ORAL ARGUMENT – 09/24/03
02-0849
DIVERSICARE V. RUBIO

LAWYER: The issue presented in this case is whether a defendant's status as a healthcare provider and the plaintiff's status as a patient can be taken out of the equation when assessing whether a claim is a healthcare liability claim.

When we look at a patient's cause of action against an institutional healthcare provider, a nursing home, a mental health facility, a hospital, it's the care that is to be provided to that patient that is critical to the analysis and cannot be ignored.

O'NEILL: If someone had broken into a window and sexually assaulted the plaintiff here, would it be a different case?

LAWYER: I do believe it would be a different case.

O'NEILL: Because the operative negligent act is security related rather than under staffing related?

LAWYER: That is the position of Diversicare in this case. It's Diversicare's position that these institutional healthcare facilities have folks in them because they are compromised physically or mentally in some way. They need to have some sort of professional healthcare service to care for them and to supervise and to monitor them in some capacity.

This is what they've signed on for: to provide healthcare services. They are not necessarily in the security business. I'm not sure that we could place them in a nursing home or a hospital, or in any other position, in this building perhaps. Supervision from outside sources from random acts of violence, I think is a different issue entirely.

In fact when I was a prosecutor many years ago, we had a case in a nursing home where a defendant from outside actually came in to the nursing home, took a fire extinguisher off the wall and started to beat a resident over the head with it. He was sitting in a wheelchair out in the hallway. Now at that time as a prosecutor, obviously, my concern wasn't with whether that was a healthcare liability claim or not. But in preparing for this oral argument I thought about situations just like that one. And Diversicare would distinguish a random act of violence from outside a facility.

WAINWRIGHT: What if this sexual assault occurred in a healthcare facility that did not have the responsibility as part of the care provided to take care of the entire patient who is unable to take care of themselves. So let's say the assault occurred in a general hospital instead of a mental care facility would the analysis and the outcome change?

LAWYER: I don't believe so. At the end of the day the analysis to be performed in this case is this. The healthcare facility is required to assess the care needs of each patient that comes into that facility. Whether again it's a nursing home, a mental health facility or a hospital. The care needs of the patient are assessed, the healthcare services commensurate with those care needs are to be performed. That would include providing whatever healthcare services are necessary to protect that person from harm.

We believe that that would also include potentially protecting that person from another patient from within the facility regardless of what kind of a facility it is.

PHILLIPS: What if I'm at my dentist office and the person in the next chair takes some _____ to what I'm saying?

LAWYER: This case is distinguishable from a situation where you're in sort of an outpatient facility if you would, or in a general practitioner's office. And we can certainly discuss issues just like that, although I don't think the Diversicare case presents that. This case presents to the court the institutional healthcare context.

When we talk about, for instance nursing homes, as the plaintiffs have contended in this case and as the AARP argues in its own brief, they say residents in nursing homes are entitled to have their fundamental care needs met. And we recognize that this is what nursing homes do. They are to provide and be sure that their residents obtain the highest practicable, physical, mental and psychosocial well being. We recognize that residents are supposed to be able to obtain the highest level of daily activity. In other words, they need help we know with potentially bathing, grooming, dressing, eating, using the restroom, maneuvering in bed and out. We also know that by statute they should not have diminished their abilities in speech.

SCHNEIDER: Speaking about that statute. The specific statute set the language in 4590i that we're talking about here. Is it your position that this language is in any way ambiguous?

LAWYER: We believe that very clearly art. 4590(I) defines a healthcare liability claim as a departure from the standards of medical care, healthcare and safety. Now the legislature has not defined safety, but they've told us to apply the common law meaning. And safety means freedom from harm or the risk of harm.

Now in the context of nursing homes for instance, we see cases in which patients stated that they've had bed sores. They've sustained brain injuries falling out of bed. This court saw that in the Gracios(?) case. We have a case where a woman is in a wheelchair and her wheelchair is pushed up against a table and her leg is broken. That's a different case...

