

IN CRITICAL CONDITION: *DIVERSICARE GENERAL PARTNER, INC. V. RUBIO, MARKS V. ST. LUKE'S EPISCOPAL HOSPITAL*, AND THE STATE OF HEALTH-CARE-LIABILITY CLAIMS IN TEXAS

David R. Schlottman*

I. INTRODUCTION

Since the 1970s, medical-malpractice claims in Texas have been governed by a special body of law.¹ Starting with the Medical Liability and Insurance Improvement Act of 1977 (MLIIA)² and continuing today with the Texas Medical Liability Act (TMLA),³ causes of action meeting the statutory definition of *health-care-liability claim* are subject to unique procedural requirements,⁴ shortened statutes of limitation,⁵ and, perhaps most importantly, limitations on damages.⁶ Moreover, under the TMLA, failure to comply with these special rules can result in harsh consequences, including dismissal of a claim with prejudice and assessment of attorney's

*Editor in Chief Elect, Baylor Law Review; Candidate for J.D., Baylor University School of Law, Spring 2012. I would first like to thank my lovely wife, Karie, for her support and encouragement. I would also like to thank my sister, Andrea Schlottman. Her discerning eye has greatly improved the quality of my writing. Finally, special thanks to John Headrick and my father, Darryl Schlottman, for their comments.

¹ See Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2039–64, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884; TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001–.507 (West 2005 & Supp. 2010).

² Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2039–64 (repealed 2003).

³ TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001–.507 (West 2005 & Supp. 2010).

⁴ See, e.g., *id.* § 74.351 (requiring filing of expert-witness report within statutorily specified time period); *id.* § 74.352 (providing for unique discovery rules in health-care-liability claims); Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 4.01, 1977 Tex. Gen. Laws 2039, 2047–48 (repealed 2003) (requiring pre-suit notice of health-care-liability claim).

⁵ See TEX. CIV. PRAC. & REM. CODE ANN. § 74.251; Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003).

⁶ See TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301–.303; Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 11.02, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003).

fees against the plaintiff.⁷ Thus, whether or not a particular cause of action is a health-care-liability claim is of critical importance.

Despite the importance of this distinction, ambiguities within the statutory definition of *health-care-liability claim* have presented the Texas Supreme Court with difficulty in delineating the precise contours of the term. While the vast majority of claims will be easily sorted,⁸ cases at the fringes can present perplexing issues of classification—especially those that blend elements of medical malpractice and traditional premises liability.⁹ In the past six years, the Texas high court has twice had occasion to address the classification of these types of cases residing in the twilight zone between premises liability and medical malpractice.¹⁰ The first, *Diversicare General Partner, Inc. v. Rubio*, assessed the status of allegations arising out of the sexual assault of a nursing home resident by another patient.¹¹ The second, *Marks v. St. Luke's Episcopal Hospital*, resolved whether a patient's fall, allegedly caused by a defective bed, was a health-care-liability claim under the MLIIA.¹² In both cases, a sharply divided Court

⁷ See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b)(1)–(2); *Med. Hosp. of Buna Tex., Inc. v. Wheatley*, 287 S.W.3d 286, 294–95 (Tex. App.—Beaumont 2009, pet. denied) (noting that upon a plaintiff's failure to comply with expert-report requirements, dismissal and an award of attorney's fees is mandatory, not discretionary).

⁸ See *Boothe v. Dixon*, 180 S.W.3d 915, 921 (Tex. App.—Dallas 2005, no pet.). Even absent the statutory definition, many claims can intuitively be sorted as health-care-liability claims or not. *Id.* For example, a cause of action arising from a botched eye surgery is obviously a health-care-liability claim. *Id.* at 916.

⁹ Less intuitive, however, is a claim based on a plaintiff's fall from an allegedly defective hospital treadmill which was prescribed to the plaintiff by her doctor. See *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 772 (Tex. App.—Corpus Christi 2006, pet. denied).

¹⁰ See *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 660 (Tex. 2010); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 844–45 (Tex. 2005).

¹¹ *Diversicare*, 185 S.W.3d at 844–45.

¹² *Marks*, 319 S.W.3d at 660. The MLIIA was repealed in 2003. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. Although the TMLA reworked many of the MLIIA's provisions, the TMLA retains a nearly identical definition of *health-care-liability claim* as that of the MLIIA. Compare Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003) (defining *health-care-liability claim* under MLIIA), with TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (adding “or professional or administrative services directly related to health care” to MLIIA definition). Presumably, interpretations of the MLIIA's definition are binding as to its cloned language in the TMLA's definition. See *Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 (Tex. Dec. 17, 2010) (applying interpretations of the MLIIA to resolve whether an action was a health-care-liability claim under the TMLA). Any potential implications of the TMLA's addition to the MLIIA's definition of *health-care-liability claim* will be noted as relevant.

found that the plaintiffs' actions were health-care-liability claims.¹³ However, these two cases, comprising a total of eight opinions combined, reveal the Court's internal disagreement over the proper construction and application of the statutory definition.¹⁴ These highly fractured decisions resulted in uncertainty as to what constitutes a health-care-liability claim and whether a patient may ever be able to assert a premises-liability action against a health-care provider which would not be subject to the MLIIA or TMLA.

Discussion and resolution of that uncertainty will be the focus of this Comment. Part II begins with an exposition of the source and history of Texas's various medical-malpractice laws. Part III outlines the Texas Supreme Court's general framework for resolving whether a cause of action is a health-care-liability claim. Part IV examines *Diversicare* and *Marks* in depth to determine how those cases have affected the Court's construction of *health-care-liability claim*. Finally, Part V will propose an interpretation of *health-care-liability claim* that allows for the existence of premises-liability actions outside the scope of that term. Within Part V, it will be argued that this proposed framework furthers the policy underlying Texas's malpractice law and represents the better choice as a matter of statutory construction.

II. THE HISTORY OF TEXAS MEDICAL-MALPRACTICE LAW

A. *The Malpractice Insurance Crisis of the 1970s and the Medical Liability and Insurance Improvement Act*

The origin of Texas medical-malpractice laws can be traced to a series of statutes passed in the 1970s.¹⁵ It was then that the impetus for reform was born of a widely held perception that the United States was mired in a medical-malpractice insurance crisis which had caused runaway premiums in the insurance markets.¹⁶ Commentators and analysts posited that

¹³ See *Marks*, 319 S.W.3d at 659–60; *Diversicare*, 185 S.W.3d at 844–45.

¹⁴ See generally *Marks*, 319 S.W.3d 658; *Diversicare*, 185 S.W.3d 842.

¹⁵ See Darrell L. Keith, *The Texas Medical Liability and Insurance Improvement Act – A Survey and Analysis of Its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 266–67 (1984).

¹⁶ See Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 5–6 (1986). One detailed national survey of the medical-malpractice insurance market found that from 1960 to 1972, the price of insurance coverage increased seven-fold for physicians, ten-fold for surgeons, and five-fold for hospitals. See James R. Posner,

increasing premiums would ultimately lead to the failure of insurance companies and the unavailability of malpractice insurance at any price.¹⁷ As a result of the crisis, a number of physicians and health-care providers were forced either to cease or reduce the scope of their practices, thus driving down the availability of health care statewide.¹⁸

In line with the prevailing national sentiment, the 64th Texas Legislature faced political pressure to remedy the crisis, and it responded by passing the Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act (PPHA) in 1975.¹⁹ This legislation—Texas's first iteration of medical-malpractice reform—was limited in scope and designed to expire at the end of 1977.²⁰ It primarily sought to alter rules regarding the statute of limitations in medical-malpractice actions involving insured defendants, and, most notably, it provided no protection to uninsured physicians or health-care providers.²¹

Despite the PPHA's limited reforms and temporary existence, the 64th Legislature had a lasting impact on Texas medical-malpractice law through its creation of the Medical Professional Liability Study Commission.²² The Commission was headed by the noted tort scholar W. Page Keeton and was tasked to offer permanent solutions to the malpractice insurance crisis.²³ After numerous meetings, the Commission submitted its final report to the

Trends in Medical Malpractice Insurance, 1970–1985, 49 LAW & CONTEMP. PROBS. 37, 38 (1986). The cause of the troubled state of the 1970s malpractice insurance market is unresolved. See, e.g., Charles P. Hall, Jr., *Medical Malpractice Problem*, ANNALS AM. ACAD. POL. & SOC. SCI., May 1979, at 82 (attributing the malpractice crisis to negligent practices in the medical community, unrealistic patient expectations, and a philosophy of entitlement amongst Americans); Robinson, *supra*, at 11 (positing an increase in the use of risky yet beneficial surgeries as one possible cause of the crisis); Posner, *supra*, at 38–39 (noting a decline in the stock market as a contributing factor to the crisis).

¹⁷ Robinson, *supra* note 16, at 5–6.

¹⁸ Keith, *supra* note 15, at 267.

¹⁹ *Id.*

²⁰ *Id.* at 267 & n.21.

²¹ *Id.* at 267.

²² See, e.g., Jeff Watters, Note and Comment, *Better to Kill than to Maim: The Current State of Medical Malpractice Wrongful Death Cases in Texas*, 60 BAYLOR L. REV. 749, 752–53 (2008).

²³ Max Sherman & Michael L. Pate, *The Texas Legislature and Medical Malpractice*, 10 TEX. TECH L. REV. 339, 340–41 (1979).

65th Texas Legislature in December 1976²⁴ and recommended a host of malpractice tort reforms.²⁵

Acting on the recommendations of the Keeton Report, the 65th Texas legislature passed the Medical Liability and Insurance Improvement Act of 1977.²⁶ The stated purpose of the MLIIA was, among other things, to lessen the frequency and severity of health-care-liability claims, reduce the size of malpractice judgments, maintain the affordability of medical-malpractice-liability insurance, and ensure that health care within Texas remained affordable.²⁷ To realize these goals, the MLIIA instituted pre-suit notice requirements,²⁸ altered the informed-consent doctrine,²⁹ restricted the use of *res ipsa loquitur*,³⁰ shortened the statute of limitations for minors,³¹ and capped the civil liability of physicians and health-care providers, with some exceptions, to \$500,000 dollars.³² In keeping with its stated goals, the applicability of the MLIIA's reforms was limited to a statutorily defined class of "health care liability claims."³³

²⁴ *Id.* at 341.

²⁵ See Watters, *supra* note 22, at 752. See Keith, *supra* note 15, at 271–80, for a more complete synopsis of the Keeton Report's recommendations.

²⁶ Roger Sherman & Geraldine Szott Moohr, *Medical Malpractice Tort Reform in Texas: Treating Symptoms Rather than Seeking a Cure*, 12 J. CONSUMER & COM. L. 142, 144 (2009); see Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2039–64 (repealed 2003).

²⁷ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.02(b), 1977 Tex. Gen. Laws 2039, 2040–41 (repealed 2003); see Watters, *supra* note 22, at 753.

²⁸ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 4.01, 1977 Tex. Gen. Laws 2039, 2047–48 (repealed 2003); see Keith, *supra* note 15, at 282.

²⁹ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 6.01–.07, 1977 Tex. Gen. Laws 2039, 2048–50 (repealed 2003); see Keith, *supra* note 15, at 291.

³⁰ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 7.01, 1977 Tex. Gen. Laws 2039, 2050 (repealed 2003); see Keith, *supra* note 15, at 295–98.

³¹ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003); see Keith, *supra* note 15, at 302.

³² Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 11.02, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003). The \$500,000 dollar damages cap did "not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury." *Id.* Also, the actual ceiling of the damages cap was tied to the consumer price index and would increase and decrease in proportion to fluctuations in the index. *Id.* sec. 11.04, 1977 Tex. Gen. Laws at 2053.

³³ See *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004). See generally Act of May 30, 1977, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, 2039–64 (repealed 2003).

In the years following its passage, the MLIIA was amended on multiple occasions.³⁴ Despite these additions, repeated challenges to the validity of various MLIIA provisions significantly reduced the scope and extent of the Act's reforms.³⁵ To illustrate, in 1988, the Texas Supreme Court ruled the MLIIA's damages cap unconstitutional as applied to common-law causes of action under the open-courts provision of the Texas Constitution.³⁶ Further limiting the Act, the Court later held that the damages cap was to be applied on a per-defendant basis rather than a per-plaintiff basis.³⁷ Additionally, the MLIIA's alteration of the statute of limitations for minors was ruled unconstitutional.³⁸ This consistent amendment and invalidation ultimately resulted in a patchwork and weakened MLIIA which bore little resemblance to the Keeton Report that had originally inspired it.³⁹

B. History Repeats Itself: The Texas Medical Liability Act

By 2002, the same conditions that spawned the creation of the MLIIA appeared to be repeating themselves.⁴⁰ The number of medical-malpractice insurance carriers had dropped from nineteen to four in just three years, and, as a result, prices within the market were soaring.⁴¹ Reminiscent of the 1970s, high insurance premiums caused many doctors within the state to restrict the scope of their practice or even cease practice entirely.⁴² It was further worried that excessive health-care litigation was exacerbating the situation.⁴³

³⁴ See Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part One*, 36 TEX. TECH L. REV. 1, 4–5 (2005).

³⁵ *Id.*

³⁶ *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988). A later case upheld the validity of the cap as applied to wrongful-death actions. See *Rose v. Doctors Hosp.*, 801 S.W.2d 841, 846–47 (Tex. 1990).

³⁷ *Rose*, 801 S.W.2d at 847.

³⁸ See *Weiner v. Wasson*, 900 S.W.2d 316, 320–21 (Tex. 1995).

³⁹ See Hull et al., *supra* note 34, at 3–5.

⁴⁰ See Patricia F. Miller, Comment, *2003 Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 523–24 (2006).

⁴¹ See Hull et al., *supra* note 34, at 3.

⁴² *Id.* at 13–14. Indeed, the Texas State Board of Medical Examiners reported that in 2003, over two-thirds of Texas counties did not have obstetricians-gynecologists, a majority of counties did not have pediatricians, and almost one-third of counties did not have family physicians. *Id.* at 3.

⁴³ See *id.* at 8; Miller, *supra* note 40, at 523–24.

Given such concerns, political pressure for further tort reform was immense.⁴⁴ In 2002, the Texas Legislature took its first step toward confronting the problem by forming the Nelson Committee to study the causes of rising malpractice insurance rates within the state.⁴⁵ After a series of hearings, the Nelson Committee issued its report, which, like the Keeton Commission before it, found that a key cause of rising premiums was excessive health-care litigation.⁴⁶ Buoyed by these findings, prominent political leaders in Texas, including Governor Perry, Lieutenant Governor Dan Dewhurst, and Speaker of the House Tom Craddick, intensified their calls for tort reform.⁴⁷

This political pressure culminated in 2003 with the 78th Legislature's repeal of the MLIIA⁴⁸ and passage of House Bill 4,⁴⁹ commonly known as the Texas Medical Liability Act.⁵⁰ Much like its predecessor,⁵¹ the reforms of the TMLA, which presently reside in Chapter 74 of the Texas Civil Practice and Remedies Code, include: a \$250,000 cap on non-economic damages in all medical-malpractice cases;⁵² restoration of the MLIIA's

⁴⁴ See Hull et al., *supra* note 34, at 3. Evidencing the perceived severity of the situation, Governor Perry made the issue of tort reform one of the central planks of his successful re-election campaign of 2002. Watters, *supra* note 22, at 754.

⁴⁵ Hull et al., *supra* note 34, at 12.

⁴⁶ *Id.* Specifically, the Nelson report found the frequency of medical-malpractice claims combined with the increasing size of jury awards and defense costs associated with those claims to be major contributing factors in rising malpractice premiums. *Id.* at 26.

⁴⁷ *Id.* at 3, 11.

⁴⁸ Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

⁴⁹ Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, secs. 74.001–.507, 2003 Tex. Gen. Laws 847, 864–82 (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001–.507 (West 2005 & Supp. 2010)).

⁵⁰ See, e.g., Yamada v. Friend, No. 08-0262, 2010 WL 5135334, at *1 (Tex. Dec. 17, 2010); Pallares v. Magic Valley Elec. Coop., 267 S.W.3d 67, 70 (Tex. App.—Corpus Christi 2008, pet. denied); *In re Mem'l Hermann Hosp. Sys.*, 209 S.W.3d 835, 837 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

⁵¹ See Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169 (2005), for an extensive discussion detailing the similarities and differences between the MLIIA and the TMLA.

⁵² TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2005); see Watters, *supra* note 22, at 756–60, for guidance on the actual operation of the TMLA's cap on non-economic damages. Concurrent with its enactment of the TMLA, the 78th Legislature also passed House Joint Resolution 3, a constitutional amendment designed to give the legislature unequivocal authority to limit the recovery of non-economic damages in medical-malpractice actions. See Watters, *supra* note 22, at 759. H.J.R. 3 was presented to the Texas electorate in the form of Proposition 12 and

statute of limitations for minors;⁵³ a limit on attorney contingency fees;⁵⁴ and procedural reforms designed to reduce frivolous lawsuits.⁵⁵ Also similar to the MLIIA, the TMLA's applicability is limited to health-care-liability claims,⁵⁶ defined nearly identically as it was in the MLIIA.⁵⁷

III. HEALTH-CARE-LIABILITY CLAIMS: THE GENERAL FRAMEWORK

Under both the MLIIA and the TMLA, the threshold inquiry regarding the applicability of those acts is whether the cause of action at stake constitutes a health-care-liability claim.⁵⁸ The MLIIA defines *health-care-liability claim* 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.⁵⁹

was subsequently approved, thereby ensuring that the TMLA's damages cap would not suffer the same fate as that of the MLIIA. *See* TEX. CONST. art. III, § 66; *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1990) (holding that a constitutional amendment which gives the legislature clear authority to restrict particular common-law causes of action effectively creates an exception to the open-courts provision of the Texas Constitution); Watters, *supra* note 22, at 759.

⁵³ Compare TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (West 2005), with Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003).

⁵⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 74.507.

⁵⁵ *See id.* §§ 74.351–403.

⁵⁶ *Id.* § 74.001(a)(13).

⁵⁷ *See supra* note 12 and accompanying text.

⁵⁸ *See, e.g., Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 (Tex. Dec. 17, 2010) (applying the TMLA); *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam) (applying the MLIIA).

⁵⁹ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003). The TMLA defines *health-care-liability claim* 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 or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13). The TMLA's most substantive addition to the MLIIA's definition is the inclusion of "or professional or administrative services directly

This definition provides two manners in which a cause of action against a physician or health-care provider may be regarded as a health-care-liability claim: (1) when a cause of action alleges a departure from an accepted standard of medical care or health care (health-care prong); or (2) when a cause of action alleges a departure from an accepted standard of safety (safety prong).⁶⁰ When resolving whether a claim implicates either of these prongs, courts look to the underlying nature of the claim and are not bound by the form of the pleadings.⁶¹

As noted above, in most cases, classifying a particular cause of action as a health-care-liability claim or not will be a relatively intuitive task. For example, allegations of negligence against a doctor arising out of a newborn's death in the course of a hospital delivery would clearly be health-care-liability claims.⁶² However, a claim based on a plaintiff's injury allegedly incurred when the plaintiff stepped on a sharp paint chip while taking a medically prescribed shower at a hospital in preparation for surgery presents a much more difficult question of classification.⁶³ Ultimately, the status of these close calls turns on whether the cause of action is based upon a claimed departure from an accepted standard of health care, medical care, or safety.⁶⁴ This section will explore the Texas Supreme Court's general

related to health care.” See *supra* note 12 and accompanying text. As the Texas Supreme Court has only once addressed whether a claim met the TMLA's definition of *health-care-liability claim*, the primary focus of this Comment will be the Court's treatment of the same definition in the MLIIA. See *Yamada*, 2010 WL 5135334, at *1. However, the Court's pre-TMLA precedent is binding as to the language shared by the MLIIA and TMLA definitions. See *id.* at *3–4 (citing MLIIA precedent to resolve whether a cause of action was a health-care-liability claim under the TMLA). See also Hull et al., *supra* note 51, at 176–78, for a discussion of changes between the MLIIA and TMLA definition of *health-care-liability claim*.

⁶⁰ See *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).

⁶¹ *Id.* at 847, 851 (“We are not bound by the niceties of pleadings, and a mere ‘recasting’ of a health care liability claim based on physician or health care provider negligence in the garb of some other cause of action is not sufficient to preclude the application of [the MLIIA].” (quoting Glen M. Wilkerson et al., *Analysis of Recent Attempts to Assert Medical Negligence Claims “Outside” Texas’s Article 4590i*, 20 REV. LITIG. 657, 679 (2001) (internal quotation marks omitted))); see *Gormley v. Stover*, 907 S.W.2d 448, 450 (Tex. 1995) (per curiam); *Sorokolit v. Rhodes*, 889 S.W.2d 239, 242 (Tex. 1994).

⁶² See *Smalling v. Gardner*, 203 S.W.3d 354, 365 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

⁶³ See *Shults v. Baptist St. Anthony’s Hosp. Corp.*, 166 S.W.3d 502, 503, 505 (Tex. App.—Amarillo 2005, pet. denied).

⁶⁴ See *Diversicare*, 185 S.W.3d at 848.

framework for classifying health-care-liability claims and how the Court has attempted to resolve these close calls.

A. The Health-Care Prong: The Meaning of Accepted Standards of Medical Care or Health Care Prior to Diversicare and Marks

Under the health-care prong, a cause of action is a health-care-liability claim if it is based upon a “claimed departure from accepted standards of medical care or health care.”⁶⁵ The MLIIA defines *health care* as “any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient’s medical care, treatment, or confinement.”⁶⁶ The statute also defines *medical care*,⁶⁷ but as the two definitions are somewhat circular, courts have treated the terms as largely synonymous.⁶⁸

Even prior to *Diversicare* and *Marks*, it was well established that a cause of action alleges a departure from accepted standards of health care or medical care when the act or omission complained of is an inseparable part of the rendition of medical services.⁶⁹ In resolving that inquiry, a key consideration is whether proving the cause of action would require the

⁶⁵ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003); see *Diversicare*, 185 S.W.3d at 848.

⁶⁶ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(2), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003). The TMLA incorporates the MLIIA’s definition of *health care* without change. See Hull et al., *supra* note 51, at 186.

⁶⁷ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(6), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003). The MLIIA defines *medical care* as “any act defined as practicing medicine [by statute], performed or furnished, or which should have been performed, by one licensed to practice medicine in Texas for, to, or on behalf of a patient during the patient’s care, treatment, or confinement.” *Id.* With the exception of updating the statutory cross-reference, the TMLA adopted the MLIIA’s definition of *medical care* wholesale. See Hull et al., *supra* note 51, at 186.

