id. at 346. Accordingly, the plaintiff only could recover from the optometrists for negligence in the rendition of professional services, not for the sale of the lenses. *Id.*

More recently, in *Walden v. Jeffery*, the court rejected a products liability claim against a dentist for providing ill-fitting dentures. 907 S.W.2d at 448. The court noted that the plaintiff had not alleged that her dentist was marketing dentures apart from his profession of dentistry. *Id.* Rather, she contended that the dentist provided her with dentures while in the course of consulting with her “in his professional capacity as a dentist.” *Id.* The record, therefore, established that “the providing of dentures was an

inseparable part of [the dentist's] rendition of medical services.” *Id.* Citing *Barbee*, the court opined that “a physician who supplies ill-fitting contact lenses, or in this case dentures, is not liable for a breach of implied warranty relating to the product but for negligence in the rendition of services.” *Id.*

Dr. Hadley tries unsuccessfully to distinguish these cases. For example, he emphasizes that in *Barbee*, “the failure was not attributable to the product itself,” but instead rested with the optometrists’ professional services. (Hadley’s Br. at 26). He argues, in contrast, that Emig “sued [him] because the diet drugs were defective.” (*Id.* at 16). But this is untrue. All of Emig’s liability claims against Dr. Hadley were predicated on allegations of negligence in his rendition of professional medical services. (S.C.R. 64-91; App. at 25-52). Nowhere in her pleadings did she allege that Dr. Hadley also was vicariously liable for distributing a defective product. (*See id.*). The only products liability allegations contained in Emig’s petition – meaning those allegations for recovery of personal injury damages “allegedly caused by a defective product,” Tex. Civ. Prac. & Rem. Code Ann. § 82.001(2) – were directed *at Wyeth*. (1 C.R. 135-37; S.C.R. 73-83; App. at 34-44, 53-55). Emig’s claims against Dr. Hadley were based upon his exercise of medical judgment, not a commercial sale. Thus, *Barbee* and *Walden*’s examination of whether a product is furnished as an “inseparable part” of a patient’s medical care is applicable here.

This Court has applied the same general analysis to define the contours of a “health care liability claim” subject to the restrictions imposed by the medical malpractice statutes. *See* Tex. Civ. Prac. & Rem. Code §§ 74.001, *et seq.* (Vernon 2005);

article 4590i, n.5, *supra*. The court explained that to determine whether a cause of action is a “health care liability claim,” it must consider the underlying nature of the claim. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543-44 (Tex. 2004). “If the act or omission alleged in the complaint is an inseparable part of the rendition of health care services, then the claim is a health care liability claim.” *Id.* at 544 (citing *Walden*, 907 S.W.2d at 448). A plaintiff cannot re-cast her health care liability claim as something else. *See, e.g., MacGregor Med. Ass’n v. Campbell*, 985 S.W.2d 38, 40 (Tex. 1998) (per curiam).

This Court occasionally has wrestled with the rare case that stands on the nexus between the distinct schemes governing products liability and simple negligence on the one hand, and health care liability actions on the other. *See, e.g., Marks v. St. Luke’s Episcopal Hosp.*, No. 07-0783, 2009 WL 2667801 (Tex. Aug. 28, 2009) (pet. for r’hrq filed). This is not such a case. In *Marks*, for example, this Court closely divided over the question of whether a hospital’s provision of a negligently maintained bed should be characterized as “inseparable from the rendition of medical services.” *Id.* at *4. But there can be no serious dispute that a physician who prescribes a drug to treat his patient’s medical condition does so as an inseparable part of his professional medical care. *See, e.g., Gross v. Kahanek*, 3 S.W.3d 518, 520 (Tex. 1999) (per curiam) (treating allegations based on physician’s prescription of medication as health care liability claim); *Rowntree v. Hunsucker*, 833 S.W.3d 103, 105 (Tex. 1992) (same).

2. *The courts of appeal likewise have declined to find that health care providers are “engaged in the business” of distributing products provided to patients as an inseparable part of their medical care.*

In *Easterly v. HSP of Texas, Inc.*, 772 S.W.2d 211 (Tex. App.–Dallas 1989, no writ), the Dallas Court of Appeals rejected strict liability and breach of warranty claims against a hospital for the “sale” of a defective epidural kit administered during childbirth. The plaintiff sustained injuries when a catheter broke off in her spine after it was inserted during epidural anesthesia. *Id.* at 212-13. The Dallas court determined that a hospital could be held strictly liable for a defective product only where it “introduced into the stream of commerce a defective product *unrelated to the essential professional relationship.*” *Id.* at 213 (citation omitted, emphasis added). The court reasoned that its task was to “ascertain whether the epidural kit was intimately and inseparably connected to the professional service of providing [the plaintiff] with anesthesia during the delivery of her child.” *Id.* Noting that “[t]he hospital is not in the business of selling epidural kits separate from the medical relationship between doctor and patient involving the furnishing of medical services,” the court held that:

The “sale” of the epidural kit was integrally related to the medical procedure – the kit was not a separate good sold in a commercial transaction. In other words, the epidural kit was so intimately connected to the service provided as to lose its separate character as a good.

Id. (internal citations omitted). Similarly, with regard to the breach of warranty claim, the court concluded that the plaintiff had not shown that the hospital was a “merchant[] selling goods” rather than a service provider. *Id.* at 214. “Absent a specific showing of

the sale of a good not intimately related to the medical service provided, summary judgment was proper on [the plaintiff's] breach of warranty cause of action." *Id.*

In *Cobb v. Dallas Fort Worth Med. Ctr.-Grand Prairie*, 48 S.W.3d 820, 826-27 (Tex. App.–Waco 2001, no pet.), the Waco Court of Appeals likewise held that a hospital was not a seller of allegedly defective transpedicular hardware and screws that had been implanted in the plaintiff's back. Citing *Easterly*, the court emphasized that hospitals are not sellers of medical products provided to patients in conjunction with their medical care because those products are "intimately and inseparably connected" with the provision of medical services. *Id.* at 826. The court explained that the hospital was "not in the business of independently selling 'TSRH sets' to the public, nor [was] it in the business of providing them outside of its primary purpose of providing medical facilities." *Id.* Additionally, the plaintiff could not have provided her own set during surgery. *Id.* at 826-27. Accordingly, the court held "that the allegedly defective pedicular hardware and screws installed in Mrs. Cobb's back are inseparable from the services rendered by the hospital," and thus the hospital was entitled to summary judgment on the plaintiff's strict liability claim. *Id.* at 827.