SCHNEIDER: I'm mainly interested from the aspect of whether or not when we go to interpret this statute whether or not you look at legislative intent?

LAWYER: I think absolutely you do look at legislative intent.

SCHNEIDER: Even though its' not ambiguous?

LAWYER: It is not ambiguous when we look at the intent of the legislature. For instance, when art. 4590i was promulgated in 1977, the legislature had the opportunity to include an exclusion to the definition of healthcare liability claim, which it could be perhaps - the way the plaintiffs argue that their case is framed would apply in this exclusion. Again, the exclusion has been deleted. And it states a healthcare liability claim does not apply to negligence not directly related to the furnishing of medical or healthcare to the patient, including but not limited to premises defects, vehicular accidents and other negligent acts not related to a healthcare liability claim.

SCHNEIDER: So you take the position that legislative intent can be determined what's excluded from a bill?

LAWYER: Yes. It's Diversicare's position that based upon the fact that the legislature could have included this exclusion in the definition of health care liability claim, and did not so include it, tells us that the legislature intends to interpret what is a healthcare liability claim very broadly. It appears to us that they intend to apply it broadly to whatever is a healthcare liability.

SCHNEIDER: Is there any authority in Texas holding different than that?

LAWYER: This is the first case before this court that talks about an institutional healthcare facility...

SCHNEIDER: No. I mean about the exclusion language.

LAWYER: I am not personally familiar with language in Texas that states that that exclusionary language should not be considered.

WAINWRIGHT: You indicated that if someone broke into the hospital from outside of the hospital, a third party, and assaulted Mr. Rubio there would not be a claim under the medical liability act. Correct?

LAWYER: We believe that that could be separated. We believe that that could be under the CTL policy.

WAINWRIGHT: And then you said that the amount of care, the responsibility to provide a certain amount of care depends upon what the patient requires and what they are there for?

LAWYER: Yes.

WAINWRIGHT: What if the patient is like Mrs. Rubio and cannot take care of herself, has

dementia or Alzheimer depending on what part of the record you read, why wouldn't it then under your test be the responsibility of the healthcare institution to protect her from the break-in by a third party, whereas the patient down the hall might be a strapping 6' 4", 300 pound male and could protect himself? Based on your standard why does the third party breaking into the hospital change the analysis for Mrs. Rubio?

LAWYER: Diversicare realizes we have to draw the line somewhere. We're certainly trying to stay away from a slippery slope here. I think that institutional healthcare facilities are not necessarily in the business of security from the outside world. I think that they do stand in the same place as premises owner for purposes of known dangers from the outside world. Once we get into the inside world, and particularly in cases where you have mental health facilities and nursing home facilities, you have a much more of this patient on patient assault activity, because so many of the patients are mentally compromised in some way.

This is what they've signed on to do: to control patient interaction; and to protect the patients from one another is yet another healthcare concern, healthcare task, healthcare duty that they take on. They are uniquely suited for this position. This is healthcare by its very nature.

WAINWRIGHT: So your standard then, is it assault caused by folks who are external to the facility verses internal to the facility?

LAWYER: It's our position in this case that this case is about a patient on patient assault within the confines of this institutional healthcare facility.

WAINWRIGHT: I understand that. Of course, the court has to resolve this case, but we also have to be mindful of its implications and ramifications. I'm frankly testing your theory.

LAWYER: We hesitate to ask this court to extend an internal institutional incident beyond the doors of the facility. At that point, then the nursing home or the hospital or the healthcare facility stands in the shoes of a business. That's why they have a CTL policy to cover that. We hesitate to ask this court to extend this outside the doors of the facility.