⁶⁸ See, e.g., *Diversicare*, 185 S.W.3d at 848 (“A cause of action alleges a departure from accepted standards of medical care or health care if . . .”). Evidencing the circular nature of the statutory definitions, *health care* is defined by using the term *medical care*. See Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(2), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003); see also TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10) (West 2005).

⁶⁹ See, e.g., *Marks v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010); *Diversicare*, 185 S.W.3d at 848; *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 544 (Tex. 2004); *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995); *Jones v. Khorsandi*, 148 S.W.3d 201, 205 (Tex. App.—Eastland 2004, pet. denied); *Shaw v. BMW Healthcare, Inc.*, 100 S.W.3d 8, 15 (Tex. App.—Tyler 2002, pet. denied); *Williams v. Walker*, 995 S.W.2d 740, 741 (Tex. App.—Eastland 1999, no pet.).

specialized knowledge of a medical expert.⁷⁰ *Garland Community Hospital v. Rose* is illustrative of the Texas Supreme Court's application of the health-care prong.⁷¹

In *Garland*, the Court was asked to resolve whether a cause of action against a hospital for negligent credentialing was a health-care-liability claim under the MLIIA.⁷² Although such an action has not been formally recognized by the Texas Supreme Court,⁷³ the claim is based on an alleged breach of a hospital's duty to its patients to exercise reasonable care in the selection of its medical staff and in granting specialized privileges.⁷⁴ The facts underlying the negligent credentialing action in *Garland* stemmed from a series of cosmetic surgeries performed by Dr. Fowler of Garland Community Hospital on the plaintiff, Rose, which had allegedly resulted in scarring and other permanent injuries.⁷⁵ Rose initially sued only Dr. Fowler, but she later amended her petition to include the negligent-credentialing claim against the Hospital after she learned that similar complaints had been previously lodged against Dr. Fowler.⁷⁶

Turning to the question of the MLIIA's applicability, the Court held that a cause of action for negligent credentialing was a health-care-liability claim because the action was based on an alleged departure from an accepted standard of health care.⁷⁷ The Court reasoned that a hospital's credentialing activities were an inseparable part of the hospital's rendition

⁷⁰ See *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam) ("In enacting [the MLIIA], the Legislature intended health care liability claims to be scrutinized by an expert or experts before the suit can proceed."); *Garland Cmty. Hosp.*, 156 S.W.3d at 544.

⁷¹ 156 S.W.3d at 541.

⁷² *Id.* at 542. Under the TMLA, a cause of action for negligent credentialing would almost certainly be a health-care-liability claim. See *Hull et al.*, *supra* note 51, at 176–78.

⁷³ *Garland Cmty. Hosp.*, 156 S.W.3d at 542 n.1.

⁷⁴ See *Park N. Gen. Hosp. v. Hickman*, 703 S.W.2d 262, 265 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); see also *Lopez v. Cent. Plains Reg'l Hosp.*, 859 S.W.2d 600, 604 (Tex. App.—Amarillo 1993, no writ) (holding that a material issue of fact existed as to whether the hospital negligently credentialed a doctor); accord, e.g., *Pedroza v. Bryant*, 677 P.2d 166, 168–70 (Wash. 1984); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 164 (Wis. 1981). See generally *St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 509–10 (Tex. 1997) (Phillips, C.J., dissenting) (collecting authority recognizing the existence of a hospital's duty to exercise reasonable care in the selection of its medical staff).

⁷⁵ *Garland Cmty. Hosp.*, 156 S.W.3d at 542.

⁷⁶ *Id.*

⁷⁷ *Id.* at 545–46.

of medical care.⁷⁸ To support its conclusion, the Court noted that a hospital's core function is to provide a location where doctors can dispense health services.⁷⁹ Accordingly, a hospital's decision of which doctors to credential is a necessary component in the quality of the hospital's delivery of health services and is thus an inseparable part of the hospital's rendition of health care.⁸⁰ The Court also highlighted that a claim of negligent credentialing involves a specialized standard of care outside the ordinary experience of jurors who would have little familiarity with the procedures utilized by hospitals in the credentialing process.⁸¹ Therefore, the need for expert testimony in establishing a claim of negligent credentialing favored the Court's conclusion that Rose had asserted a health-care-liability claim.⁸²

B. The Safety Prong: The Meaning of Accepted Standards of Safety Prior to Diversicare and Marks

In addition to the health-care prong, a cause of action against a health-care provider or physician will also be a health-care-liability claim if it is based upon an alleged departure from an accepted standard of safety.⁸³ Unlike *medical care* or *health care*, both the MLIIA and the TMLA fail to specifically define the meaning of *safety*.⁸⁴ Both acts instruct that the term is to be interpreted consistent with its meaning at common law.⁸⁵

Prior to its decisions in *Diversicare* and *Marks*, the Texas Supreme Court did not have occasion to interpret the meaning of the safety prong. However, the widely held view of the Texas appellate courts was that *safety* within the MLIIA meant safety as it relates to health care.⁸⁶ Thus, to be a health-care-liability claim under the safety prong, a cause of action would have to allege a departure from an accepted standard of safety within the

⁷⁸ *Id.* at 545.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 546 (quoting *Mills v. Angel*, 995 S.W.2d 262, 275 (Tex. App.—Texarkana 1999, no pet.)).

⁸² *Id.*

⁸³ See *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).

⁸⁴ *Id.* at 855.

⁸⁵ See TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) (West 2005) (TMLA); Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(b), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003) (MLIIA).

⁸⁶ See *Diversicare*, 185 S.W.3d at 866–67 (O'Neill, J., dissenting) (collecting authority).

health-care industry.⁸⁷ The Texas Supreme Court's treatment of the safety prong will be discussed in depth below.⁸⁸

C. *The Artful-Pleading Doctrine*

Related to the Court's oft-repeated statement that health-care-liability claims cannot be recast as other causes of action,⁸⁹ the Court has similarly noted that a plaintiff may not use artful pleading to avoid the application of the MLIIA.⁹⁰ Thus, if a cause of action is determined to be a health-care-liability claim, then any additional causes of action based upon the exact same act or omission underlying the first will also be health-care-liability claims.⁹¹

For example, in *Yamada v. Friend*, the Friends sued the City of North Richland Hills and Dr. Roy Yamada for the death of their twelve-year-old daughter, Sarah, who died after collapsing at a water park owned by the city.⁹² Their lawsuit centered upon the defendants' failure to use an automatic external defibrillator in attending to Sarah.⁹³ As to Dr. Yamada specifically, the Friends contended that he had negligently advised the water park about the proper placement of defibrillators.⁹⁴ The Friends asserted that through his single act of deficient consultation, Dr. Yamada had breached two duties: (1) a duty to exercise ordinary care; and (2) a

⁸⁷ See *Healthcare Ctrs. of Tex., Inc. v. Rigby*, 97 S.W.3d 610, 621 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); *Zuniga v. Healthcare San Antonio, Inc.*, 94 S.W.3d 778, 783 (Tex. App.—San Antonio 2002, no pet.); *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 673 (Tex. App.—Dallas 2001, no pet.) (“Although the Act includes breaches of accepted standards of safety within the definition of a health care liability claim, the term ‘safety’ cannot be read in isolation. The breach must be of an accepted standard of safety within the health care industry.” (internal citation omitted)); *Rogers v. Crossroads Nursing Serv., Inc.*, 13 S.W.3d 417, 419 (Tex. App.—Corpus Christi 1999, no pet.) (“[T]he only reasonable interpretation is that a departure from accepted standards of safety means safety in the diagnosis, care or treatment.”).

⁸⁸ See *infra* Parts IV–V.

⁸⁹ See *supra* note 61 and accompanying text.

⁹⁰ See, e.g., *Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 (Tex. Dec. 17, 2010); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 668 (Tex. 2010) (Johnson, J., concurring); *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 464 (Tex. 2008); *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004).

⁹¹ See, e.g., *Yamada*, 2010 WL 5135334, at *3.

⁹² *Id.* at *1.

⁹³ *Id.*

⁹⁴ *Id.*

duty to act as an emergency-medicine physician of reasonable and ordinary prudence.⁹⁵

On appeal before the Texas Supreme Court, the Friends conceded that their second claim related to Dr. Yamada's alleged breach of his duty of medical care was a health-care-liability claim falling within the TMLA.⁹⁶ However, the Friends argued that their first claim for simple negligence was not a health-care-liability claim because the breach alleged by that action related only to Dr. Yamada's general duty of ordinary care and not his professional duties as a medical doctor.⁹⁷ Utilizing the artful-pleading doctrine, the Court disagreed and ruled that the Friends' simple negligence action was a health-care-liability claim.⁹⁸ The Court noted that both of the Friends' claims were based on the exact same allegedly negligent act of Dr. Yamada and therefore could not be "split into health care and non-health care claims by pleading that [Dr. Yamada's] actions violated different standards of care."⁹⁹

IV. *DIVERSICARE* AND *MARKS* AND THEIR IMPACT ON WHAT CONSTITUTES A HEALTH-CARE-LIABILITY CLAIM UNDER THE MLIIA AND THE TMLA

Diversicare and *Marks* represent the Texas Supreme Court's two most recent cases addressing the construction and application of the MLIIA's definition of *health-care-liability claim*.¹⁰⁰ Both highly divided decisions, these cases demonstrate the Court's sharp internal disagreement over of the meaning and scope of that term in the context of cases which could arguably be construed as asserting premises-liability claims.¹⁰¹ This section will explore the reasoning of these two cases and then outline their likely effect on the meaning of *health-care-liability claim*. Because each of *Marks* and *Diversicare*'s opinions, concurrences, and dissents underlies this Comment's proposed framework in Part V, each opinion will be examined in depth.

⁹⁵ *Id.*

⁹⁶ *Id.* at *4.

⁹⁷ *Id.* at *3.

⁹⁸ *See id.* at *4.

⁹⁹ *Id.* at *3.

¹⁰⁰ *See generally* *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005); *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658 (Tex. 2010).

¹⁰¹ *See generally* *Diversicare*, 185 S.W.3d 842; *Marks*, 319 S.W.3d 658.

A. Diversicare General Partner, Inc. v. Rubio

1. The Facts and History of the Case

From 1994 to 1999, Maria Rubio was a resident of the Goliad Manor nursing home, a limited partnership comprised of a host of entities (collectively “Diversicare”).¹⁰² In 1999, Rubio’s daughter, as next friend, brought suit against Diversicare for injuries that Rubio sustained in two separate falls while she was a resident of Goliad Manor.¹⁰³ Later, in 2000, Rubio amended her petition to include various claims arising from the alleged failure of Diversicare to adequately supervise Rubio and protect her from a series of sexual assaults by another resident—assaults which had allegedly occurred between October 1994 and April 1995.¹⁰⁴ Specifically, her allegations were “that Diversicare failed to: (1) implement safety precautions to protect the safety of its residents; (2) protect her from repeated acts of sexual abuse and assault by others including other residents; and (3) establish appropriate corporate safety, training and staffing policies.”¹⁰⁵

After the amendment, Diversicare moved for summary judgment against all of Rubio’s claims related to the sexual assaults on the grounds that they were health-care-liability claims and thus barred by the MLIIA’s two-year statute of limitations.¹⁰⁶ The trial court severed those claims and then granted Diversicare’s motion.¹⁰⁷ The court of appeals reversed, holding that Rubio’s claims arising from the sexual assaults were claims for common-law negligence outside the scope of the MLIIA.¹⁰⁸ However, on review, the

¹⁰² *Diversicare*, 185 S.W.3d at 845.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 857 n.1 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment) (internal quotation marks omitted).