In *Nevauex v. Park Place Hosp., Inc.*, 656 S.W.2d 923 (Tex. App.–Beaumont 1983, writ ref'd n.r.e.), the Beaumont Court of Appeals held that a hospital and a radiation technician were not liable under theories of strict liability or breach of warranty for radiation burns suffered by the plaintiff in connection with cobalt therapy administered for treatment of uterine bleeding. The court stated that even assuming radiation therapy was a "product," strict liability would not apply because "it was

‘intimately and inseparably connected with the professional services rendered.’” *Id.* at 926 (citation omitted). Neither the hospital nor the radiation technician were “merchants in dispensing cobalt radiation.” *Id.*

Dr. Hadley contends that Texas common law has never “universally exempted” health care providers from products liability claims. (Hadley’s Br. at 30). This observation is true as far as it goes, but does nothing to further Dr. Hadley’s argument that physicians who prescribe medications to their patients are drug “sellers.” Although a few Texas cases have held that defective products potentially can form the basis for products liability claims against a hospital, those holdings are implicated *only where the product supplied by the hospital is unrelated to the provision of medical care. See, e.g., Thomas v. St. Joseph Hosp.*, 618 S.W.2d 791, 796-97 (Tex. Civ. App.–Houston [1st Dist.] 1981, writ ref’d n.r.e.) (holding that plaintiff could pursue strict liability claim against hospital that supplied the decedent with defective gown);⁷ *see also Moers v. W. Houston Healthcare Group, Ltd.*, No. 01-97-1322-CV, 1998 WL 506641, at *3 (Tex. App.–Houston [1st Dist.] Aug. 20, 1998, no pet.) (not designated for publication) (holding that hospital potentially could be held strictly liable for introducing into the

⁷ In a string cite, Dr. Hadley references the Waco Court of Civil Appeals’ opinion in *Providence Hosp. v. Truly*, 611 S.W.2d 127 (Tex. Civ. App.–Waco 1981, writ dism’d), as holding that the provision of a contaminated drug to a patient during surgery constituted a “sale” of the drug by the medical provider. (Hadley’s Br. at 27-28). But *Truly* is no longer good law. It was overruled *sub silentio* by the Waco court’s holding in *Cobb* that a hospital that dispenses a product as a part of the patient’s medical care is not a seller where the product is inseparable from the medical care, the hospital does not sell the product independently of its services, and the patient could not provide her own product while in the hospital. And *Truly*’s holding is not viable after this Court’s subsequent decision in *Walden*. In fact, *Truly* was later disapproved on other grounds, *see Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1991), and was criticized by the *Easterly* court. *See Easterly*, 772 S.W.2d at 214. In any event, *Truly* is distinguishable from this case. Dr. Hadley did not allege or prove in the trial court that he provided a drug to Emig, but only a prescription—an authorization to obtain a drug. Moreover, Emig never alleged that Dr. Hadley was a “seller” vicariously liable for distributing a defective product.

stream of commerce a defective bed). So while a hospital may not be “universally exempted” from vicarious products liability claims based on its status as a health care provider, strict liability may only lie where such a hospital “supplies a product *unrelated to the essential professional relationship.*” *Thomas*, 618 S.W.2d at 796 (emphasis added); *accord Moers*, 1998 WL 506641, at *3. Contrary to Dr. Hadley’s suggestion, these decisions further bolster the established rule in Texas jurisprudence that health care professionals are not “sellers” of products provided as “an inseparable part of [the] rendition of medical services.” *Walden*, 907 S.W.2d at 448.

Similarly, Dr. Hadley’s effort to couch his prescription of medications to treat his patients’ medical conditions as a “sales/service hybrid situation[],” (Hadley’s Br. at 28), is contrary to this authority. The cases establish that the only circumstances where such a “sales/service hybrid” might apply in the health care context are situations such as where a hospital supplies a product unrelated to medical services rendered. *See, e.g., Thomas*, 618 S.W.2d at 796. But as discussed more fully below, that plainly is not the situation where a physician prescribes a medication as part of treating a patient’s health condition.⁸

Dr. Hadley’s spin on these authorities also is peculiar for another reason. Although a medical doctor himself, Dr. Hadley seems to advocate *expansion* of common

⁸ Currently pending before this Court are cross-petitions for review of the Beaumont Court of Appeals’ decision granting statutory indemnity in *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386 (Tex. App.–Beaumont 2008, pet. granted), which considered whether a subcontractor involved in the construction of residential homes might be considered *both* a services provider *and* a “seller” of the materials used in the construction. *Id.* at 393-94. But *K-2* has no bearing on whether prescribing physicians are “sellers” of medicines. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20 cmt. d (1998) (emphasizing in comment regarding “[s]ales-service combinations” that “in a strong majority of jurisdictions, hospitals are held not to be sellers of products they supply in connection with the provision of medical care, regardless of the circumstances.”).

law tort liability for physicians. (*See, e.g.,* Hadley’s Br. at 24-25 (stating that “the common law is anything but settled as it concerns physicians as sellers”); *id.* at 27 n.13 (favorably citing Missouri case law approving liability for medical providers under a strict liability theory)). Dr. Hadley does, of course, suggest that Texas physicians might be protected from strict liability claims by the medical malpractice statutes contained in Chapter 74 and former article 4590i. But those statutes’ protections only extend to circumstances where “the act or omission complained of is an inseparable part of the rendition of medical services.” *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005) (citations omitted). To the extent Dr. Hadley concedes on appeal that his treatment of Emig involved medical services at all, he now apparently asserts (in contrast to his position in the trial court) that the medical services he provided to Emig and his prescription of medications to her are “separable.” But he cites no support for this position in Texas law. Indeed, as described above, Texas case law is decidedly against such an argument.⁹

⁹ Texas’s rule – and the reasoning behind it – is consistent with that in the majority of jurisdictions to have considered the issue of whether health care providers are product “sellers.” *See, e.g., Royer v. Catholic Med. Ctr.*, 741 A.2d 74, 76-78 (N.H. 1999); *In re Breast Implant Prod. Liab. Litig.*, 503 S.E.2d 445, 448 (S.C. 1998); *Cafazzo v. Cent. Med. Health Servs., Inc.*, 668 A.2d 521, 524-25 (Pa. 1995); *Porter v. Rosenberg*, 650 So.2d 79, 82-83 (Fla. Ct. App. 4th Dist. 1995); *St. Mary Med. Ctr., Inc. v. Casco*, 639 N.E.2d 312, 314 (Ind. Ct. App. 3d Dist. 1994); *Redwine v. Baptist Gen. Convention of the State of Okla.*, 681 P.2d 1121, 1124 (Okla. Ct. App. 1982); *Osborn v. Kelley*, 402 N.Y.S.2d 463, 464 (N.Y. App. Div. 1978); *Batiste v. Am. Home Prods. Corp.*, 231 S.E.2d 269, 272 (N.C. Ct. App. 1977); *Carmichael v. Reitz*, 17 Cal. App. 3d 958, 979 (Cal. Ct. App. 1971); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 20 cmt. d (noting most jurisdictions hold that hospitals are not strictly liable as “sellers” for harm caused by defective products where products are used in medical treatment).