O'NEILL: What would be wrong with a test that posited something along the line of - if it's something that requires medical testimony as to a standard of care? Let's presume this were a staff member who had attacked the plaintiff here. And the claim was that they had negligently hired this person with a criminal background. My understanding under this former test would be that that would not be a healthcare liability claim, because there you are looking at the employer for negligently hiring someone who had a criminal background. Whereas, it strikes me the patient to patient, the underpinnings of that are under staffing. And what the standard of care in terms of staffing for an Alzheimer's unit would be becomes more of something that needs expert testimony healthcare liability than the other situation I just posited.

LAWYER: At the end of the day as this court has held in other cases before it where plaintiffs have tired to recast their claims as DTPA breach of warranty type claims, this court has said we need to look at the standard of care, we need to look at the nature of the plaintiff's claim. So we must be mindful of the fact that the plaintiff in cases such as these is an in-patient in a healthcare facility, not a resident in an apartment complex. Because the standards of care are greater within the facility. In fact in some respects exponentially greater in a healthcare facility and the duties that are owed by that facility to their residents than what is owed by an apartment complex to their residents. And so when you look at a plaintiff's claim that they have not been provided the healthcare services that they needed to protect them from harm within the facility, whether that's a bed sore, a brain injury falling out of bed - we've seen fatal injuries where people fall out of windows. The analysis is the same when it's a patient on patient assault.

O'NEILL: So you say the scenario where the orderly is the assaulter, and the claim is they were negligent in hiring him because he had a criminal background, you'd still say that was a healthcare liability claim or not?

LAWYER: Well we maybe walking the line with that one too, because I'm mindful of the Rose v. Garland Hospital case that the court will hear in November where the negligent credentialing and recredentialing of the physicians, and whether that is a healthcare liability claim. I realize Dallas split a line in timing and determined that was an act that was taken well prior to the actual course of treatment, and, therefore, that was not a healthcare liability claim.

It is conceivable I suppose that at the end this orderly is supposed to be providing care and services to this patient...

O'NEILL: On negligent credentialing would you need expert testimony to determine whether there was negligent credentialing?

LAWYER: I would think so. The ordinary juror could not possibly know whether a doctor was properly credentialed or not.

O'NEILL: But you would not need expert testimony where an orderly was - if there's a claim of negligent hiring because of criminal background? You would need expert medical testimony.

LAWYER: With respect to that issue that's true.

PHILLIPS: And how about here? Take these facts. Suppose you win for the next case, the plaintiff is going to need expert testimony. What's it going to look at and what is your expert response going to be?

LAWYER: In this case, and there are so many others like it, the crust of the allegation here is that there was improper staffing of nurses in training and number to provide the healthcare

services that these residents, and in particular Mrs. Rubio needed. They say that that was the instrumentality that caused not only leg fractures, which caused the filing of this suit in the first place, but also this assault committed by another patient.

The test is, and this is where expert testimony comes in in the standard of care and the nature of the claim, but these patients have to be assessed for their mental and physical condition. And they need to be assessed for the healthcare that they need to keep them protected from various harms.

In this case, this is a woman with Alzheimer, in her 80's, who was in a facility with other folks who were mentally compromised. Not only did they need to be protected from themselves, she needed to be protected from herself and from others.

The ordinary juror can't know what is the proper supervision of these patients, the proper handling of these patients, whether it's Mrs. Rubio or it's the gentleman who's alleged to have assaulted her.

O'NEILL: If under staffing is the claim, you would need expert testimony _____? If you had a staff member there observing one patient aggressively going in to another's room, and you did nothing to stop that, there could be liability there, because that doesn't relate to staffing or it doesn't relate _____.

LAWYER: To me that goes back to supervision. And that goes back to healthcare services performed by the facility for the person who's having their room aggressively approached by the other patient. At the end of the day, I think it comes down to supervision and monitoring. And this is what these healthcare facilities are suited to do.

Again as we've talked about with nursing homes and with mental health facilities where the folks are very often mentally compromised, you have so much incidents of this. And so at the end of the day it's the - were these folks assessed for what healthcare needs had to be met for them? Were those healthcare needs met, and did the alleged failure to meet those needs proximately cause their injury? At the end of the day that's the standard of care that this court has sought to impose in 4590i cases. You need an expert to talk about assessment and providing proper care, and causation. And also this is healthcare by its very definition under art. 4590i. It's an act performed by the healthcare facility for the patient during the course of their confinement.