¹⁰⁶ *Id.* at 845; see Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 10.01, 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003) (MLIIA statute of limitations). In *Diversicare*, the parties agreed that Rubio was mentally incapacitated for the entirety of her residence at Goliad Manor. *Diversicare*, 185 S.W.3d at 847. Unlike the general statute of limitations contained in the Texas Civil Practice and Remedies Code, the MLIIA does not provide for tolling based on mental incapacity. *Id.*

¹⁰⁷ *Diversicare*, 185 S.W.3d at 845.

¹⁰⁸ *Id.* Prior to *Diversicare*, a number of Texas courts of appeal had determined that claims based on one patient’s assault of another were ordinary negligence claims and not subject to the MLIIA. See *Healthcare Ctrs. of Tex., Inc. v. Rigby*, 97 S.W.3d 610, 616–17 (Tex. App.—

Texas Supreme Court reversed in a 6-3 decision and held that Rubio's causes of action were health-care-liability claims that were time-barred under the MLIIA.¹⁰⁹ In so deciding, the justices in the majority disagreed as to whether Rubio's claims implicated the health-care prong or the safety prong, while the dissenting justices argued that neither prong was at stake.¹¹⁰

2. *Diversicare's* Treatment of the Health-Care Prong

Under the health-care prong, five justices in the majority agreed that Rubio's claim alleged a breach of accepted standards of health care.¹¹¹ Disagreeing, one concurring justice and three dissenting justices would have held that Rubio's cause of action presented an ordinary premises-liability claim.¹¹²

a. *The Majority's Application of the Health-Care Prong*

Utilizing the established framework for determining whether a cause of action is based on an alleged breach of an accepted standard of medical care or health care,¹¹³ the majority concluded that Rubio's negligence action based on inadequate supervision was a health-care-liability claim.¹¹⁴ It reasoned that a nursing home's decision on the amount and frequency of professional supervision and monitoring was intimately intertwined with the nursing home's judgments regarding the administration of its health-care services.¹¹⁵ For example, a patient with a particular psychiatric

Houston [14th Dist.] 2002, pet. denied); *Zuniga v. Healthcare San Antonio, Inc.*, 94 S.W.3d 778, 780 (Tex. App.—San Antonio 2002, no pet.); *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 670 (Tex. App.—Dallas 2001, no pet.); *Sisters of Charity of the Incarnate Word v. Gobert*, 992 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

¹⁰⁹ *Diversicare*, 185 S.W.3d at 844, 846, 855.

¹¹⁰ See *id.* at 849; *id.* at 857 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 865 (O'Neill, J., dissenting).

¹¹¹ See *id.* at 849 (majority opinion).

¹¹² See *id.* at 857 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 865 (O'Neill, J., dissenting).

¹¹³ See *supra* Part III.A.

¹¹⁴ See *Diversicare*, 185 S.W.3d at 849–50.

¹¹⁵ See *id.* at 850 (“The nature and intensity of care and treatment, including professional supervision, monitoring, assessment, quantities and types of medication, and other medical treatment are judgments made by professionals trained and experienced in treating and caring for patients and the patient populations in their health care facilities.”).

disorder might need more supervision than another, and such a judgment would require the use of specialized medical knowledge to figure the appropriate level of supervision.¹¹⁶ On this basis, the majority concluded that Diversicare's supervision and protection of Rubio were inseparably related to its rendition of health-care services, and, thus, allegations that Diversicare had inadequately completed those tasks were health-care-liability claims.¹¹⁷

As another factor in its favor, the majority also noted that expert testimony would be required to establish Rubio's claim that Diversicare failed to provide an appropriate amount of supervision.¹¹⁸ To the majority, it is outside the common knowledge of the general public to understand the appropriate level of supervision necessary to keep residents adequately protected.¹¹⁹ However, despite its holding, the majority did suggest that under the proper set of circumstances, a premises-liability claim falling outside the MLIIA was possible.¹²⁰

b. Chief Justice Jefferson's Application of the Health-Care Prong

Although Chief Justice Jefferson agreed with the majority to the extent that Rubio's case implicated the safety prong,¹²¹ he disagreed with the majority's application of the health-care prong.¹²² To the Chief Justice, Rubio's cause of action for negligent supervision was instead an ordinary premises-liability claim.¹²³

The source of the Chief Justice's divergence from the majority was his recognition that a nursing home owes two separate, yet concurrent, duties to

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.* at 851–52.

¹¹⁹ See *id.* at 851 (“It is not within the common knowledge of the general public to determine the ability of patients in weakened conditions to protect themselves, nor whether a potential target of an attack in a healthcare facility should be better protected and by what means.”).

¹²⁰ See *id.* at 854 (“There may be circumstances that give rise to premises liability claims in a healthcare setting that may not be properly classified as health care liability claims, but those circumstances are not present here.”).

¹²¹ See *id.* at 855 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment); *infra* Part IV.A.3.b.

¹²² See *Diversicare*, 185 S.W.3d at 855 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment).

¹²³ *Id.* at 857.

its patients: a duty of ordinary care in the maintenance of its premises and a professional duty of medical care in the administration of its professional health services.¹²⁴ These concurrent duties are derived from a nursing home's status as both a health-care provider and a residential facility.¹²⁵ As such, Chief Justice Jefferson reasoned that because Rubio's allegations regarding her supervision "stem from the nursing home's duty as a premises owner rather than as a health care provider, [they] thus are classic premises liability claims."¹²⁶

c. The Dissent's Application of the Health-Care Prong

Like the Chief Justice,¹²⁷ the three justices of the dissent also felt that Rubio's claims were more properly characterized as premises-liability claims.¹²⁸ At the outset of her opinion, Justice O'Neill overviewed her guiding principle in construing and applying the MLIIA: "[T]he Legislature's purpose in enacting the MLIIA may be thwarted if courts construe the MLIIA's definition of 'health care liability claim' either too broadly or too narrowly."¹²⁹ She noted that a determination that a plaintiff's pleadings allege a breach of the professional medical duty of care would likely result in defense and indemnification costs falling under a health-care provider's malpractice insurance policy rather than its general insurance policy.¹³⁰ As such, sweeping more causes of action within the ambit of *health-care-liability claim* would result in a greater number of malpractice

¹²⁴ See *id.* at 857–58.

¹²⁵ See *id.* at 858; *Charrin v. Methodist Hosp.*, 432 S.W.2d 572, 574–75 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ) ("A patient accepted by a hospital enjoys the status of an invitee or business visitor entitled to the exercise of ordinary care by the hospital to keep its premises in reasonably safe condition for the expected use. Thus, the hospital as occupier of the premises has a duty to keep them in a reasonably safe condition for its invitees, to warn or protect its invitees from any dangers of which it knows or should know in the exercise of ordinary care.") (internal citation omitted)).

¹²⁶ See *Diversicare*, 185 S.W.3d at 858 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment).

¹²⁷ See *id.* at 855.

¹²⁸ *Id.* at 861 (O'Neill, J., dissenting).

¹²⁹ *Id.* at 862.

¹³⁰ See *id.* at 862 (citing TEX. INS. CODE ANN. art. 21.49-3, § (2)(1) (West Supp. 2010) (defining *medical-liability insurance* as covering claims "arising out of the death or injury of any person as the result of negligence in rendering or the failure to render professional service by a health care provider"))).

insurance payouts and would in turn increase the cost of malpractice insurance¹³¹—the exact opposite goal of the MLIIA.¹³²

With the policy underlying the MLIIA in mind, the dissent turned to the question of classifying Rubio's allegations, which it construed as asserting two separate claims: (1) a claim of understaffing; and (2) a premises liability claim.¹³³ As to the first, the dissent agreed with the majority that decisions regarding staffing and supervision required specialized medical judgment; thus, a claim related to staffing was a health-care-liability claim.¹³⁴ In regards to the second, the dissent argued that Rubio's allegation that Diversicare failed to use ordinary care to protect her from sexual violence was a premises-liability claim that existed independent of her first claim.¹³⁵ The dissent reasoned that because Diversicare's acts in securing its premises from known sexual predators did not require the use of medical judgment, Rubio's second cause of action was not a health-care-liability claim, but, rather, a premises-liability claim.¹³⁶

3. *Diversicare's* Treatment of the Safety Prong

Diversicare presented the first opportunity for the Texas high court to address when a cause of action alleged a departure from an accepted standard of safety.¹³⁷ Like the health-care prong, the justices largely disagreed as to whether Rubio's allegations met this standard.¹³⁸

¹³¹ See *id.* at 863.

¹³² See *supra* Part II.A.

¹³³ See *Diversicare*, 185 S.W.3d at 864–65 (O'Neill, J., dissenting).

¹³⁴ See *id.* at 864.

¹³⁵ See *id.* at 865.

¹³⁶ See *id.* In response to the dissent, the majority argued that the splitting of Rubio's allegations into both health-care- and premises-liability claims was not permissible under the artful-pleading doctrine. See *id.* at 854 (majority opinion). Subsequent to its decision in *Diversicare*, the Court in *Yamada* held that the exact same allegedly negligent act or omission cannot produce both health-care and non-health-care claims. See *Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 (Tex. Dec. 17, 2010); *supra* Part III.C. Assuming that Rubio's claims were all derived from the exact same act or omission, then the majority's argument in *Diversicare* would be persuasive under *Yamada*. See *Yamada*, 2010 WL 5135334, at *3. However, to the extent Rubio's individual allegations were each based on separate acts or omissions, the majority's "classification by association" was an erroneous application of the artful-pleading doctrine. See *infra* Part V.D.

¹³⁷ See *Diversicare*, 185 S.W.3d at 844–45, 855.

¹³⁸ See *id.* at 866–67 (O'Neill, J., dissenting).

a. *The Majority's Construction and Application of the Safety Prong*

In one paragraph, the majority held that Rubio's claims, in addition to implicating the health-care prong, were also health-care-liability claims because they alleged departures from accepted standards of safety.¹³⁹ After first noting that the MLIIA left *safety* undefined, the Court applied the commonly understood definition of *safety* as being "untouched by danger; not exposed to danger; secure from danger, harm or loss."¹⁴⁰ The Court then posited that "[b]ecause the supervision of Rubio and the patient who assaulted her are inseparable from the accepted standards of safety applicable to the nursing home . . . Rubio's claims are [health-care-liability claims] under the safety element of the statute."¹⁴¹

b. *Chief Justice Jefferson's Construction of Safety*

Concurring, Chief Justice Jefferson agreed with the majority that Rubio's claims alleged a departure from accepted standards of safety but disagreed on the majority's construction of that term, which he regarded as too narrow.¹⁴² In his opinion, contrary to the Texas courts of appeal which had previously interpreted *safety* to mean safety as it relates to the rendition of health care,¹⁴³ Chief Justice Jefferson argued that *safety* should be construed without the limitation that a claim implicating the safety prong must in some way relate to health care.¹⁴⁴ Under this construction, any claim against a health-care provider which alleged a breach of standards of safety would be a health-care-liability claim regardless of whether the

¹³⁹ See *id.* at 855.

¹⁴⁰ *Id.* (quoting BLACK'S LAW DICTIONARY 1336 (6th ed. 1990)). Under the TMLA and MLIIA, terms left undefined by the statute are to be defined according to their meaning as understood at common law. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b) (West 2005) (TMLA); Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.02(b), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003) (MLIIA).

¹⁴¹ *Diversicare*, 185 S.W.3d at 855 ("Professional supervision, monitoring, and protection of the patient population necessarily implicate the accepted standards of safety under the MLIIA, just as those duties in this case are included in the term health care.").