C. Dr. Hadley’s arguments for departing from this well-settled authority when interpreting Chapter 82 are groundless.

Dr. Hadley faults the court of appeals for rejecting his indemnity claim based upon the common law decisions holding that health care providers are not “sellers” of products used in professional medical treatment. He argues that this authority is inapposite when construing the “new, distinct statutory duty” created by section 82.002. (Hadley’s Br. at 11-12). He makes the following three arguments to support his contention: (1) the statutory indemnity scheme created by the legislature is broader than the right to indemnity found at common law; (2) “seller” is more broadly defined in Chapter 82 and includes a larger class of persons than found at common law; and (3) the legislature’s 2003 amendment of the Insurance Code to include health care providers as “vendors” for purposes of certain insurance contracts establishes that the legislature also intended to extend statutory indemnity protection to health care providers when it enacted section 82.002 in 1993. None of these arguments support him, however.

1. *Provisions in the indemnity statute that have no bearing on whether a person is a “seller” within the meaning of section 82.001(3) are irrelevant to the issues presented by this case.*

Dr. Hadley maintains that the enactment of section 82.002 substantially expanded the scope of a manufacturer’s indemnity duty, and catalogues various ways in which the statutory duty to indemnify exceeds that of the common law.¹⁰ He then tries to use the notion that the legislature intended to create a more expansive indemnity scheme for

¹⁰ Dr. Hadley emphasizes that, unlike at common law, section 82.002: (1) does not require a judicial finding of tortious conduct by the manufacturer in order to implicate its duty to indemnify a seller; (2) mandates indemnity for a seller even if it did not sell the particular product that allegedly harmed the plaintiff; and (3) requires a judicial determination of fault by the seller before indemnity may be denied.

innocent “sellers” to bootstrap his argument in favor of indemnity for prescribing physicians. *But the differences Dr. Hadley identifies between the common law indemnity scheme and the statutory scheme are immaterial to the issue presented by this case.* The issue here is simple: was Dr. Hadley “engaged in the business” of distributing or otherwise placing prescription medications into the stream of commerce for a “commercial purpose”? *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3). Statutory provisions that do not address Dr. Hadley’s putative status as a “seller” are irrelevant.

Dr. Hadley’s argument that he should reap the benefits of Chapter 82’s indemnity scheme merely because section 82.002 makes it easier for those who qualify as innocent retail sellers to obtain indemnity is based on a logical fallacy. As the court of appeals explained, the “broadening of the circumstances under which a seller can seek indemnity does not suggest an additional legislative intent to also broaden the scope of defendants who are considered sellers.” *Hadley*, 287 S.W.3d at 850. In other words, Dr. Hadley still must prove that he satisfies Chapter 82’s definition of a “seller” in order to access the statute’s enhanced protections.

2. *The definition of “seller” codified in section 82.001(3) does not differ from the common law definition of that term in any way that is material to this case.*

Dr. Hadley next contends that the established case law discussed above is of no value in determining whether health care providers are “sellers” under Chapter 82 because “[t]he plain language of the Code considerably expands the definition of who is a seller from the common law.” (Hadley’s Br. at 13-14). This argument overstates the differences, if any, between the two definitions. Section 82.001(3)’s requirement that a

“seller” be “engaged in the business” of commercially distributing or otherwise placing in the stream of commerce a product has not materially changed from the common law. The operative language is the same. *Compare* Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3) (defining a “seller” as “a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce” a product), *with New Texas Auto Auction Serv.*, 249 S.W.3d at 403-04 (explaining that Texas imposes strict products liability on sellers “engaged in the business” of “selling,” “distributing,” or “placing” into the stream of commerce a product).

Dr. Hadley notes that the definition of “seller” included in section 82.001(3) differs somewhat from that in the Second Restatement of Torts, since the Restatement defines “seller” only as one “engaged in the business *of selling*” a product, *see* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added), and thus omits parties in the business of commercially “distributing” or “otherwise placing” products in the currents of commerce. (Hadley’s Br. at 13, 25). But this observation does nothing to support Dr. Hadley’s indemnity claim for at least two reasons.

First, the Texas common law’s definition of “seller” has never been as narrow as that in the Second Restatement. As this Court has noted, “section 402A explicitly applies only to those whose business is ‘selling’ a product, *but from the outset we have applied it more broadly.*” *New Texas Auto Auction Serv.*, 249 S.W.3d at 403 (emphasis added). Strict products liability in Texas is not limited to “sales transactions;” liability also extends to others who are “in the business” of “distributing” or “placing” a product in the stream of commerce, such as manufacturers, distributors, lessors, bailors, and dealers.

See id. at 403-04. In fact, the court specifically acknowledged the *similarity* between the definition found in Chapter 82 and that in the Texas common law. *See id.* at 404 (“It is true that we have sometimes referred to strictly liable defendants as ‘introducing’ products into the stream of commerce, although more often we have referred to them as ‘placing’ them in that current, *as has the Legislature.*”) (citing Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3) (internal footnotes omitted, emphasis added)). Dr. Hadley therefore is incorrect to suggest that the definition of “seller” contained in Chapter 82 amounts to a significant break with the common law, or renders the cases cited above irrelevant.

Second, and in any event, variations between the Second Restatement’s definition of “seller” and that in Chapter 82 involve distinctions without a difference for purposes of this case. Section 82.001(3) maintains the common law’s requirement that the “distribution” or “otherwise placing” of a product in the stream of commerce be a party’s “*business*” for that person to fall within the definition of a “seller.” Moreover, the “distribution” or “placing” must be for a “*commercial purpose.*” As discussed above, a physician who uses a medical device or pharmaceutical product to treat a patient is not “in the business” of distributing those products, and the nature of his relationship to the patient is professional, not “commercial.”¹¹

¹¹ There also are serious problems with Dr. Hadley’s suggestion that his act of writing a prescription amounted to “placing” the drug into commerce. *See* discussion, n.6, *supra*. In fact, a physician who issues a written prescription authorizing a patient to buy a drug from a pharmacy is even further removed from a “seller”-type relationship than the health care providers sued in the cases discussed above. In *Barbee*, *Walden*, *Easterly*, *Cobb*, and *Neveaux*, the doctor or hospital *physically supplied* the patient with a medical product, and presumably billed them for those products, but the courts still determined that those health care providers could not be sued as “sellers” of the products in question.

