

REVERSE and REMAND; Opinion Filed May 28, 2008.



In The

Court of Appeals

Fifth District of Texas at Dallas

.....

No. 05-07-00964-CV

.....

**EDUCARE COMMUNITY LIVING CORPORATION - TEXAS
D/B/A MAYKUS COMMUNITY HOME, Appellant**

V.

GINGER RICE, INDIVIDUALLY AND AS NEXT FRIEND OF REGINALD DONELL RICE, AN INCAPACITATED MINOR, Appellee

.....

On Appeal from the 162nd Judicial District Court

Dallas County, Texas

Trial Court Cause No. 07-01280

.....

MEMORANDUM OPINION

Before Justices Wright, O'Neill, and Francis

Opinion By Justice Francis

In this interlocutory appeal, Educare Community Living Corporation - Texas d/b/a Maykus Community Home (Maykus) challenges the trial court's order denying its motion to dismiss negligence claims filed against it by Ginger Rice on behalf of herself and her mentally disabled son. In two issues, Maykus argues the trial court erred in denying its motion because (1) the claims are health care liability claims and (2) the expert report filed by Rice is insufficient.

We conclude the claims are health care liability claims subject to chapter 74 of the Texas Civil Practice and Remedies Code (the Texas Medical Liability Act). Further, we conclude the expert report was deficient. Accordingly, we reverse the trial court's order denying the motion and remand for further proceedings consistent with this opinion.

Maykus is a State-licensed intermediate care facility for the mentally retarded. Reginald Rice is a mentally challenged, autistic, and moderately retarded male with limited communication skills who resided at Maykus from June 2001 until May 2006. Although Reginald was "independently ambulatory," he was unable to care for himself and "depended upon others for his care and safety."

In February 2007, Rice sued Maykus and its former employee, Chesona Wilson, alleging her son was injured when Wilson, a caregiver at the facility, burned him with scalding water and beat him. She alleged Maykus, through its employees acting within the course and scope of their employment, was negligent in failing to properly carry out its responsibilities of supervision and care in a reasonably safe manner. She alleged Maykus failed to (1) provide a safe facility; (2) supervise its employees; (3) exercise reasonable care for Reginald's safety; (4) reasonably investigate a pattern of ongoing incidents resulting in injuries; and (5) fully investigate the incident involving Reginald. Although Rice contended her lawsuit was not a health care liability claim, she filed an expert report "prophylactically to avoid running afoul" of chapter 74. The expert report was prepared by a nurse practitioner, S. Frances Scholl Foster, who provided an opinion on standard of care, breach of the standard of care, and causation.

Maykus filed a motion to dismiss, arguing the lawsuit against it was a health care liability claim requiring an expert report. Maykus argued that the expert report provided was deficient because Foster was not qualified under the statute to offer an opinion on causation. In response, Rice argued she did not plead "a medical malpractice case" and the conduct involved - "an employee assault of a resident and [Maykus's] failure to supervise the employee" - does not "constitute medical care." Alternatively, she argued that causation was undisputed and therefore no expert testimony on that issue was needed. The trial court denied the motion. This appeal ensued.

We begin with the first issue which involves whether Rice's causes of action against Maykus are health care liability claims. Whether a claim is a health care liability claim is a question of law that we review de novo. *Lee v. Boothe*, 235 S.W.3d 448, 451 (Tex. App.-Dallas 2007, pet. denied). Under chapter 74, a cause of action against a health care provider is a health care liability claim if it is based on a "claimed departure from accepted standards of care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury or death to 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) (Vernon 2005). Health care is broadly defined as "any act or treatment performed or furnished, or that 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." *Id.* § 74.001(a)(10).

A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of health care services. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 851 (Tex. 2005). In determining whether a claim is subject to the requirements of chapter 74, we focus on the essence of the claim and consider the alleged wrongful conduct and the duties allegedly breached, rather than the injuries suffered. *Diversicare*, 185 S.W.3d at 851; *Lee*, 235 S.W.3d at 451. We also consider whether expert testimony is necessary to show breach of an applicable standard of care, although we also recognize that a claim may be a health care liability claim and not require expert testimony to prevail at trial. *Lee*, 235 S.W.3d at 451.

In *Diversicare*, a nursing home resident, Rubio, was allegedly sexually assaulted by another resident. Rubio's daughter brought suit on Rubio's behalf against *Diversicare*, the owner of the nursing home. The petition alleged multiple incidents of sexual assault occurred as a result of *Diversicare's* failure to adequately supervise and monitor Rubio to protect her from sexual abuse and assault from the other resident. Rubio asserted, among other things, negligent supervision and failure to provide nursing services, breach of an implied covenant to provide reasonably safe premises, and fraudulent inducement. As here, Rubio contended her claims were not health care liability claims.