¹⁴² *Id.* at 855, 860–61 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment).

¹⁴³ See *id.* at 860; *supra* note 87 and accompanying text.

¹⁴⁴ *Diversicare*, 185 S.W.3d at 860–61 ("Safety is commonly understood to mean protection from danger. The specific source of that danger, be it a structural defect, criminal assault, or careless act, is without limitation." (internal citation omitted)).

unsafe condition was in any way related to the rendition of health-care services.¹⁴⁵ According to the concurrence, such an interpretation is most faithful to the MLIIA's plain language.¹⁴⁶ Therefore, because Rubio's allegations centered on Diversicare's failure to keep her safe from sexual assault, the concurrence concluded that Rubio had presented health-care-liability claims under the safety prong.¹⁴⁷

c. The Dissent's Construction of Safety

Contrary to Chief Justice Jefferson, the three justices of the dissent argued that *safety* within the MLIIA's definition of *health-care-liability claim* should be interpreted to mean safety as it relates to health care.¹⁴⁸ Under this construction, a cause of action would implicate the safety prong only if the allegedly unsafe condition related to the health-care provider's rendition of medical services.¹⁴⁹ To the dissent, such an interpretation was most consonant with the provision of the Code Construction Act¹⁵⁰ requiring that terms in a statute must be read in the context of the statute as a whole.¹⁵¹

In further support of its interpretation, the dissent noted that "[t]he [TMLA] now provides that all claims '... [alleging] departure[s] from accepted standards of medical care, or health care, or safety or professional or administrative services *directly related to health care*' are included in the definition of health care liability claim."¹⁵² The dissent reasoned that the TMLA's alteration of the MLIIA's definition to include "directly related to health care" indicated that the legislature intended that under the MLIIA, an

¹⁴⁵ *Id.* at 861.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 866.

¹⁴⁹ See *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 673 (Tex. App.—Dallas 2001), *overruled by* *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005); *Rogers v. Crossroads Nursing Serv., Inc.*, 13 S.W.3d 417, 418–19 (Tex. App.—Corpus Christi 1999, no pet.).

¹⁵⁰ TEX. GOV'T CODE ANN. §§ 311.001–.034 (West 2005 & Supp. 2010).

¹⁵¹ See *Diversicare*, 185 S.W.3d at 866 (citing TEX. GOV'T CODE ANN. § 311.011 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.")).

¹⁵² *Id.* at 867 (emphasis in original) (quoting TEX. CIV. PRAC & REM. CODE ANN. § 74.001(a)(13) (West 2005)).

alleged breach of a standard of safety must relate to health care in order to be a health-care-liability claim.¹⁵³

B. Marks v. St. Luke's Episcopal Hospital

Described as the most divided case of the 2010 term “by a long shot,”¹⁵⁴ *Marks v. St. Luke's Episcopal Hospital* represents the Texas Supreme Court's latest foray into the construction and application of the MLIIA's definition of *health-care-liability claim*.¹⁵⁵ In a dizzying array of opinions, concurrences, and dissents, the justices sparred over when a cause of action alleges a breach of an accepted standard of safety and whether that standard was met on the facts of *Marks*.¹⁵⁶ The following subparts will navigate those opinions in an attempt to resolve what the case reveals about the high court's interpretation and application of the health-care and safety prongs.

1. The Facts and History of the Case

Irving Marks was a patient at St. Luke's Episcopal Hospital where he underwent back surgery.¹⁵⁷ Seven days after his surgery, Marks fell in his hospital room.¹⁵⁸ He alleged that the fall was caused by his hospital bed's

¹⁵³ *Id.* (citing *Alexander v. Alexandria*, 9 U.S. (5 Cranch) 1, 7–8 (1809) (concluding that the subsequent amendments of a legislative body “show the sense in which the legislature employed doubtful phrases previously used,” and that courts should accept this “legislative sense of its own language” as “a direction to the courts in expounding the provisions of the law.”)).

¹⁵⁴ See Mary Alice Robbins, *High Court Flip-Flops in Case Involving Hospital Bed Footboard*, TEXAS LAWYER, Sept. 6, 2010, at 1.

¹⁵⁵ See *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 662–63 (Tex. 2010).

¹⁵⁶ See generally *id.* The case head notes highlighting the breakdown of the justices' opinions reveal the fractured nature of *Marks*:

Justice MEDINA delivered the Court's judgment and an opinion, in which Justice HECHT joined, and in which Justice WAINWRIGHT, Justice JOHNSON and Justice WILLET joined as to Parts I & IV. . . . Justice WAINWRIGHT filed a concurring opinion. Justice JOHNSON filed a concurring opinion, in which Justice WILLETT joined, and in which Justice HECHT joined as to Parts II and III-A, and in which Justice WAINWRIGHT joined as to Parts I, II, and III-A. Chief Justice JEFFERSON filed an opinion concurring in part and dissenting in part, in which Justice GREEN, Justice GUZMAN, and Justice LEHRMANN joined. Justice GUZMAN filed an opinion concurring in part and dissenting in part.

Id. at 659, 666.

¹⁵⁷ *Id.* at 660.

¹⁵⁸ *Id.*

footboard, which collapsed when he attempted to use it to push himself from the bed into a standing position.¹⁵⁹ Marks then sued the hospital, asserting that its negligence contributed to his fall.¹⁶⁰ Specifically, he alleged that the hospital was negligent in: (1) failing to train and supervise its nursing staff properly; (2) failing to provide him with the assistance he required for daily living activities; (3) failing to provide him with a safe environment in which to recover; and (4) providing him a hospital bed that had been negligently assembled and maintained by the hospital's employees.¹⁶¹

On initial consideration of the case in 2009, the Texas Supreme Court held in a 5-4 decision that Marks's first three allegations were health-care-liability claims but that his fourth allegation was not.¹⁶² However, in a rare maneuver, 364 days after that decision, the Court granted the hospital's motion for rehearing, withdrew its 2009 opinion and judgment, and then substituted a new 5-4 decision concluding that all of Marks's claims were in fact health-care-liability claims subject to the MLIIA.¹⁶³

2. Marks's Application of the Health-Care Prong

Within *Marks*, there was no dispute over the proper framework for determining whether a cause of action implicates the health-care prong.¹⁶⁴ The case reaffirmed the rule that a cause of action alleges a departure from an accepted standard of health care if the act or omission complained of is

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 660. Further evidencing *Marks*'s divisive nature is its tortuous procedural history. The trial court determined that all of Marks's causes of action were health-care-liability claims and dismissed the case for failure to file an expert report as required by the MLIIA. *Id.* at 660–61. The court of appeals then reversed, holding that Marks had presented premises-liability claims. *See Marks v. St. Luke's Episcopal Hosp.*, 177 S.W.3d 255, 259 (Tex. App.—Houston [1st Dist.] 2005, pet. granted), *vacated*, 193 S.W.3d 575 (Tex. 2006). The Texas Supreme Court then granted review and without reference to the merits of the case remanded it to the court of appeals for reconsideration in light of *Diversicare*. *See St. Luke's Episcopal Hosp. v. Marks*, 193 S.W.3d 575, 575 (Tex. 2006). A divided court of appeals subsequently held that Marks had presented only health-care-liability claims. *See Marks v. St. Luke's Episcopal Hosp.*, 229 S.W.3d 396, 402 (Tex. App.—Houston [1st Dist.] 2007), *aff'd*, 319 S.W.3d 658 (Tex. 2010).

¹⁶² *See Marks*, 319 S.W.3d at 676, 680–81.

¹⁶³ *See id.* at 659–60; Robbins, *supra* note 154, at 1. According to Texas Supreme Court clerk Blake Hawthorne, between 1999 and 2008, the Court granted rehearings and changed its first decision in only 0.5% of its cases. Robbins, *supra* note 154, at 14.

¹⁶⁴ *See Marks*, 319 S.W.3d at 670 (Johnson, J., concurring).

an inseparable part of the rendition of health-care services.¹⁶⁵ Applying this rule, all nine justices agreed that Marks's first three allegations¹⁶⁶ were health-care-liability claims.¹⁶⁷

The plurality opinion regarded the fourth claim, which alleged that the hospital's employees were negligent in the construction of Marks's bed, as implicating only the safety prong.¹⁶⁸ Four concurring justices, however, disagreed, arguing that Marks's fourth allegation was a health-care-liability claim because it alleged a departure from an accepted standard of health care.¹⁶⁹ They reasoned that it was undisputed that Marks was recuperating in his bed for necessary medical reasons.¹⁷⁰ As such, "[If] his condition made hospitalization medically necessary, then it logically follows that the hospital had to provide him with a hospital bed. And, if a hospital bed was necessary . . . it follows that the bed was an integral and inseparable part of his care and treatment."¹⁷¹ Therefore, the concurring justices concluded that Marks's fourth allegation implicated the health-care prong.¹⁷²

3. Marks's Construction and Application of the Safety Prong

The portions of *Marks* that drew the most heated debate were the issues of when a cause of action alleges a departure from an accepted standard of safety and whether Marks's allegation that the hospital's employees had negligently assembled his bed met that standard.¹⁷³ As in *Diversicare*,¹⁷⁴ the justices disagreed as to whether a cause of action implicating the safety prong must allege a breach of an accepted standard of safety directly related

¹⁶⁵ See *id.* (citing *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005)); *Walden v. Jeffery*, 907 S.W.2d 446, 448 (Tex. 1995).

¹⁶⁶ *Marks*, 319 S.W.3d at 660. These claims were that the hospital was negligent in: (1) failing to train and supervise its nursing staff properly; (2) failing to provide him with the assistance he required for daily living activities; and (3) failing to provide him with a safe environment in which to recover. *Id.*

¹⁶⁷ See *id.* at 661–62; *id.* at 668 (Johnson, J., concurring); *id.* at 676 n.2 (Jefferson, C.J., concurring and dissenting).

¹⁶⁸ *Id.* at 663 (plurality opinion).

¹⁶⁹ *Id.* at 670 (Johnson, Willett, Hecht, Wainwright, JJ., concurring).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 672.

¹⁷³ See *id.* at 663; *id.* at 667 (Wainwright, J., concurring); *id.* at 673 (Johnson, J., concurring); *id.* at 675 (Jefferson, C.J., concurring and dissenting).

¹⁷⁴ See *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848, 854, 855 (Tex. 2005).

to health care or, instead, merely a breach of an accepted standard of safety in the broad, unrestrained sense of the term.¹⁷⁵

a. The Plurality and Dissent's Construction and Application of the Safety Prong

Further developing the *Diversicare* dissent's construction of the safety prong,¹⁷⁶ six justices of the *Marks* Court agreed that "standards of safety must be construed in light of the other standards of medical and health care, standards that are directly related to the patient's care and treatment."¹⁷⁷ Thus, a cause of action would implicate the safety prong only when it alleged a breach of an accepted standard of safety directly related to medical or health care.¹⁷⁸ To apply this standard, the plurality and dissent noted that "an accepted standard of safety is implicated under the MLIIA when the unsafe condition or thing, causing injury to the patient, is an inseparable or integral part of the patient's care or treatment."¹⁷⁹ In so deciding, the plurality and dissent reaffirmed the proposition of *Diversicare* that "not every accidental injury to a patient in a health care setting [will] constitute a health care liability claim under [the MLIIA]."¹⁸⁰

To reach its conclusion, the plurality utilized several canons of construction.¹⁸¹ It observed that the meaning of *safety* must be read in the context of the entirety of the MLIIA, and that under the principle of

¹⁷⁵ *Marks*, 319 S.W.3d at 664; *id.* at 673 (Johnson, J., concurring); *id.* at 674 (Jefferson, C.J., concurring and dissenting).