Dr. Hadley's reliance on *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999) is misplaced. In *Fitzgerald*, there was no question that the party seeking indemnity was a "seller," and was "engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof." *See id.* at 867. The seller was not a physician or health care provider, but rather an individual who operated a retail company that sold spinal fixation devices for use by his customers. *Id.* The issue was whether such a retailer sued under a vicarious products liability theory was eligible for statutory indemnity from a manufacturer if *he sold products of the same or similar type* involved in the lawsuit, but did not sell *the particular product* claimed to have harmed the underlying plaintiff. *Id.* at 865. The court determined that such an "innocent seller" could seek indemnity, even if the seller was not in the chain of distribution for the particular product that caused harm, because the statute does not include any chain-of-distribution requirement. *Id.* at 867-69. *Fitzgerald* does not address whether health care providers may be classified as "in the business" of distributing a medical or pharmaceutical product for a "commercial purpose," or even suggest how those phrases should be construed.

Nor does *Fitzgerald* stand for the proposition that the common law is irrelevant when interpreting section 82.002's "new, distinct duty" to indemnify, as Dr. Hadley now insists. This Court previously has relied upon common law authorities when applying Chapter 82's indemnity scheme where the legislature showed no intention to depart from the common law's approach. *See Owens & Minor, Inc.*, 251 S.W.3d at 486 (holding

manufacturer not required to indemnify seller for claims involving defects in another manufacturer's products where common law did not require indemnification and where legislature used no language indicating an intent to depart from common law's analysis). *Fitzgerald* is not inconsistent.

If anything, *Fitzgerald* undermines Dr. Hadley's argument for indemnity by recognizing that "it is a cardinal law in Texas that a court construes a statute, 'first, by looking to the plain and common meaning of the statute's words.'" *Fitzgerald*, 996 S.W.2d at 865 (quoting *Liberty Mut. Ins. Co. v. Garrison Contractors*, 966 S.W.2d 482, 484 (Tex. 1998)). The *Fitzgerald* court refused to "judicially amend" the indemnity statute to exclude from indemnity "sellers" who did not distribute the product that caused the plaintiff's harm. *Id.* at 867. Dr. Hadley effectively asks this Court to "judicially amend" the statute by *reading out* the explicit requirement that a seller be "engaged in the business" of distributing a product for a "commercial purpose." *Fitzgerald* – as well as general principles of statutory construction – require the Court to give effect to *all* of the language in the statute's definition of "seller." As discussed above, that definition excludes health care professionals like Dr. Hadley who use a product to treat a patient while engaged in the practice of medicine.

3. *The legislature's 2003 amendment of the Insurance Code does not support Dr. Hadley's argument because the legislature has not similarly amended the indemnity scheme.*

Dr. Hadley maintains that the legislature's 2003 amendment of the Insurance Code to include health care providers as "vendors" for purposes of certain insurance coverage evidences its intent a decade earlier also to include health care providers within the scope

of the indemnity statute enacted in 1993. But to the extent the legislature’s action has any relevance at all to this case, it cuts *against* Dr. Hadley’s indemnity argument. Prior to the 2003 revision of the Insurance Code, the Austin Court of Appeals held that cosmetic surgeons who allegedly “sold” silicone breast implants to their patients were not “vendors” of the implants for purposes of an insurance contract. *See Texas Med. Liab. Trust v. Zurich Ins. Co.*, 945 S.W.2d 839 (Tex. App.–Austin 1997, writ denied). Although the physicians alleged that they were “vendors” and thus were entitled to *contractual* indemnity under the terms of the manufacturer’s vendor’s insurance policy, the court rejected the proposition that the sale of the implants were distinct from the rendition of professional medical services. Instead, the record established that “the physicians in this case were selling professional services – specifically, surgical procedures” – and that the implants “were at most incidental and collateral to the professional services being rendered by the physicians.” *Id.* at 843. The court continued:

To be an additional insured under the vendor’s endorsements, the physicians must, *in the regular course of their business*, be vendors of Dow Corning breast implants. The undisputed summary judgment proof establishes that these physicians do not sell breast implants as a means of livelihood; rather, they earn a living by providing professional medical services.

The Texas Supreme Court has distinguished the sale of goods from the sale of professional medical services. . . . Here, the undisputed record establishes that the physicians are in the regular course of providing medical services – namely, cosmetic surgery. Any sale of breast implant appliances was merely incidental to the rendition of these services. Because selling breast implants was not the physicians’ regular course of business and because the underlying petitions did not allege that the physicians’ regular course of business was the sale of breast implants, the physicians are not “vendors” of breast implants as that term is used in the vendor’s endorsements.

Id. at 843 (internal citations omitted, emphasis in original).

It took an act of legislation to include these physicians as “vendors” for purposes of insurance coverage. In 2003, the 78th Legislature amended the law to explicitly allow a physician or health care provider to claim the benefit of a vendor’s endorsement of a manufacturer’s general liability or products liability policy. *See* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 10.08, 2003 Tex. Gen. Laws 847, 883-84 (amended 2005) (current version at Tex. Ins. Code Ann. § 1902.002 (Vernon 2008)). But this change was a legislatively-enacted exception to prior insurance case law.¹² *The legislature has made no similar change to the indemnity scheme in Chapter 82 either before or since.*

Dr. Hadley asks this Court to do what the legislature has not done – expand statutory indemnity protection beyond persons “engaged in the business” of distributing products for a “commercial purpose” – for the sake of making the Insurance Code and Chapter 82’s indemnity scheme “consistent.” (Hadley’s Br. at 24). But as the court of appeals recognized, “[t]he legislature obviously knew how to specifically include doctors in the definition of vendor, but it has not taken similar action under chapter 82 in the six years since amending the Insurance Code.” *Hadley*, 287 S.W.3d at 851. It therefore correctly adhered to the plain language of the indemnity statute and the established case law discussed above and concluded that a health care provider who uses a product