And a departure from that standard of medical care or healthcare or safety is a healthcare liability claim under art. 4590i. So the CA has improvidently reversed the TC's summary judgment in this case.

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RESPONDENT

LAWYER: This case involves the question that is uniformly agreed upon by not just the 13th CA in the underlying case, but the 5th court in Dallas in the Bush case, likewise the 1st court out of Houston, the 14th court in Houston. All these courts together say the same thing. They say that when you have a sexual assault against a person at one of these facilities, the question becomes is this even medical treatment involved?

HECHT: What if you had a physical assault, not a sexual assault? The same thing.

LAWYER: Matter of fact that happened in the Rigby case. Each of these cases has some of the most chilling stories contained in these cases. The Rigby case for example out of the 14th CA, authored in part by J. Brister, pointed out the fact that these type of claims have nothing at all to do with medical diagnosis or treatment. What they have to do is with garden variety as J. Brister referred to it are regular negligence cases.

HECHT: What about the argument that this has to do with staffing?

LAWYER: Literally the 1st court in Gobert addressed that question. And said even if it is it doesn't have anything to do with medical treatment. And the calling of any experts on the question of the standard of care, you can do that if your car breaks down and you get it fixed. You can get an expert.

HECHT: It seems to me that it has something to do with it. Because for example, in our shop we're not accustomed to people hitting on each other during the course of the day, and we take it that they've been - part of their training includes not doing that. So we don't have to have monitors standing around making sure there are no assaults. But it's quite different in this environment where people don't behave rationally. You would have to know - I mean do we have two people for each one?

LAWYER: I think that question goes to the issue that I'm addressing. I don't doubt that you may have an expert who testifies in numerous cases...

O'NEILL: No. A medical expert.

LAWYER: No, not a medical expert because it's not a medical standard of care.

O'NEILL: Some healthcare. In order to prove under staffing there's got to be some testimony that a nursing home with an Alzheimer unit there needs to be more staffing here. What's the reasonable staffing for a medical facility like this? Or healthcare related in that sense expert. I didn't mean just any expert.

LAWYER: But it's not medical treatment, which is the issue under this medical liability improvement act. The question is is there medical treatment or diagnosis? And then the crucial issue is medical "expert testimony." Required to do what? To establish the standard of care for that

profession.

OWEN: If were writing the statute, we might have chosen to include those words, but they are not in the statute. I don't see medical testimony. I'm struggling with the definition of healthcare liability claim. And what the legislature has put in writing that we have to deal with is a claim against a healthcare provider from accepted standards of safety. It doesn't say anything about medical testimony or...

LAWYER: Part of the analysis has been if there is a professional standard of care for a medical service provider, that's something a doctor, a nurse is trained in medical school on. Nowhere in medical school does anyone have a course on preventing rape of patients. This is garden variety premises liability negligence. And the important point on this is some times you can get a harmony with different CA and it may make a little difference. In this case when you have the Dallas court, the San Antonio court, the Corpus court and both Houston courts looking at the very issue the court is asking me about and saying you can segregate, you can sever a premises liability claim, because it doesn't have anything to do with medical treatment.

HECHT: I'm still struggling with that. Because it looks like to me if you were going to prove one of these cases, you wouldn't hire Brinks or Wells Fargo or some security company, or an off duty police officer to come in and say you have to have this kind of staffing. You hire a nursing home expert who comes in and says, oh well. If you've got these kind of patients, you have to look after them this way because otherwise they will hurt each other.