¹⁷⁶ *See Diversicare*, 185 S.W.3d 866–67 (O'Neill, J., dissenting); *supra* Part IV.A.3.c.

¹⁷⁷ *See Marks*, 319 S.W.3d at 664.

¹⁷⁸ *See id.* at 664.

¹⁷⁹ *Id.*; *see id.* at 676 (Jefferson, C.J., concurring and dissenting) ("Because I do not believe that the bed's footboard was integral to or inseparable from the health care services St. Luke's provided to Marks, I respectfully dissent from the Court's judgment affirming the court of appeals' judgment on this ground.").

¹⁸⁰ *See id.* at 664 (plurality opinion); *id.* at 675 (Jefferson, C.J., concurring and dissenting).

¹⁸¹ *See id.* at 664 (plurality opinion). For reference, the MLIIA defines *health-care-liability claim* 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.

Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003).

ejusdem generis, interpretations of broad terms following specific language should be construed consonant with the specific language.¹⁸² It also highlighted that an interpretation of *safety* as encompassing all negligent injuries would effectively subsume the MLIIA's more specific standards of medical care and health care and render them a nullity.¹⁸³ To the plurality, each of these principles favored its more narrow reading of *safety*.¹⁸⁴

While the justices of the plurality and dissent were united as to the proper standard for determining when a cause of action alleged a breach of an accepted standard of safety, there was bitter disagreement over the application of that standard to the facts of *Marks*.¹⁸⁵ Addressing Marks's fourth claim regarding the allegedly negligent construction of his hospital bed, the plurality contended:

At its core, this claim alleges the failure of a piece of equipment provided during Marks's inpatient care. Medical equipment specific to a particular patient's care or treatment is an integral and inseparable part of the health care services provided. When the unsafe or defective condition of that equipment injures the patient, the gravamen of the resulting cause of action is a health care liability claim.¹⁸⁶

As such, the plurality held that Marks's fourth claim alleged a breach of accepted standards of safety and was a health-care-liability claim.¹⁸⁷

Taking issue with what it regarded as conclusory analysis, the dissenting justices vehemently contested the plurality's conclusion that the hospital bed footboard was integral or inseparable from the hospital's rendition of medical services.¹⁸⁸ In the view of the dissent, Marks's fourth claim was

¹⁸² See *Marks*, 319 S.W.3d at 663. Thus, under ejusdem generis, a broad term such as *safety* should be construed in light of the more specific terms *medical care* and *health care* that precede it. See *id.* at 664.

¹⁸³ See *id.* at 663–64 (“We do ‘not read statutory language to be pointless if it is reasonably susceptible of another construction.’” (quoting *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995))).

¹⁸⁴ See *id.* at 664.

¹⁸⁵ See *id.*; *id.* at 675 (Jefferson, C.J., concurring and dissenting).

¹⁸⁶ *Id.* at 664 (plurality opinion). The quoted text represents the entirety of the plurality's analysis regarding the application of the safety prong. See *id.*

¹⁸⁷ See *id.* at 664.

¹⁸⁸ See *id.* at 675 (Jefferson, C.J., concurring and dissenting) (“[T]he Court must explain how a piece of wood at the end of a bed is integral to medical care.”).

clearly a premises-liability claim.¹⁸⁹ To bolster his argument, Chief Justice Jefferson took the unusual step of appending the Court's contrary 2009 decision to his dissent.¹⁹⁰ In his words: "The Court's previous opinion describes in great detail why the footboard was *not* integral to St. Luke's delivery of health care services to Marks."¹⁹¹

Relying on the 2009 majority opinion,¹⁹² the dissent accused the plurality of holding in word only that a cause of action must allege a breach of accepted standards of safety related to health care in order to implicate the safety prong, but in reality applying a definition of safety without limitation¹⁹³—a construction advocated by Chief Justice Jefferson in *Diversicare*.¹⁹⁴ To the dissent, Marks's complaint regarding the construction of the hospital bed footboard had nothing to do with the scope or degree of the medical services Marks received, nor did it involve professional medical judgment about how the bed's configuration might aid in his treatment.¹⁹⁵ Moreover, Chief Justice Jefferson highlighted that the Court's 2009 opinion found that the construction of Marks's bed was solely the responsibility of the hospital's maintenance staff.¹⁹⁶ Thus, "Presumably, tasks performed by the maintenance staff do not require any specialized health care knowledge, and evaluation of whether those tasks were performed negligently would not require expert medical testimony."¹⁹⁷ Accordingly, the dissent concluded that the hospital bed's footboard was not integral to or inseparable from the hospital's rendition of health-care

¹⁸⁹ See *id.* at 676.

¹⁹⁰ See *id.*; Robbins, *supra* note 154, at 1.

¹⁹¹ Marks, 319 S.W.3d at 675 (Jefferson, C.J., concurring and dissenting).

¹⁹² See *id.*

¹⁹³ *Id.* ("If Marks leaned on his bedside table as support and it collapsed, would that be a health care liability claim? What if Marks fell down a 'rickety staircase' while perambulating for the first time after surgery?").

¹⁹⁴ See *id.* at 674–75 ("In a prior case, I wrote that the Legislature's definition of 'safety' forbids a premises liability claim against a health care provider, even if the claim is based on a structural defect, criminal assault, or careless act. Had the *Diversicare* Court adopted that approach, the outcome of this case would not be in doubt." (internal citation and quotation marks omitted)).

¹⁹⁵ See *id.* at 675, 681 ("No evidence shows that the assembly of Marks's hospital bed involved any medical or professional judgment, or that the bed's footboard or its assembly were related to, or affected by, Marks's care or treatment.").

¹⁹⁶ *Id.* at 681.

¹⁹⁷ *Id.*

services, and, thus, Marks's claim for negligent construction was not a health-care-liability claim.¹⁹⁸

b. Justice Johnson's Construction of the Safety Prong

Mirroring the tension between the concurrence and dissent in *Diversicare*,¹⁹⁹ Justices Johnson and Hecht argued that *safety* should be construed limitlessly and without the plurality's requirement that health-care-liability claims under the safety prong allege a breach of standards of safety related to health care.²⁰⁰ They argued that a contrary interpretation was precluded by the MLIIA's legislative intent broadly to cover claims made by patients against health-care providers.²⁰¹ They further stressed that requiring claims under the safety prong to allege a breach of accepted standards of safety related to health care would effectively read *safety* out of the statute.²⁰² Thus, to avoid rendering a portion of the MLIIA as surplusage, Justices Johnson and Hecht determined that *safety* should be construed broadly and without the plurality's limitation.²⁰³

4. Justice Johnson's Application of the Artful-Pleading Doctrine

In addition to finding that Marks's fourth claim regarding the negligent construction of his hospital bed alleged a breach of accepted standards of health care and safety,²⁰⁴ Justice Johnson, joined by three other justices, would have further held that the same claim was a health-care-liability claim within the artful-pleading doctrine.²⁰⁵ The concurrence initially noted the entire Court's agreement that Marks's first three allegations were

¹⁹⁸ *Id.* at 675–76.

¹⁹⁹ *See supra* Parts IV.A.3.b–c.

²⁰⁰ *See Marks*, 319 S.W.3d at 672–73 (Johnson, J., concurring). Justice Johnson agreed with the reasoning of Chief Justice Jefferson's concurrence in *Diversicare*. *See id.* at 673–74.

²⁰¹ *See id.* at 673.

²⁰² *See id.* (“Applying the plurality’s ‘inseparable or integral part of the patient’s care or treatment’ standard to ‘safety’ effectively reads safety out of the statute instead of properly giving it meaning as an additional category of claims.”).

²⁰³ *See id.* at 673–74 (“Accordingly, the Court should construe the Legislature’s inclusion of ‘safety’ claims in the MLIIA as expanding the scope of health care liability claims beyond what it would be if the statute only covered medical and health care claims, not confining those claims to be the same as claims already coming within the statute’s coverage as health care claims.”).

²⁰⁴ *Id.* at 672.

²⁰⁵ *See id.* at 668–69.

health-care-liability claims.²⁰⁶ Consequently, Justice Johnson reasoned that Marks's final allegation—that the hospital bed was negligently assembled—must also be a health-care-liability claim as it was “based on the same facts and the same damages as the first three.”²⁰⁷ Therefore, because “the substantive facts are that [Marks's] injury arises from a health care liability claim[,] he should not be allowed to avoid application of the MLIA by finding another way to plead his claim for damages.”²⁰⁸

C. *The State of the Law Post-Diversicare and Marks*

1. The Health-Care Prong

In regards to the proper standard for determining when a cause of action alleges a breach of an accepted standard of medical care or health care, *Diversicare* and *Marks* offered very little that was new. Both cases reaffirmed the principle that a cause of action alleges a breach of accepted standards of medical care or health care when the act or omission complained of is an inseparable part of the health-care provider's rendition of medical services.²⁰⁹ As such, the lower courts of Texas have held accordingly.²¹⁰

The most significant effect of these cases is their expansive interpretation of what constitutes an act or omission that is an inseparable part of the rendition of health-care services. In the wake of *Diversicare*, Texas appellate courts have determined a number of actions to be health-care-liability claims that on their face appear to have little to do with the delivery of health care.²¹¹ Examples include: allegations that a doctor of an in vitro fertilization clinic converted a couple's fertilized eggs and sold

²⁰⁶ See *id.* at 668. Marks's first three claims were that the hospital was negligent in: (1) failing to train and supervise its nursing staff properly; (2) failing to provide him with the assistance he required for daily living activities; and (3) failing to provide him with a safe environment in which to recover. *Id.* at 660 (plurality opinion).

²⁰⁷ *Id.* at 668 (Johnson, J., concurring).

²⁰⁸ *Id.* at 669.

²⁰⁹ See *id.* at 670; *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005).

²¹⁰ See, e.g., *Saleh v. Hollinger*, No. 05-10-00339-CV, 2011 WL 9808, at *5 (Tex. App.—Dallas Jan. 4, 2011, no pet. hist.); *Heriberto Seden, P.A. v. Mijares*, No. 01-10-00374-CV, 2010 WL 5187737, at *4 (Tex. App.—Houston [1st Dist.] Dec. 23, 2010, no pet. hist.); *Ramchandani v. Jimenez*, 314 S.W.3d 148, 152 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

²¹¹ See *infra* notes 212–14.

them to another person;²¹² a cause of action arising from a doctor's unauthorized communication of a patient's confidential information to the patient's employer;²¹³ as well as various actions against health institutions arising from sexual assaults of patients by employees of the institutions.²¹⁴ Part V will argue that the scope of what constitutes an inseparable part of the rendition of health care should be modified and restricted, thus allowing for the existence of premises-liability claims against health-care providers outside the ambit of the MLIIA or TMLA.²¹⁵

2. The Safety Prong

Like the health-care prong, the proper standard for resolving when a cause of action alleges a breach of accepted standards of safety is most likely settled. Although there was disagreement in *Diversicare* and *Marks*, six justices of the *Marks* court agreed that an accepted standard of safety is implicated under the MLIIA when the unsafe condition or thing causing injury to the patient is an inseparable or integral part of the patient's care and treatment.²¹⁶ Indeed, *Marks* has been cited for that very proposition by the Houston court of appeals.²¹⁷

The conclusion of the *Marks* Court regarding when the safety prong is implicated is further supported by the TMLA's additions to its predecessor statute.²¹⁸ As noted above, the most salient difference between the definition of *health-care-liability claim* under the TMLA and the MLIIA is the TMLA's addition of "or professional or administrative services directly

²¹² See *Saleh*, 2011 WL 9808, at *2–3, *7.