¹² In 2004, the Waco Court of Appeals, applying the law in effect before the 2003 amendment, reversed an award of summary judgment against physicians who sought to be classified as “vendors” under a manufacturer’s insurance policy. *See Texas Med. Liab. Trust v. Hartford Accident & Indem. Co.*, 151 S.W.3d 706 (Tex. App.–Waco 2004, pet. denied). The *Hartford* court applied the “eight-corners rule,” and thus, unlike the *Zurich* court, considered only the allegations in the underlying complaint and the language in the insurance contract. *Id.* at 708-09. Unlike *Hartford*, the record in this case establishes that Dr. Hadley’s prescription of diet drugs was made in the context of a professional medical relationship.

integrally related to medical treatment is not a “seller” of that product under Texas law. Dr. Hadley’s complaint that this result is “unfair” is misdirected. “Whether or not [his] position is fair, it is simply what the statute provides.” *Meritor Automotive, Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 91 (Tex. 2001). Any policy decision to expand indemnity to persons outside of Chapter 82’s current definition of “seller” should be left to the legislature.

4. *Dr. Hadley’s interpretation of the statute is at odds with the legislature’s clear language.*

Dr. Hadley’s effort to expand indemnity protections to prescribing physicians sued for medical negligence also is flawed for other reasons. First, his suggestion that the legislature intended to radically depart from the common law’s concept of a “seller” by including health care providers who would not otherwise be strictly liable at common law, without making any provision in the text for such a change, strains credulity. As noted above, the Court must presume that the legislature acted with knowledge of the common law and court decisions when it codified a manufacturer’s indemnity duties and the definition of “seller.” *See Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999). But despite knowing that the common law had not included health care providers as “sellers” of products used in medical treatment, the legislature continued to adhere to the requirement that a “seller” be “engaged in the business” of distributing a product for a “commercial purpose.”

If the legislature intended to include health care providers within the scope of “sellers” and depart from this aspect of the common law, it could have added them either

in the definition of “seller” or in the indemnity statute, itself. The Legislature specifically *did* mention “health care provider[s]” and “prescriber[s]” elsewhere in Chapter 82, *see* Tex. Civ. Prac. & Rem. Code Ann. § 82.007(a) (Vernon 2005), but did not do so in relation to any indemnity rights.

Alternatively, the Legislature could have eliminated the requirement that a seller be “engaged in the business” of distributing a product for a “commercial purpose,” and potentially opened indemnity protections to *all* individuals who have any role in the chain of distribution (assuming without conceding that doctors have such a role). But it did not do so. *Cf. Owens & Minor, Inc.*, 251 S.W.3d at 486 (“In the absence of language indicating that the Legislature intended for one manufacturer to hold an innocent seller harmless for losses caused by products made by another manufacturer, we decline to assign such broad liability”). The plain language of the statute extends indemnity protections *only* to those who fall within the scope of the definition of “seller” in section 82.001(3). Dr. Hadley offers no valid reason for expanding indemnity to persons whom the common law did not recognize as “engag[ing] in the business” of commercially distributing products. The Court should decline Dr. Hadley’s invitation to amend the statute by judicial fiat.

Furthermore, it makes sense that the legislature would exclude prescribing physicians from the class of “innocent sellers” that the indemnity statute was designed to protect. Retailers subject to vicarious strict products liability and eligible for statutory indemnity generally are not in a position to impose their own judgment in deciding whether a particular product is appropriate for a customer; rather, they act as a mere “pass

through” for a product and are innocent of individual culpability. *See, e.g., Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 262 (Tex. 2006) (“The purpose of section 82.002 is to protect innocent sellers who are drawn into products liability litigation *solely because of the vicarious nature of that liability. . . .*”) (emphasis added). In contrast, a physician who prescribes a medicine is charged with carefully weighing whether a drug is appropriate for a particular patient, using his or her individualized medical judgment to match ““patient and palliative.”” *Wyeth-Ayerst Labs. Co. v. Medrano*, 28 S.W.3d 87, 91 (Tex. App.–Texarkana 2000, no pet.) (quoting *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974)). It would be poor public policy indeed to encourage physicians to cast off this important role and instead act as mere “pass throughs” – handing out drugs without utilizing their professional judgment – to gain the benefit of potential indemnity rights. In fact, as discussed below, such conduct would be criminal under existing Texas law. *See* Tex. Health & Safety Code Ann. § 481.071(a) (Vernon 2003).

5. *Dr. Hadley’s reading of the statute also is at odds with the purpose of Chapter 82’s indemnity scheme.*

Chapter 82’s indemnity scheme is meant “to protect innocent sellers who are drawn into products liability litigation *solely because of the vicarious nature of that liability* by assigning responsibility for the burden of the litigation to product manufacturers.” *Hudiburg Chevrolet, Inc.*, 199 S.W.3d at 262 (emphasis added); *see also Owens & Minor, Inc.*, 251 S.W.3d at 487 (observing that “Section 82.002 was designed to remedy the fundamental unfairness inherent in a [strict liability] scheme that holds an

innocent seller liable for defective products manufactured by another by requiring the manufacturer to indemnify the seller unless the seller is independently liable for negligence, intentional misconduct, or any other act or omission”). But, as explained above, physicians are not strictly liable for purported product defects in the drugs they prescribe. A plaintiff may sue the prescribing physician only for negligence, which is precisely what Emig did here. It is inconsistent with the statute’s purpose to require a manufacturer to indemnify a physician against allegations of his own medical negligence when the doctor cannot be vicariously liable for (and was not even sued for) distributing a defective product.

In fact, holding that doctors are “sellers” in the indemnity context could have implications for physician *liability*. If a prescribing physician is classified as “engaged in the business” of “commercially” distributing drugs for purposes of the indemnity statute, there is nothing to prevent personal injury plaintiffs from arguing that those same physicians should also be held strictly liable as “sellers” at common law. As noted above, the medical malpractice statutes may not protect those physicians from such liability given that the commercial distribution of goods arguably is not an “inseparable part of the rendition of medical services.” *Diversicare*, 185 S.W.3d at 848. Furthermore, physicians charged with liability for commercial sales (as opposed to medical services) might lose insurance coverage for acts deemed outside the scope of their professional medical practice. These possibilities further militate against Dr. Hadley’s interpretation.

D. Dr. Hadley ignores Chapter 82's requirement that only a seller who places a product into commerce for a "commercial purpose" may be eligible for indemnity.