LAWYER: But that issue is what the 1st court looked at, and the 14th court looked at. And what they opined was this, that it's okay in a regular negligence case to bring in expert testimony. As I was mentioning, if your car breaks down and you take it in and it doesn't get fixed right, you might get an expert to come in and say what happened. But it doesn't make it a professional standard of care. And the medical malpractice improvement law what it was attempting to do, even if we accept the petitioner's argument and that somehow that this healthcare crisis is what was behind the passing of this, the whole question seemed vague to me. Because in answer to questions counsel even reminded everyone that traditional premises liability claims like the person who comes in a window, not even handled by malpractice insurance, and the price of insurance is going to go up. They are handled under comprehensive global liability policies. Just like if you're hurt a K-Mart or if you're hurt at a restaurant. And the irony would be that the people in our society who get least protect, these individuals who are in these nursing homes would be treated worse under our law than a person that goes to Dennys or a person that goes to K-Mart, or a person that goes to a restaurant and has a premises liability claim.

WAINWRIGHT: Let's look at the statute again. The definition of healthcare liability claim says there is liability among other things for a claim _____ from the accepted standards of medical care, for healthcare, for safety. Presuming the legislature meant to include each word in that phrase that's included, that is they weren't overlapping or being redundant, then you conclude that safety means something different from healthcare and medical care. What did the legislature intend safety

to mean since they stated it separately and specifically?

LAWYER: The answer is in two parts. I can't directly answer what the legislature intended, but each of the cases that I addressed before that stand as a _____ authority have answered that question that you can sever if in fact the claim that's being made can be isolated from the medical treatment issue, which is the third part of the test that's being used by the courts. The courts answer to that question by asking is it dealing with diagnosis or treatment? If so, is it a requirement to have expert testimony? And then finally can you segregate the claim?

OWEN: I'm asking you to focus on the language of the statute because that's what we've got to look at and they talk about - the legislature chose the words, not a court, and they defined healthcare to include any act during the patient's confinement. Now that's what healthcare is defined as. And they've also included the word "safety" in there. So those are words that we've got to deal with and they are not tied to medical treatment. Medical care is defined in a separate section right below it. Medial care is not tied to any of these definitions. So what do we do with the words "during a patient's confinement" any act, and the word "safety?" It's not linked with medical care.

LAWYER: I agree. And with candor none of the courts directly struggled with either the legislative intent or the direct answer to your question. But what they are looking at it is the severability. The question is can this claim stand alone without any question of if the healthcare provider is involved? Does it make it more akin to a premises liability claim?

O'NEILL: How is it going to be tried if it stands alone?

LAWYER: Perfect question. If this case goes back to trial they're not going to have a professional standard of care issue.

O'NEILL: How is it going to be argued? Your argument to the jury is going to be under staffing isn't it?

LAWYER: It's going to be an ordinary negligence premises liability claim.

HECHT: But who are you going to call as your expert to prove that they did not follow the standard of care? It's not going to be an off duty policeman. It's going to be a nursing home administrator.

LAWYER: Unlike a medical malpractice claim where medical expert testimony is required, you may not even have to have an expert on the question of under staffing. Because you can go to the jury in Texas on a garden variety to ordinary negligence case without any expert testimony.

O'NEILL: You're agreeing that the underlying negligent act is going to be under staffing?

LAWYER: Not necessarily. Because the Reese opinion out of this court in 1999 pointed out than on a premises liability case, the issue is if there was a known danger on premise.

O'NEILL: But the main danger is understaffing.

LAWYER: That's right. It was a structural defect in that case.

OWEN: What's the premises defect in this case?

LAWYER: In this case it's the fact that you have people who cannot literally take care of themselves who are...

OWEN: What's wrong with the building that caused the...

LAWYER: Inadequate safety. The failure to protect these people from those rapists that seem for reasons unknown to me to be moving among nursing homes. These are all nursing home cases, and they are all different people who are sexually assaulting these individuals.

JEFFERSON: The premise of your argument is the vulnerability of these patients that are caused by their medical condition. The whole reason that they are there is because they require medical care and a medical assessment. How then can we separate that from what happened? How is this all not intertwined?