²¹³ See *Sloan v. Farmer*, 217 S.W.3d 763, 765, 769 (Tex. App.—Dallas 2007, pet. denied).

²¹⁴ See *Sedeno*, 2010 WL 5187737, at *7; *Christus Spohn Health Sys. Corp. v. Sanchez*, 299 S.W.3d 868, 875 (Tex. App.—Corpus Christi 2009, pet. denied); *Holguin v. Laredo Reg'l Med. Ctr.*, 256 S.W.3d 349, 355 (Tex. App.—San Antonio 2008, no pet.); *Vanderwerff v. Beathard*, 239 S.W.3d 406, 409 (Tex. App.—Dallas 2007, no pet.).

²¹⁵ See *infra* Part V.

²¹⁶ See *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010). Interestingly, in the latest case addressing whether a cause of action was a health-care-liability claim, the Texas Supreme Court expressly passed on the opportunity to construe the safety prong. See *Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 n.2 (Tex. Dec. 17, 2010).

²¹⁷ See *Sedeno*, 2010 WL 5187737, at *4; cf. *Yates-Williams v. El Nihum*, Civil Action No. H-09-2554, 2010 WL 3505159, at *6 (S.D. Tex. Sept. 3, 2010) (citing *Marks* for same proposition).

²¹⁸ See *supra* note 12.

related to health care.”²¹⁹ Many courts interpreting the safety prong under the TMLA, including Justice O’Neill’s dissent in *Diversicare*,²²⁰ have concluded that “directly related to health care” was intended to modify “safety.”²²¹ Thus, a cause of action would only implicate the safety prong so long as the allegedly unsafe condition was an inseparable part of the health-care provider’s rendition of medical services.²²²

Despite the probable clarity of the legal standard underlying the safety prong, *Marks* renders it quite unclear as to when a cause of action actually alleges an unsafe condition or thing that is an inseparable part of a patient’s care or treatment.²²³ Prior to the 2010 *Marks* decision, various Texas courts of appeal held that causes of action arising from slip and falls and similar situations were premises-liability claims rather than health-care-liability claims.²²⁴ However, in light of the *Marks* plurality’s conclusion that the construction of a bed by non-medical hospital staff was an inseparable or integral part of the hospital’s delivery of medical services, the continued

²¹⁹ See *supra* notes 12, 59 and accompanying text.

²²⁰ See *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 867 (Tex. 2005) (O’Neill, J., dissenting).

²²¹ See *Harris Methodist Fort Worth v. Ollie*, 270 S.W.3d 720, 723, 726 (Tex. App.—Fort Worth 2008, pet. filed); *Omaha Healthcare Ctr., L.L.C. v. Johnson*, 246 S.W.3d 278, 284 (Tex. App.—Texarkana 2008, pet. filed); *Christus Health v. Beal*, 240 S.W.3d 282, 288–89 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 775 (Tex. App.—Corpus Christi 2006, pet. denied). But see *Holguin v. Laredo Reg’l Med. Ctr.*, 256 S.W.3d 349, 355 (Tex. App.—San Antonio 2008, no pet.); *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 328 (Tex. App.—San Antonio 2006, pet. denied).

²²² See *supra* notes 220–21 and accompanying text.

²²³ See *Marks v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010).

²²⁴ See *St. David’s Healthcare P’ship v. Esparza*, 315 S.W.3d 601, 605 (Tex. App.—Austin 2010, pet. filed) (involving plaintiff’s slip and fall which was allegedly caused by a gelatinous substance spilled by a nurse); *Dual D Healthcare Operations, Inc. v. Kenyon*, 291 S.W.3d 486, 489 (Tex. App.—Dallas 2009, no pet.) (involving nursing home resident’s slip and fall after the floors were stripped and waxed); *Harris Methodist Fort Worth*, 270 S.W.3d at 726–27 (involving a post-operative patient who slipped on a newly washed bathroom floor); *Omaha Healthcare Ctr.*, 246 S.W.3d at 286–87 (involving the death of a nursing home patient after being bit by a spider); *Valley Baptist Med. Ctr.*, 210 S.W.3d at 775–76 (involving a patient who was injured at a medical center’s fitness center after her doctor recommended an exercise routine and referred her to the center); *Shults v. Baptist St. Anthony’s Hosp. Corp.*, 166 S.W.3d 502, 505 (Tex. App.—Amarillo 2005, pet. denied) (involving a patient who was allegedly injured by a sharp paint chip in the shower); cf. *Tex. W. Oaks Hosp., L.P. v. Williams*, 322 S.W.3d 349, 353–54 (Tex. App.—Houston [14th Dist.] 2010, pet. filed) (finding that an action brought by a nurse against a hospital for inadequate training was not a health-care-liability claim).

propriety of those holdings is doubtful.²²⁵ Effectively, *Marks* calls into question whether a premises-liability claim asserted against a health-care provider can ever fall outside the definition of *health-care-liability claim*.²²⁶ Resolution of that uncertainty will be the focus of the following Part.

V. RESOLVING THE PREMISES-LIABILITY AND HEALTH-CARE-LIABILITY CLAIM CONUNDRUM

Despite the conflicting opinions of *Diversicare* and *Marks*, a framework for construing and applying the definition of *health-care-liability claim* can be crafted that will allow courts to distinguish between those causes of action against health-care providers that are premises-liability claims and those that are health-care-liability claims. The following subparts construct that framework, and, within each, it will be argued that the proposed framework represents the better choice as a matter of statutory construction and most appropriately reflects the policy considerations underlying both the MLIIA and the TMLA.²²⁷

A. *Health-Care Providers Owe Patients a Duty to Keep Their Premises in a Reasonably Safe Condition*

The first piece of this Comment's proposed framework requires a clear holding from the Texas Supreme Court that health-care providers, such as hospitals and nursing homes, owe their patients a duty to exercise ordinary care in the maintenance of their premises in addition to their professional duties associated with the delivery of medical services. This holding would clarify that health-care providers owe patients separate, yet concurrent, duties, and that a patient's claim alleging a wrongful act, omission, or unsafe condition could potentially implicate a health institution's duty as either a medical-care provider or as a premises owner.²²⁸

Support for this proposed holding flows naturally and intuitively from the dual role of medical institutions as health-care providers and premises

²²⁵ See *Marks*, 319 S.W.3d at 664.

²²⁶ See *id.*

²²⁷ Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.02(b), 1977 Tex. Gen. Laws 2039, 2040 (repealed 2003) (MLIIA).

²²⁸ See *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 851 (Tex. 2005) (“[W]e focus on the essence of [a plaintiff's] claim and consider the alleged wrongful conduct and the duties allegedly breached . . .”).

owners.²²⁹ Beyond intuition, it is well established that premises owners owe a duty to their invitees to maintain their premises in a reasonably safe condition.²³⁰ Because a patient is clearly “one who enters on another’s land with the owner’s knowledge and for the mutual benefit of both,” patients should be regarded as invitees of a health institution who are afforded a duty of reasonable care by an institution in the maintenance of its premises.²³¹ Accordingly, appellate courts in Texas²³² and other states²³³ have concluded that in addition to professional duties, health-care providers owe patients a duty to maintain their premises in a reasonably safe condition. Given this authority, the Court should expressly hold that health institutions owe patients both the professional duty of a health-care provider and the general duty of a premises owner.

²²⁹ *Cf. id.* at 858 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment) (“A nursing home serves dual roles as both a health care provider and residential facility.” (citing *Richard v. La. Extended Care Ctrs., Inc.*, 835 So. 2d 460, 468 (La. 2003))).

²³⁰ *See, e.g.*, *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 764–65 (Tex. 2009); *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161, 162–63 (Tex. 2007); *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000); *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983).

²³¹ *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex. 1975); *see, e.g.*, *Motel 6 G.P. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996) (per curiam).

²³² *See Omaha Healthcare Ctr., L.L.C. v. Johnson*, 246 S.W.3d 278, 286 (Tex. App.—Texarkana 2008, pet. filed); *Bush v. Green Oaks Operator, Inc.*, 39 S.W.3d 669, 672–73 (Tex. App.—Dallas 2001, no pet.); *W. Oaks Hosp., Inc. v. Jones*, No. 01-98-00879-CV, 2001 WL 83528, at *7 (Tex. App.—Houston [1st Dist.] Feb. 1, 2001, pet. denied) (not designated for publication); *Tenet Health Ltd. v. Zamora*, 13 S.W.3d 464, 471 (Tex. App.—Corpus Christi 2000, pet. dismissed w.o.j.); *McCombs v. Children’s Med. Ctr.*, 1 S.W.3d 256, 259 (Tex. App.—Texarkana 1999, pet. denied); *Denton Reg’l Med. Ctr. v. LaCroix*, 947 S.W.2d 941, 950 (Tex. App.—Fort Worth 1997, writ denied); *Prieto v. Val Verde Mem’l Hosp.*, 747 S.W.2d 487, 489–90 (Tex. App.—San Antonio 1988, no writ); *Charrin v. Methodist Hosp.*, 432 S.W.2d 572, 574–75 (Tex. App.—Houston [1st Dist.] 1968, no writ).

²³³ *See Bonds v. Brown*, 368 So. 2d 536, 538 (Ala. 1979) (by implication); *Weinstein v. St. Mary’s Med. Ctr.*, 68 Cal. Rptr. 2d 461, 468 (Cal. Ct. App. 1997); *Mooney v. Graham Hosp. Ass’n*, 513 N.E.2d 633, 636 (Ill. App. Ct. 1987) (“We find plaintiff’s status to be that of a business-invitee to which the owner or occupier of the premises owes the duty of exercising ordinary and reasonable care to see that the premises are reasonably safe.”); *Morrison v. St. Luke’s Health Corp.*, 929 S.W.2d 898, 905 (Mo. Ct. App. 1996) (“When plaintiff fell her status was that of an invitee and [the hospital’s] status was that of an owner and/or occupier of the premises on which plaintiff was injured.”); *Burns v. Forsyth Cnty. Hosp. Auth., Inc.*, 344 S.E.2d 839, 846 (N.C. Ct. App. 1986); *McDonald v. Aliquippa Hosp.*, 606 A.2d 1218, 1220 (Pa. Super. Ct. 1992); *Kenning v. HCA Health Servs.*, No. M1998-00482-COA-R3-CV, 1999 WL 1206697, at *4 (Tenn. Ct. App. Dec. 17, 1999).

B. Accepted Standards of Safety Are Implicated Only When the Unsafe Condition or Thing Directly Relates to the Patient's Medical Care

Next, the Court should clarify that a cause of action implicates the safety prong only when it alleges a breach of an accepted standard of safety that relates to a patient's medical care or treatment. Such a holding would, of course, overrule the contention that a cause of action is a health-care-liability claim if it alleges a breach of a standard of safety, whether or not the allegedly unsafe condition relates to the patient's health care or treatment.²³⁴ Although *Marks* has likely rejected such a broad construction,²³⁵ a concrete holding of the majority of the Court that standards of safety are implicated only when the allegedly unsafe condition relates to the patient's medical care or treatment would provide much needed clarity to the law.