Even setting aside the issue of whether prescribing doctors are "in the business" of distributing drugs (which by itself is dispositive of Dr. Hadley's claim), Dr. Hadley never offered any evidence that his writing of a prescription for Emig amounted to placing the drugs into commerce for a "commercial purpose." See Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3). Although not specifically defined in Chapter 82, a "commercial" activity commonly is understood to be an activity "conducted to make a profit." BLACK'S LAW DICTIONARY 38 (9th ed. 2004); see *McKisson*, 416 S.W.2d at 792 (holding that distributor who handed out free samples of beauty product was strictly liable as a seller because samples were distributed with "the expectation of profiting therefrom through future sales"). But Dr. Hadley has never established that he participated in any "commercial" transaction involving the drugs that he prescribed, much less that the "commercial" distribution of drugs was his business. Cf. *Smith Servs. v. Grinnell Corp.*, 294 S.W.3d 357, 359 (Tex. App.—Amarillo 2009, no pet.) (holding company that was in the business of maintaining and repairing oil wells and that had exchanged tools with injured party was not a "seller" of those tools under Chapter 82, because casual exchange of tools did not amount to an effort to "commercially distribute" the product). Dr. Hadley recommended medications to Emig in order to treat her weight condition, and provided her with a written prescription authorizing her to buy the drugs. He did not supply the drugs himself, and he did not place the drugs into commerce for purposes of profit.

Indeed, Texas law generally prohibits physicians from profiting off the distribution of drugs they prescribe. As noted by the court of appeals, the criminal law carefully limits the circumstances under which a physician can validly distribute prescription drugs. *See Hadley*, 287 S.W.3d at 851. It is a felony for a physician to prescribe or dispense a controlled substance, such as diet drugs, “*except for a valid medical purpose and in the course of medical practice.*”¹³ Tex. Health & Safety Code Ann. § 481.071(a) (Vernon 2003) (emphasis added); *see also Morris v. Blanchette*, 181 S.W.3d 422, 424 (Tex. App.–Waco 2005, no pet.) (noting that prescribing medicine without a valid medical purpose is a felony under Health and Safety Code); *Mosby v. State*, No. 06-03-00014-CR, 2004 WL 177549, at *1 (Tex. App.–Texarkana Jan. 29, 2004, pet. stricken) (mem. op.) (same).¹⁴ Thus, prescribing a drug for a “medical purpose” rather than a “commercial purpose” effectively is what distinguishes a *doctor* from a *dealer*.

The legislature also has placed significant restrictions on who may engage in the retail sale of prescription medicines. Texas law provides that only an individual or facility properly licensed under the Texas Pharmacy Act may dispense a prescription

¹³ Pondimin (known generically as “fenfluramine”) and Redux (known generically as “dexfenfluramine,” and the d-isomer of fenfluramine) were classified as Schedule IV controlled substances by both federal and state law. *See* 21 C.F.R. § 1308.14(d) (2009) (stating that any material containing fenfluramine, including its isomers, are deemed Schedule IV controlled substances); Tex. Health & Safety Code Ann. § 481.032 (Vernon 2003) (same).

¹⁴ Likewise, the federal Controlled Substances Act makes it unlawful to prescribe a controlled substance unless it is “issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” 21 C.F.R. § 1304.04(a) (2009); *see also* 21 U.S.C. § 841(a)(1); *United States v. Moore*, 423 U.S. 122, 124 (1975) (holding that registered physicians may be prosecuted for violation of Controlled Substances Act “when their activities fall outside the usual course of professional practice”).

medication for retail sale. *See* Tex. Occ. Code Ann. §§ 558.001, *et seq.*, & 560.001, *et seq.* (Vernon 2004). There are limited circumstances where a physician can dispense a drug to meet a patient’s “immediate needs,” but the physician’s opportunity to profit from such transactions is strictly proscribed. *See* Tex. Occ. Code Ann. § 158.001 (Vernon 2004) (stating physician may supply a patient with a drug “necessary to meet the patient’s immediate needs,” but providing that that allowance “does not permit a physician to operate a retail pharmacy without complying with Chapter 558”). For instance, a physician may provide a “pharmaceutical sample” to a patient in the course of medical treatment, *id.* at § 158.002(a), but such samples *may only be “delivered to a patient free of any direct or indirect charge,” id.* at § 158.002(b)(1) (emphasis added). Also, rural physicians in sparsely populated counties without a pharmacy within a 15-mile radius may apply to keep prescription drugs in their office to be dispensed in the course of treating the physician’s patients, but those physicians may seek reimbursement only for their “actual costs” incurred in dispensing the drug. *Id.* at § 158.003(a). Unlike a retail pharmacy, the physician *may not charge a “separate fee imposed for the act of dispensing the drug itself.” Id.* (emphasis added). Dr. Hadley never has explained why, despite the prohibition against medical doctors profiting from the distribution of prescription drugs, he should be considered to have placed Emig’s drugs into commerce for a “commercial purpose” simply by virtue of writing her a prescription.

E. Dr. Hadley does not qualify as a “seller” of diet drugs based on his prescription of medications to Emig for treatment of her medical condition.

The record in this case establishes that Dr. Hadley is not “engaged in the business” of distributing Wyeth’s medications for a “commercial purpose.” *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.001(3). His “business” is the practice of medicine. Wyeth’s “no-evidence” motion for summary judgment specifically challenged Dr. Hadley to produce summary judgment evidence raising a genuine issue of fact on his claim that he is a “seller” of prescription drugs. (3 C.R. 1051-59). Dr. Hadley had ample opportunity to establish that he was “engaged in the business” of commercially distributing diet drugs outside of his professional medical practice, but he never produced any such evidence before the trial court, whether in his own summary judgment motion or in his response to Wyeth’s no-evidence motion. Furthermore, the summary judgment evidence offered with Wyeth’s traditional summary judgment motion and with Dr. Hadley’s motion demonstrates as a matter of law that he is not a drug “seller.”

The record reflects that Emig sought medical treatment from three doctors, including Dr. Hadley. (3 C.R. 1083:3-18; App. at 66). After conducting a medical examination, an EKG, and obtaining Emig’s and her family’s medical history, Dr. Hadley prescribed the medication to Emig, gave her instructions, and discussed with her some possible side effects of the medication. (3 C.R. 935:10-12, 973:12-19, 1082:1-12, 1083:20-23, 937:10-25, 1085:1-24, 1086:1-22; App. at 65-67, 69-71, 73).