LAWYER: I'm not powerful enough to show this court how everyone - very seldom can I say that everyone agrees with me. Every court that struggled with these questions of looking at a sexual assault at a nursing home, not just in Texas, the AARP brief that's filed in conjunction with our response also points out the other states looking at this same question have all said separate the claim if it's an...

OWEN: But those were medical malpractice cases under the common law and they weren't looking at a statute. The only issue in this case is whether the statute of limitations applies. You were arguing why should we treat these people different from someone that's at K-Mart? And the only question about difference in treatment is which statute of limitations is going to apply. And so we've got to look at what the legislature said about here's the limitations that applies and it applies to these kinds of claims, and we've got to look at their language, not the common law, not whether this is a medical malpractice claim, but their language.

LAWYER: We have to decide if this type of premises liability claim is somehow subsumed under the medical malpractice ____ improving statute. Because we believe and the courts in Texas have uniformly looked at this and said it doesn't apply to medical malpractice on premises liability issues such as this when a rapist does harm to people under the charge of that nursing home or that hospital. Nursing care and medical treatment has nothing to do with it. And to answer your question, this case didn't go to the jury on an ordinary negligence submission. It's not a professional

standard of care. It's a garden variety negligence standard of duty, breach of duty, causation and damages. And I really believe that if you - you don't even have to have an expert on this, because this court...

O'NEILL: You would have to concede it's inextricably intertwined with what's necessary for an Alzheimer patient to staff ratio.

LAWYER: I think it's a function of that. But it's not a question of the medical treatment that this legislature looked at when it said we've got to do something about the cost of malpractice insurance. Because the premiums are driving up the rates and doctors can't get insurance and that's bad for Texas. And I agree that maybe that's true. But at the same time what is also wrong with that argument is the issue of premises liability is not even an issue in medical malpractice. This is not a claim against the medical malpractice coverage. This is the comprehensive liability policy that every facility has. So it doesn't even touch the medical malpractice classes.

WAINWRIGHT: You've mentioned the CA's in Texas that have held uniformly in support of your position. Only one of them addresses safety. That's Rogers from Corpus Christi, 1999. Correct?

LAWYER: Rogers v. Crossroads.

WAINWRIGHT: And the discussion is one paragraph?

LAWYER: That's correct.

WAINWRIGHT: So there's not been any focus in all candor by the CA's generally on this issue of safety?

LAWYER: Admittedly so.

WAINWRIGHT: Looking at the statute on the use of the word safety. Separate from the medical care and healthcare, I think we all agree it has to relate somehow to the treatment of the patient. We don't mean general safety in the sense of being safe in walking down the sidewalk in a city. So it relates somehow to treatment. Do you have a definitive idea or theory of what safety in this context means separate from healthcare and medical care?

LAWYER: Conceding the fact that you're correct. I believe the Rogers court is the court that addresses its definition and its meaning. Outside of the context of healthcare, the answer of safety in premises liability cases is well known. There is a duty to warn of those things the owner knows or is reasonably certain to know of. That's the duty that arises in premises cases.

WAINWRIGHT: You talked about the crucial factor is whether medical testimony is required. Is that your standard?

LAWYER: No. That's the standard of the 14th court, the 1st court, the Corpus court, the San Antonio court. All the courts have looked at this, have come up with this 3 part test.

WAINWRIGHT: Is that the standard you want us to - or the factor you think our court should focus on in deciding this issue, whether medical expert testimony is required?

LAWYER: I think it's not a test. It's a factor. It's a flexible factor.

WAINWRIGHT: And what are the other factors?

LAWYER: The first factor is, is there really medical treatment involved? Is there medical treatment diagnosis involved? If there is, is there a professional standard of care that's required to even survive summary judgment? If you don't have that professional standard of care, then the case is over. And then the third step that's embraced by the 14th court, also embraced by I think the most excellent analysis of the 5th court in Dallas in the Bush v. Green Oaks case, it embraces the problem and talks about the three part test and says, this is the way to look at it because you can segregate, says step 3, some claims. The attempt is to segregate.