Established principles of statutory construction militate in favor of this proposed holding.²³⁶ First, the meaning of *safety* within the definition of *health-care-liability claim* must be considered in the full context of the MLIIA and the TMLA.²³⁷ Because both statutes are clearly intended to deal with medical-malpractice claims, "[t]he Legislature . . . could not have intended that standards of safety encompass all negligent injuries to patients."²³⁸ Moreover, the meaning of a particular word in a statute may be ascertained by reference to other words associated with that word in the same provision.²³⁹ Thus, the placement of *safety* in the series "accepted standards of medical care, or health care, or safety" counsels that the

²³⁴ See *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 672–74 (Tex. 2010) (Johnson, J., concurring); *Diversicare*, 185 S.W.3d at 859–61 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment).

²³⁵ See *supra* Part IV.C.2.

²³⁶ See *Diversicare*, 185 S.W.3d at 860–61 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in the judgment).

²³⁷ See, e.g., TEX. GOV'T CODE ANN. § 311.011(a) (West 2005) ("Words and phrases shall be read in context . . ."); *Harris Cnty. Hosp. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) ("We determine legislative intent from the statute as a whole and not from isolated portions."); *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) ("[W]e read the statute as a whole and interpret it to give effect to every part." (quoting *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998) (internal quotation marks omitted))).

²³⁸ *Marks*, 319 S.W.3d at 664.

²³⁹ See *City of San Antonio*, 111 S.W.3d at 29; *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, 174 n.2 (1980); *accord* *Third Nat'l Bank v. Impac Ltd.*, 432 U.S. 312, 322 (1977).

meaning of *safety* was intended to be determined with reference to accepted standards of medical and health care.²⁴⁰ Finally, as to the TMLA specifically, its alteration of the MLIIA's definition of *health-care-liability claim* to include "accepted standards of medical care, or health care, or safety . . . directly related to health care"²⁴¹ also favors the proposed holding.²⁴²

Beyond the canons of construction, reading *safety* to mean safety as it relates to health care also comports with the overarching policy goals of the MLIIA and TMLA.²⁴³ Both statutes were designed to remedy perceived crises in the price and availability of medical-malpractice insurance.²⁴⁴ Thus, an overbroad interpretation of *safety* would result in an increased number of malpractice-insurance-coverage claims and thereby produce the opposite of the intended purpose of the MLIIA and TMLA.²⁴⁵ Accordingly, the Court should clarify the present state of the law and hold that accepted standards of safety are implicated only when the allegedly unsafe condition or thing is related to the patient's health or medical care.

C. The Allegedly Wrongful Act, Omission, or Unsafe Condition Must Proximately Relate to the Health-Care Provider's Dispensation of Medical or Health-Care Services in Order to Be a Health-Care-Liability Claim

The third and most important component of this Comment's proposed framework for determining when a cause of action is a health-care-liability claim is a requirement that the allegedly wrongful act, omission, or unsafe condition proximately relate to the health institution's delivery of medical

²⁴⁰TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2005) (TMLA); Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003) (MLIIA).

²⁴¹TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13); see *supra* note 59 and accompanying text.

²⁴²See *supra* note 221 and accompanying text.

²⁴³Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.02(b), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003) (MLIIA).

²⁴⁴See Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.02, 1977 Tex. Gen. Laws 2039, 2039–41 (repealed 2003) (MLIIA); Hull et al., *supra* note 34, at 10–30 (explaining the historical circumstances underlying the TMLA).

²⁴⁵See *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 686–87 (Tex. 2010) (Guzman, J., concurring and dissenting); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 862–63 (Tex. 2005).

care. Thus, under this Comment's framework, a cause of action would allege a departure from an accepted standard of health care or medical care only if: (1) the act or omission complained of was an inseparable part of the rendition of medical services; and (2) the act or omission was proximately related to those medical services. Similarly, a claim would allege a departure from an accepted standard of safety only if: (1) the allegedly unsafe condition or thing causing injury to the patient was an inseparable part of the rendition of medical services; and (2) the unsafe condition was proximately related to those medical services.

A proximity requirement would provide courts with a sensible manner by which to avoid overbroad classifications of what constitutes a health-care-liability claim. Under the Texas Supreme Court's current formulation, an accepted standard of health care, medical care or safety is implicated when the act, omission, or unsafe condition is an inseparable part of the rendition of medical care.²⁴⁶ However, by endlessly dragging out the chain of causation, virtually any act, omission, or unsafe condition occurring on the premises of a health-care provider can in one sense be regarded as "inseparable" from the rendition of medical services.

To illustrate, it is useful to consider the following hypothetical situation: a hospital patient slips and falls after stepping on a gelatinous substance in a hallway that the hospital's janitorial staff had failed to clean that day.²⁴⁷ Using the logic described above, one could argue that the patient came to the hospital for medical care. To render effective medical care, the hospital has to provide a sanitized environment. To provide a sanitized environment, the hospital must clean the surfaces and floors of its premises. To clean the surfaces and floors of its premises, the hospital must utilize janitorial services. Therefore, the hospital's janitorial services are an "inseparable" part of its rendition of medical care. While entirely logical, this drawn-out chain of reasoning reveals the attenuated and non-proximate relationship between the act of cleaning floors and the rendition of medical care. Instead, the janitorial services of a hospital are more proximately related to the hospital's duty to provide reasonably safe premises, and, as such, a cause of action against the hospital arising from the omissions of the janitorial service should not be classified as a health-care-liability claim. In

²⁴⁶ See *Marks*, 319 S.W.3d at 664; *id.* at 675–76 (Jefferson, C.J., concurring and dissenting); *Diversicare*, 185 S.W.3d at 848; *supra* Part IV.C.1–2.

²⁴⁷ See *St. David's Healthcare P'ship v. Esparza*, 315 S.W.3d 601, 605 (Tex. App.—Austin 2010, pet. filed).

this way, the proximity requirement effectuates the Court's statement in *Marks* "that not every accidental injury to a patient in a health care setting [will] constitute a health care liability claim."²⁴⁸

As a corollary of the above, the proximity requirement will also assist courts in determining whether a cause of action implicates a health institution's duty as a premises owner or its professional duties as a provider of medical services. If the alleged wrongful act, omission, or unsafe condition more proximately relates to the health institution's duty as a premises owner, then a cause of action relating to that wrong constitutes a premises-liability claim. Conversely, if there is a more proximate relationship to the health institution's professional duties, then the action constitutes a health-care-liability claim. Accordingly, the proximity requirement would prevent the overexpansion of what constitutes health-care-liability claims, which, as noted above, comports with the policy underlying the MLIA and the TMLA.²⁴⁹

D. The Artful-Pleading Doctrine Does Not Permit Classification by Association

The final element of this Comment's proposed framework is a clarification that the artful-pleading doctrine prevents only the exact same act or omission from being cast as both a health-care- and premises-liability claim. This clarification is necessary because of intimations in *Diversicare* and *Marks* that under the artful-pleading doctrine, a cause of action based on a specific act or omission can become a health-care-liability claim simply by virtue of its broad factual association with a different act or omission giving rise to a separate cause of action that is a health-care-liability claim.²⁵⁰ Essentially, these two cases can be fairly construed as permitting classification by association.²⁵¹

For example, citing the artful-pleading doctrine, the concurring opinion in *Marks* seemed to utilize this type of classification by association.²⁵² In *Marks*, the plaintiff alleged four distinct sources of negligence: (1) failing to train and supervise its nursing staff properly; (2) failing to provide him

²⁴⁸ *Marks*, 319 S.W.3d at 664.

²⁴⁹ See *supra* Part V.B.

²⁵⁰ See *Marks*, 319 S.W.3d at 668–69 (Johnson, J., concurring); *Diversicare*, 185 S.W.3d at 854.

²⁵¹ See *Marks*, 319 S.W.3d at 668–69 (Johnson, J., concurring).

²⁵² See *id.*

with the assistance he required for daily living activities; (3) failing to provide him with a safe environment in which to recover; and (4) providing a hospital bed that had been negligently assembled and maintained by the hospital's employees.²⁵³ The entire Court agreed that the first three were health-care-liability claims.²⁵⁴ Based on that conclusion, the concurrence reasoned that Marks's fourth claim must also be a health-care-liability claim because it was "based on the same facts and same damages as the first three."²⁵⁵ However, this use of the artful-pleading doctrine is somewhat misguided. While the doctrine does prevent the same facts from being cast as both health-care- and non-health-care-liability claims,²⁵⁶ what constitutes the same facts must not be construed liberally. To illustrate, Marks's four allegations of negligence are perhaps derived from the same facts in that each allegedly negligent act or omission contributed to Marks's fall from the bed; however, they are not the same facts insofar as each allegation is based on a separate act, omission, or unsafe condition.²⁵⁷ As such, use of the artful-pleading doctrine to classify allegations on the basis of their loose factual association effectively ignores the distinct nature of the individual acts or omissions underlying each allegation of negligence.

Instead, the artful-pleading doctrine should be regarded as preventing only the exact same act, omission, or unsafe condition from being cast as both a health-care- and non-health-care-liability claim.²⁵⁸ Otherwise, as *Marks* illustrates, the artful-pleading doctrine will sweep premises-liability claims into the ambit of the MLIIA or TMLA merely because of their broad factual association with other causes of action which are health-care-liability claims. Thus, just as a cause of action that is essentially a health-care-liability claim cannot be recast as a non-health-care claim, a cause of action predicated upon an act, omission, or unsafe condition which is essentially a premises-liability claim should not be recast as a health-care-liability claim under the artful-pleading doctrine.²⁵⁹

²⁵³ *Id.* at 660 (plurality opinion).

²⁵⁴ *See id.* at 661–62; *id.* at 668 (Johnson, J., concurring); *id.* at 676 n.2 (Jefferson, C.J., concurring and dissenting).

²⁵⁵ *Id.* at 668 (Johnson, J., concurring).

²⁵⁶ *See, e.g., Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 (Tex. Dec. 17, 2010); *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004).

²⁵⁷ *Marks*, 319 S.W.3d at 660; *id.* at 668 (Johnson, J., concurring).

²⁵⁸ *See Yamada*, 2010 WL 5135334, at *4.

²⁵⁹ *See Rogers v. Crossroads Nursing Serv., Inc.*, 13 S.W.3d 417, 420 (Tex. App.—Corpus Christi 1999, no pet.) (“Just as a health care liability claim may not be recast as another cause of

VI. CONCLUSION

Describing the decision in *Marks*, Texas Supreme Court commentator Don Cruse opined: “They’ve created more work for themselves.”²⁶⁰ Indeed, as this Comment has demonstrated, *Diversicare* and *Marks* raise important yet confounding questions as to when a cause of action is a health-care- or premises-liability claim.²⁶¹ Adopting this Comment’s framework would provide much needed guidance to the lower courts and practitioners regarding those questions while ensuring that the scope of health-care-liability claims would not expand beyond the intent of the legislature in enacting the MLIIA and TMLA.²⁶² Until the Court addresses these critical uncertainties, the state of medical-malpractice law in Texas will remain in critical condition.

action to avoid the operation of the Act, a claim that does not involve a departure from accepted standards of medical or health care is not [a health-care-liability claim].”).

²⁶⁰ Robbins, *supra* note 154, at 15.

²⁶¹ See *Marks*, 319 S.W.3d at 665; *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005).

²⁶² Act of May 30, 1977, 65th Leg., R.S., ch. 817, sec. 1.02(b), 1977 Tex. Gen. Laws 2039, 2041 (repealed 2003) (MLIIA).