Although Dr. Hadley now seeks to characterize himself as “merely a conduit” for Wyeth’s drugs, (Hadley’s Br. at 16-17, 31), a doctor’s medical judgment in prescribing a

medication quintessentially implicates a professional medical relationship. *See Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863, 870 (Tex. Civ. App.–Corpus Christi 1973, writ ref’d n.r.e.) (“The laws and regulations prevent prescription type drugs from being purchased by individuals without the advice, guidance and consent of licensed physicians and pharmacists”). That decision fundamentally involves a medical judgment that is the foundation of such a relationship. “The physician must use his comprehensive training and experience in conjunction with his knowledge of the individual patient in determining the suitability of a [prescription] medication.” *Rolen v. Burroughs Wellcome Co.*, 856 S.W.2d 607, 609 (Tex. App.–Waco 1993, writ denied). The Texarkana Court of Appeals succinctly described the nature of that decision in the context of discussing the learned intermediary doctrine:

Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, an individualized medical judgment bottomed on a knowledge of both patient and palliative.

Wyeth-Ayerst Labs. Co. v. Medrano, 28 S.W.3d 87, 91 (Tex. App.–Texarkana 2000, no pet.) (quoting *Reyes v. Wyeth Labs.*, 498 F.2d 1264, 1276 (5th Cir. 1974)).

Simply put, the “business” of a physician who prescribes a prescription drug is the practice of medicine. *Cf.* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(19) (Vernon 2005) (defining “medical care” as “any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a

patient during the patient's care, treatment, or confinement."); Tex. Occ. Code Ann. § 151.002(13) (Vernon 2004) (defining "practicing medicine" as "the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who . . . publicly professes to be a physician. . ."). As a California appellate court correctly observed in discussing a prescribing physician's role in providing prescription medications:

[T]here is a difference between those upon whom the courts have heretofore imposed the doctrine of strict liability and a physician who prescribes an ethical drug to achieve a cure of the disorders for which the patient has sought his professional services. The former act basically as mere conduits to the distribution of the product to the consumer; the latter sells or furnishes his services as a healer of illnesses. The physician's services depend upon his skill and judgment derived from his specialized training, knowledge, experience and skill. The physician prescribes the medicine in the course of chemotherapy only as a chemical aid or instrument to achieve a cure. A doctor diagnosing and treating a patient normally is not selling . . . a product. . . .

Carmichael v. Reitz, 17 Cal. App. 3d 958, 979 (Cal. Ct. App. 1971); *see also Batiste v. Am. Home Prods. Corp.*, 231 S.E.2d 269, 272 (N.C. Ct. App. 1977) ("The physician offers his professional services and skill. . . . To say that the issuance of a prescription for drugs, which prescription is to be filled by a pharmacist should the patient desire to follow the physician's suggestion, constitutes the transfer of title to the drugs in the formula in the prescription, is simply too unrealistic for serious consideration").

Furthermore, this Court has recognized that claims arising out of a doctor's prescription for a medication are "health care liability claims" subject to the protections of the medical malpractice statutes. *See, e.g., Gross v. Kahanek*, 3 S.W.3d 518, 520 (Tex.

1999) (per curiam); *Rowntree v. Hunsucker*, 833 S.W.3d 103, 105 (Tex. 1992). As noted above, a “health care liability claim” involves an act or omission that “is an inseparable part of the rendition of health care services.” *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 544 (Tex. 2004) (citing *Walden*, 907 S.W.2d at 448). Likewise, Dr. Hadley’s prescription of diet drugs to Emig to treat her weight condition was an inseparable part of his rendition of professional medical services.

Despite Dr. Hadley’s efforts to cast himself as a mere commercial “conduit” for prescription drugs, the court of appeals properly rejected this characterization. First, Dr. Hadley cannot seriously claim to be a mere “conduit” for drugs to patients, selling them without exercising medical judgment, for such would implicate felony criminal conduct. *See* discussion, section II.D., *supra*. “Doctors are more than merely cogs in the machinery of distributing pharmaceuticals.” *Hadley*, 287 S.W.3d at 851. Second, the summary judgment evidence establishes that Dr. Hadley’s relationship to Emig was a professional medical one, not a merchandising one. Furthermore, despite a no-evidence motion for summary judgment filed against him, Dr. Hadley produced nothing to suggest that he was “in the business” of distributing drugs separate and apart from his relationship to his patients as their physician. As a matter of law, he was not a “seller” of the drugs within the meaning of Chapter 82 and is not entitled to indemnity from Wyeth in conjunction with the underlying *Emig* lawsuit.

F. Dr. Hadley should be estopped from claiming that he is a prescription drug “seller” rather than a professional health care provider.

Dr. Hadley repeatedly contended in trial court that “all” of Emig’s claims against him were “garden-variety malpractice claims,” (1 C.R. 130; App. at 19), or “medical malpractice” claims arising from his “treatment” of Emig, (1 C.R. 112-132; App. at 1-21). Dr. Hadley sought (and received) summary judgment on those claims, (1 C.R. 112-133; 2 C.R. 669-70; App. at 1-22, 23-24), specifically invoking the protections of the statute of limitations contained in former article 4590i that apply *exclusively* to a “health care liability claim,” defined as “a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care . . . [resulting] in injury to . . . the patient . . .” *See* article 4590i, n. 5, *supra*. Article 4590i only may be invoked where the alleged negligent act or omission is an inseparable or integral part of the rendition of medical services. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848-49 (Tex. 2005). Dr. Hadley thus successfully obtained summary judgment on Emig’s claims precisely because his prescription of medications to her was an inseparable part of medical services.

Dr. Hadley now endeavors to re-cast Emig’s claims against him by pointing to isolated portions of her deposition testimony where she stated that her complaints against her doctors arose from their prescription of diet drugs to her. (Hadley’s Br. at 3-5). Even if Dr. Hadley’s narrow construction of Emig’s testimony were reasonable (i.e., that her complaint is only about a “sale” and not about his treatment of her—and this is not a fair

or reasonable construction of the testimony), Emig's testimony does not vitiate the extensive allegations in her petition detailing a host of malpractice claims based on Dr. Hadley's treatment. (S.C.R. 83-89). "The duty to indemnify is triggered by the injured claimant's pleadings." *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 256 (Tex. 2006). Emig's deposition testimony did not amend her live pleadings to re-cast her extensive medical malpractice allegations into a products liability claim. *See* Tex. R. Civ. P. 63 (requiring party seeking to amend pleadings to file amendment with the clerk).