The supreme court, however, concluded otherwise. In reaching its conclusion, the court examined the nature of health care services provided by nursing homes, noting that the "level and types of health care services provided vary with the needs and capabilities, both physical and mental, of the patients." *Diversicare*, 185 S.W.3d at 850. The nursing home provided for Rubio's fundamental needs, including assuming care and custody of her. The court concluded that the "supervision and monitoring of Rubio and other nursing home residents and nursing services provided to Rubio by *Diversicare's* staff were part of her health care." *Id.* Further, the court determined that expert testimony was necessary to Rubio's claims, explaining that 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 in a healthcare facility should be better protected and by what means." *Id.* at 851.

The analysis employed in *Diversicare* applies in this case. Rice's claims are similar to those in *Diversicare*, except here, the alleged perpetrator was an employee of the facility, not another resident. In her petition, Rice alleged Maykus was negligent, through the acts of its employees, in failing to carry out its "responsibilities of supervision and care in a reasonably safe manner[.]"

Just as the nursing home in *Rubio* was caring for someone in a weakened condition, Maykus was caring for a resident who was totally dependent on its staff. The essence of Rice's complaint is that Maykus was negligent in failing to keep Reginald safe, which led to his assault by a caregiver. We conclude Rice's negligence claims, whether alleged as direct claims or based on a theory of respondeat superior, are based on breaches of the standard of care for a health care provider because the supervision, care, and protection of Reginald, a patient dependent upon the staff for his care and safety, are inseparable from the health care services provided to him. See Footnote 1 See *Diversicare*, 185 S.W.3d at 853

("[J]udgments concerning health care and medical care, including protection of patients, are made by health care professionals as part of the care and treatment of the patients admitted to their facilities.").

Rice's argument that this is a premises liability case, not a medical malpractice case, misses the point. A plaintiff cannot avoid the requirements of chapter 74 and its predecessor statute by attempting to recast a health care liability claim as a different cause of action through artful pleading. *See Diversicare*, 185 S.W.3d at 851; *Lee*, 235 S.W.3d at 451. We conclude that Rice's negligence claims against Maykus amount to causes of action for departures from accepted standards of professional health care, within the scope of the Texas Medical Liability Act. Her claims are subject to the expert report requirements of chapter 74. We sustain the first issue.

In its second issue, Maykus contends the trial court erred in denying its motion to dismiss because Rice failed to serve an expert report from a qualified expert as required by statute. Section 74.351 requires a person asserting a health care liability claim to provide an expert report for each health care provider against whom the claim is asserted. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (Vernon Supp. 2007). A person qualifies as an expert witness on the issue of the causal relationship between the alleged departure from the accepted standards of care and the injury, harm, or damages claimed "only if the person is a physician and is otherwise qualified to render opinions on that causal relationship" under the rules of evidence. *Id.* at § 74.403(a) (Vernon 2005).

Here, Rice provided the expert report of Nurse Foster, who offered opinions on the standard of care, breach of the standard of care, and causation. As a nurse, Foster could not qualify as an expert witness on causation. *See id.* at 74.403(a). Rice does not dispute that, under the statute, only a physician may opine on causation. Rather, she argues that expert testimony was not needed on this issue because Wilson was convicted of assault on her plea of guilty. Rice offers no case law to support her position. Regardless, chapter 74 sets out the requirements of an expert report. *See id.* § 74.351(r)(6) (Vernon Supp. 2007). Those requirements include an opinion on causation. *Id.* The statute provides no exceptions to this requirement. Accordingly, we conclude the report is deficient. We sustain the second issue.

If an expert report has not been timely served, section 74.351(b) provides that upon the defendant's motion, the trial court shall award attorney's fees and costs and dismiss the claim with prejudice. *Id.* at 74.351(b). If an expert report has not been served within the time period provided by statute because elements of the report are found deficient, the trial court may grant one thirty-day extension to the claimant to cure any deficiency in an expert report. *Id.* § 74.351(c).

Although not specifically requested in this Court, Rice asked the trial court for additional time to obtain a report from a physician in the event it concluded the report was deficient. Because the trial court ruled in Rice's favor, it did not consider the request for extension. Given this Court's disposition, we remand this cause to the trial court to consider whether to allow a thirty-day extension under the statute.

We reverse the trial court's order and remand for proceedings consistent with this opinion.

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MOLLY FRANCIS
JUSTICE

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Footnote [1](#)

At the hearing on the motion to dismiss, Maykus explicitly limited its request for relief to negligence claims. To the extent Rice has alleged Maykus is vicariously liable for the intentional tort of assault committed by Wilson, that claim was not before the trial court and likewise is not before this Court.

File Date[05/28/2008]

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