To me while there's a great rush to attempt to help healthcare providers, the legislature is in a perfect attempt to come up with meanings and definitions. Instead of asking this court to come in and weigh in and say whatever the issue is if something happens on a healthcare property that it's somehow covered under this limitation of the act. See I think that's bad law for Texas.

HECHT: I suppose if an orderly were helping a patient into bed, and dropped the patient or didn't do it right and the patient fell, would you think that was a healthcare claim?

LAWYER: Surely it is. It's medical treatment. If it's being provided and done so negligently, then a professional standard of care would apply.

HECHT: And if the orderly brought in a meal and spilled it on them and burned them would that be?

LAWYER: Using the analogy to the airline cases dealing with what's preemptive and what's not, the answer is probably yes.

HECHT: And if they walked off and left them when they shouldn't have, and the patient falls over or something, that would be too I guess?

LAWYER: It's all case specific. Because as counsel has correctly pointed out, there are too many cases that are wrongly pled that are really under the act, where misrepresentation is tried by the plaintiff's side to try to get around the medical malpractice act that are nothing more than misdiagnosis cases. This side agrees, we carry no brief in support of those misguided cases. On the

other hand when you can clearly separate what treatment is implied or suggested by allowing a rapist to run around wards at any type of healthcare facility especially as the AARP brief points out, are our most vulnerable citizens who are usually women who are for reasons known to other people outlive men, and that these women in these healthcare facilities are quite often left alone. They have no support. They're medicaid/medicare receivers. And the facility receives that money. At the same time what medical treatment is involved by keeping rapist away from those women? That's the issue. It's not a medical treatment at all. So you don't even get past the first test.

WAINWRIGHT: What if the doctor says I'm leaving. It's midnight. Nurse, I know you're the typical nurse for Mrs. Rubio. Don't go. And said, I'm going to send Sam. Sam in his records, but unbeknownst to the doctor is a person involved in assaults and has those tendencies, and goes and assaults Mrs. Rubio. But the doctor said because of Sam your expertise and something else, I'm sending Sam instead of the normal nurse. Now I'm going home and an assault takes place. Medical judgment or not?

LAWYER: Medical treatment. I think the line of distinction is there is no medical provision treatment or any suggestion that rape is a good thing for patients at healthcare facilities. But when a doctor does treatment, and a doctor makes recommendations - there is the Shaw case, I believe it was where it was held to be a medical healthcare claim. The person got misdiagnosed, they over dosed and they fell out of a window. Well the doctor is involved with that. The doctor is treating the patient. In medical school there is no block of instruction dealing with preventing rape of women at healthcare facilities. It's a premises case. It's separate from the medical healthcare claim.

WAINWRIGHT: The treating physician for Mrs. Rubio knows that she can't take care of herself, could hurt herself, instructs that her door be locked by the nurse whenever there's not a hospital employee or a physician in there. Medical judgment?

LAWYER: That question is fact specific again. But with a doctor's involvement in the issue, the answer could well be that could fall under what the legislature intended. But the legislature had no intent, because they did not have a broad definition that says anything that happens at a healthcare facility is under this act. They had limitations. And your sister courts have struggled with what is meant by the difference between medical services provided and then garden variety negligence that occurs.

WAINWRIGHT: The doctor, the same situation with Mrs. Rubio, understands that because of her situation she is subject to being controlled, hurt by others. And for that reason instructs that her door be locked.

LAWYER: Other patients or other employees?

WAINWRIGHT: Other patients.

LAWYER: Fact specific.

WAINWRIGHT: Medical judgment or no medical judgment involved?

LAWYER: It could well be. But without medical judgment, that's the factor that I think weighs the heaviest in all these cases. That's how - once a doctor when they make a bad diagnosis and really bazaar things happen, our courts - the same courts that agree with us also say medical treatment is involved when there is a diagnosis, even if it's a misdiagnosis.