In any event, Dr. Hadley should be estopped from now claiming that he was sued in the capacity of a commercial "seller" of medicines. Having characterized Emig's suit as a health care liability claim to obtain the benefit of summary judgment under article 4590i, Dr. Hadley cannot now re-cast that claim as one for vicarious products liability to obtain the benefit of statutory indemnity under section 82.002. *Cf. MacGregor Med. Ass'n v. Campbell*, 985 S.W.2d 38, 40 (Tex. 1998) (holding health care liability claims may not be re-cast as something else and that court must look to "essence" of claim). His numerous clear and unequivocal assertions that Emig was pursuing only a health care liability claim against him constitute judicial admissions by which he is bound. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000) (plaintiff's numerous clear and unequivocal assertions in her petition that defendant nursing home was a health care provider and that she was bringing a health care liability claim against it constituted binding judicial admissions that precluded her from arguing that nursing home was not, or failed to prove it was, a health care provider). Having wrapped himself in the protections afforded to health care providers under article 4590i to obtain summary

judgment against Emig, Dr. Hadley cannot now jettison his status as a health care provider and become the mere conduit of a product to obtain statutory indemnity.

G. Emig’s pleadings triggered no duty to indemnify.

A manufacturer’s duty to indemnify a “seller” named in a products liability suit is determined by the pleadings of the plaintiff asserting the products liability claim. *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W. 3d 86, 91 (Tex. 2001). Nothing in Emig’s pleadings against the co-defendant doctors triggered Wyeth’s duty to indemnify, because Emig never “join[ed] as [a] defendant” any seller in her underlying lawsuit. *Id.* No Texas court has held that a doctor is a “seller” of prescription medications that he uses to treat his patients. Furthermore, Emig never even *alleged* that her doctors were drug “sellers,” or that they sold or commercially distributed the medicines they prescribed.¹⁵ Thus, there is no reasonable basis on which to argue that Emig’s pleadings triggered a duty for Wyeth to indemnify Dr. Hadley for the “garden-variety [medical] malpractice claims” against him.

III. Emig Brought No “Products Liability Action” Against Dr. Hadley

Dr. Hadley spends four pages in his Brief arguing that “the underlying lawsuit was a products liability action as defined by Chapter 82,” (Hadley’s Br. at 17), despite the fact the court of appeals disposed of Dr. Hadley’s indemnity claim based solely on the ground that he was not a drug “seller,” and did not address the additional statutory element of

¹⁵ Even if a personal injury plaintiff alleged that her prescribing physician was a “seller” (and Emig did not), those allegations would not trigger a duty to indemnify the doctor under section 82.002. The only potential cause of action against the physician would be a medical negligence claim; as already discussed, that claim may not be re-cast as a products liability claim. *See, e.g., MacGregor Med. Ass’n*, 985 S.W.2d at 40.

whether Dr. Hadley’s alleged loss arose out of a “products liability action.” *See* Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a) (requiring party seeking indemnity both to qualify as a “seller,” and to establish that his “loss aris[es] out of a products liability action”). This Court likewise need not consider the issue in order to affirm. Nevertheless, Wyeth disputes Dr. Hadley’s characterization of the lawsuit against him, and this is an additional ground on which the Court may affirm the judgment.

“Products liability action,” as defined by Chapter 82, means an action against a manufacturer or seller for recovery of damages “allegedly caused by a defective product,” regardless of the particular liability theory pled. Tex. Civ. Prac. & Rem. Code Ann. § 82.001(2) (App. at 77). Although Emig brought a “products liability action” *against Wyeth* in the underlying lawsuit, *she brought no such action against any of the defendant physicians*. Emig’s claims against her doctors arose exclusively from allegations that those doctors were guilty of medical negligence. (S.C.R. 83-89; App. at 44-50). She sought no damages from them that were “allegedly caused by a defective product.” (*See id.*). Because Dr. Hadley did not suffer a loss “arising out of a products liability action” in defending against Emig’s medical malpractice suit, *see* Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a), he is not entitled to indemnity from Wyeth. *Cf. Hudiburg Chevrolet, Inc.*, 199 S.W.3d at 257 (“It is one thing to give a seller indemnity for defending unproved claims that a product is defective; it would be quite another to give a seller indemnity for defending against unproved claims that were never even made.”).

Dr. Hadley relies on *Meritor* to support his argument that he was the subject of a “products liability action.” But his dependence on that decision is misguided. According to Dr. Hadley, *Meritor* holds that a lawsuit against multiple defendants is deemed a “products liability action” against *all* of the defendants whenever a products liability claim is directed against *one* of them. Thus, Dr. Hadley argues, a manufacturer in such a case must indemnify all of its co-defendants named in the same lawsuit, even if the co-defendants were sued only on theories other than vicarious products liability. *Meritor* does not support this argument.

In *Meritor*, a personal injury plaintiff sued the manufacturers of an allegedly defective truck, as well as the commercial leasing company that supplied the truck, under a products liability theory.¹⁶ *Meritor*, 44 S.W.3d at 87. The plaintiff also sued the leasing company for its own independent negligence. *Id.* The manufacturers argued that they were not required by section 82.002 to reimburse the leasing company for expenses incurred while defending against the independent negligence claim, because that claim did not “arise out of a products liability action.” *Id.* But the court held that where a plaintiff alleges *both* a products liability claim *and* an independent negligence claim against a seller, the manufacturer is obligated by section 82.002 to indemnify the seller against loss arising out of the entire “action.” *Id.* at 90-91.

Unlike *Meritor*, however, the action against Dr. Hadley is not a “products liability action” because Emig did not join *any* products liability claims with her medical

¹⁶ There was no question in *Meritor* that the leasing company was properly characterized as a “seller” of the truck as defined by section 82.001(3). As already established, Dr. Hadley cannot claim that status here.

negligence claims against the defendant doctors. Her lone cause of action against Dr. Hadley sounded *exclusively* in negligence. Dr. Hadley therefore did not sustain any loss “arising out of a products liability action” while defending the medical negligence claim against him. Tex. Civ. Prac. & Rem. Code Ann. § 82.002(a); *see Meritor*, 44 S.W.3d at 90 (holding that “products liability action” should be read to include “all direct allegations *against the seller*”) (emphasis added). Dr. Hadley’s indemnity claim therefore fails on this ground as well.

PRAYER

For these reasons, Wyeth requests that the Court deny or refuse the petition for review. Alternatively, if the Court grants review, Wyeth requests that it affirm the court of appeals’ judgment. Wyeth prays for any further relief to which it may be entitled.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served on all parties listed below by certified mail, return receipt requested, on this 17th day of February, 2010.

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