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Supreme Court of Texas.  
Matthew W. Wasserman, M.D.

v.  
Christina Bergeron Gugel.  
No. 10-0513.

October 5, 2011.

Appearances:

Holly H. Williamson of Hunton & Williams, LLP, for Petitioner.  
Reginald W. McKamie, Sr. of the Law Offices of Reginald W. McKamie, Sr., P.C., for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0513 Matthew Wasserman, M.D. v. Christina Gugel.

MARSHAL: May it please the Court, Ms. Williamson will present argument for the Petitioner. The Petitioner has reserved seven minutes for rebuttal.

#### ORAL ARGUMENT OF HOLLY H. WILLIAMSON ON BEHALF OF THE PETITIONER

ATTORNEY HOLLY H. WILLIAMSON: May it please the Court, the question or one of the questions that we're here to address today is are we going to require plaintiffs to bring a healthcare liability claim against a doctor to comply with Chapter 74's requirements that demand or require an expert's report.

JUSTICE DAVID M. MEDINA: The amicus brief suggests that if this Court were to follow the holding in the 5th Circuit in the Vanderwerff case, that it would allow the doctor or allow the medical health profession to use this statute as a shield and hide behind alleged sexual assaults and then it also defeats the purpose of the statute. Do you agree with that?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, I would disagree with that. The purpose of the statute is to have someone, as you noted, in a dissent recently in the Omaha case is have an expert in the same area, the same field, look at what the allegations are, look behind the labels, look behind the labels of an intentional tort and determine whether this did or did not meet the standards of care.

JUSTICE EVA M. GUZMAN: Well let me ask you this. What was the medical care or the service to be rendered on the day of the assault?

ATTORNEY HOLLY H. WILLIAMSON: On the day that she says that she was assaulted, she was there, according to her petition, to come back and address the MRI.

JUSTICE EVA M. GUZMAN: Do you disagree that it was for a surgical consult?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, it was a consult where she says that she left the MRI there the day before and came back to address what was in her particular MRI.

JUSTICE EVA M. GUZMAN: Well let's just assume that it was a surgical consult. Tell me what is the relationship between the alleged injury and this defendant's professional medical judgment? What is the relationship?

ATTORNEY HOLLY H. WILLIAMSON: The relationship between Dr. Wasserman's decision was that he visited with her about the MRI that he had reviewed. He talked to her again about the issues she was complaining about and it is within his realm as a medical professional to determine whether he needs to ask her more questions, whether he needs to revisit some of those. It's clear from reading her petition, she didn't even understand what was being asked because--

JUSTICE EVA M. GUZMAN: So are you saying there was more, that she went to that office that day for then a surgical consult reviewing that MRI?

ATTORNEY HOLLY H. WILLIAMSON: We have to accept what she's got in her petition for purposes of this hearing and she says for a surgical consult, he had then though looked at the MRI. She says that she went back for a consult, but she's taken to an examination room.

JUSTICE EVA M. GUZMAN: What was the--.

ATTORNEY HOLLY H. WILLIAMSON: Not a meeting room.

JUSTICE EVA M. GUZMAN: I'm sorry, what was the professional medical judgment that he was supposed to exercise that day?

ATTORNEY HOLLY H. WILLIAMSON: He is supposed to, as an orthopedic surgeon, try to determine the origin and the source of the pain and the numbness that she complained about.

JUSTICE EVA M. GUZMAN: That day, the day of the alleged assault, what was his professional medical judgment that he was going to exercise that day?

ATTORNEY HOLLY H. WILLIAMSON: He was attempting to understand the origin and the source and the cause of her pain and her numbness.

JUSTICE EVA M. GUZMAN: Then what is the relationship between this alleged injury to that judgment?

ATTORNEY HOLLY H. WILLIAMSON: The alleged injury, her claim of sexual assault.

JUSTICE EVA M. GUZMAN: To that judgment, yeah, because what is the relationship between the sexual assault, without going into the details, and that defendant's professional medical judgment that he was going to exercise that day?

ATTORNEY HOLLY H. WILLIAMSON: Well, Your Honor, he asked her questions about where she was ex-

periencing pain. She described pain and numbness from her lower back all the way down to her shins and in her knees, basically the lower part of her body and he's going through and attempting, once again, to determine the origins and the source of that pain so that [inaudible] treatment.

JUSTICE DEBRA H. LEHRMANN: Excuse me, let me ask --

JUSTICE EVA M. GUZMAN: Could I get one hypothetical and then. Let me ask you a hypothetical. If a doctor conducts a regular physical exam and somewhere during the exam decides to shoot the patient in the head, is that a medical malpractice case?