O'NEILL: And so the underlying premise of all that is there is no medical judgment in determining how much staff is needed for those patients more in need of supervision...

LAWYER: You're saying exactly what our position is. As a matter of fact, the petitioner referred to the Rose v. Garland case, which also has to do with a case that's before this court, and it has to do with a credentialing problem. And I see the difference in those type of cases, is that administrative things that happen in hospitals just don't require. They are not medical treatment. They are administrative things that happen in hospitals. And the attempt by petitioner and others is attempting to expand coverage under an act where the legislature has had no problem at all filling in the blanks for the petitioner. The court should not accept that invitation. The court should salute those opinions that have been struggled through, the 5 opinions unanimously of our CA's in Texas on this subject.

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REBUTTAL

LAWYER: The opinions that respondent has been speaking of this morning are all cases that have not been presented to this court for review. The problem that we're seeing across the state is that these courts are relying upon each other's opinion. They are improvident opinions. Oftentimes in opposite opinions.

HECHT: Do you think some sort of medical or medical related testimony is necessary to prove liability in a situation like this?

LAWYER: Absolutely. In fact the plaintiffs conceded in the TC that they were going to bring an expert in nursing services to establish that there had been understaffing in this case, which caused Mrs. Rubio's injuries.

WAINWRIGHT: That's in the record?

LAWYER: Absolutely it is. In fact that's one of the issue that we've presented to the court in our petition for review in this case.

HECHT: Could you prove it some other way? Could you prove without medical

testimony that there was a violation standard of care?

LAWYER: It's difficult to conceive of how the average person on the street would know what the patient to staff ratio is for an Alzheimer patient. What's appropriate in a nursing home facility? How much staffing do you need? When you look at the plaintiff's petition in this case this whole case is about supervision, alleged understaffing, failure to hire and train appropriate personnel to monitor and supervise Maria Rubio. Tab F to our brief on the merits shows the court the pertinent portions of the plaintiff's amended petition in this case where they speak specifically to our alleged failure to protect this woman because we did not have enough staff on board to prevent this gentleman from entering her room.

O'NEILL: Should we look at cases that talk about coverage under medical policies verses general liability policies? We just decided a case recently where an orderly stole drugs and whether that was covered under a medical policy or a general liability policy. Should those cases drive our analysis in any way?

LAWYER: I don't know if they drive the analysis in any way. I suppose they are instructive. In that case I know that the court recognized the fact that the parties, I guess, sort of agreed that the act of keeping the medicine cabinet secure was sort of just a general liability issue not a professional issue. But I'm not sure that Diversicare necessarily agrees with that. At the end of the day, again we are talking about healthcare services provided to all the folks in that facility, and particularly the folks who ultimately were administered the tainted drugs.

It could yes perhaps be instructive to look at cases where we - you know you look at the CTL policy and look at the professional liability exclusion to see where that's going to apply and where it has not. Diversicare has not provided that analysis. We would be glad to do so if it would be helpful to the court.

At the end of the day we believe that the standards that have already been espoused by this court will govern, which is we look to the nature of the claim, we look to the standard of care and whether it's a healthcare claim, we look to whether an expert is going to be necessary in the analysis. Will the plaintiffs need that to be prove their claim? And then at the end of the day in this Rubio case, we need to look at the judicial admissions made by the plaintiffs, the fact that the alleged same instrumentality caused both injuries, whether it be the injuries to her leg or the assault. We look to the fact that the plaintiffs told the court that they would bring in a nursing staff expert to prove up their case. And we look to the fact that at oral argument in the CA, different counsel for plaintiffs told the court Mrs. Rubio was an Alzheimer patient. That's why we put her in this facility. That coupled with the plaintiff's petition that said we needed her fundamental care needs to be met. Along with a 26 item list of nursing staff inadequacies shows that this case is absolutely by its very nature a healthcare liability claim.