ATTORNEY HOLLY H. WILLIAMSON: No, Your Honor, shooting someone in the head I don't think that you can separate from.

JUSTICE EVA M. GUZMAN: It's different from sexually, that crime is different from the crime of sexual assault?

ATTORNEY HOLLY H. WILLIAMSON: Well, Your Honor, that's what they've labeled this is a sexual assault and as this Court has recognized and many of the cases dealing with Chapter 74 and the expert reports, you have to go behind the labels that are identified in the petition. And if you read her petition, she claims someone with I think a 9th grade education claims that she thought that his questions on the second day were unnecessary. She thought his exam on the second day was unnecessary.

JUSTICE DON R. WILLETT: Presume it is undisputed that what happened was a sexual assault. Would it then have to be brought under Chapter 74?

ATTORNEY HOLLY H. WILLIAMSON: It is inseparable what he did; what she claims he did is inseparable from the treatment, the ongoing treatment that he was or the examination that he was doing of her.

JUSTICE DEBRA H. LEHRMANN: Okay, let me ask you something. Is there anything that a doctor can do during a medical examination that would not require an expert report?

ATTORNEY HOLLY H. WILLIAMSON: Yes, Your Honor.

JUSTICE DEBRA H. LEHRMANN: What would that be?

ATTORNEY HOLLY H. WILLIAMSON: Shooting someone in the head, for example, would be a good example of something that is separable from what they stopped doing what they're supposed to be doing, they deviate at that point from what they're supposed to be doing.

JUSTICE DEBRA H. LEHRMANN: And where do you draw the line at?

ATTORNEY HOLLY H. WILLIAMSON: You draw the line by using an expert report in this particular case.

JUSTICE DEBRA H. LEHRMANN: No, the question is whether you need an expert report and so where do you draw the line?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, as this Court has recognized, you draw the line from looking at the allegations and in this case, the allegations are that he was performing an exam on her. She disagrees with some aspects of the exam, but we're not talking about she walks in for an eye exam and suddenly he rapes her or she walks in for a dental appointment and he grabs her breasts. This is a situation where this doctor is asking her pressure points, pain points and only another expert in this field, in this particular case--

JUSTICE DON R. WILLETT: But your hypothetical about the dentist groping a patient, you can see that is not a Chapter 74 claim.

ATTORNEY HOLLY H. WILLIAMSON: If the dentist just gropes the patient and he's supposed to be working on her teeth, no, that would not be a Chapter 74 claim. If, however, the dentist gives that patient anesthesia and the patient reacts to it and the doctor has to revive the patient, then that would be a part of his course of treatment. He might have to pound her on the chest. He might have to yank her up.

JUSTICE EVA M. GUZMAN: How would the expert report read? Sexual assault deviates from the standard of care or how would that report read from your perspective? I mean what would it really say assuming this was a sexual assault?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, in this particular case, there is no sexual assault. You have to have an expert that --

JUSTICE DEBRA H. LEHRMANN: But that's not her question. Her question is what would the expert report have said had your stance been correct if you're right? What would it have said?

ATTORNEY HOLLY H. WILLIAMSON: The expert report would describe what he did as necessary in order to determine what was the origin of the pain and the numbness to again go with her and walk her through what is going on in terms of these pressure points and these areas where she's describing from her lower back all the way almost down to her feet, her lower extremities, her lower part of her body. It would describe what he needed to do, was it within the standard of care, did he deviate from the standard of care.

JUSTICE DAVID M. MEDINA: Can we just use some common sense here? I mean, obviously, I'm not a doctor, none of us are here I don't think, but this is not a gynecologist. This is this is it just seems so beyond the pale to what this doctor allegedly did that common sense would tell you you don't need an expert report.

ATTORNEY HOLLY H. WILLIAMSON: That's not the reason we need an expert report because, as we pointed out in our brief, there is a condition called and I can't hardly pronounce it, it's called bulbocavernosus reflex, which would require and I've talked to neurologists and orthopedic surgeons who say that you do insert your finger into a vagina or with a male you do squeeze certain parts of their genitalia.

JUSTICE EVA M. GUZMAN: That's almost illogical. He's going to tell her she doesn't need surgery. He's done the exam the day before. On the day that's he's going to tell her she doesn't need surgery, he suddenly thinks it's appropriate to insert his fingers in her --

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, he's certainly going to say it was medically necessary and that he did not deviate from the standards of care because she is describing for him additional pain, additional numbness, different symptoms than she described the day before. That is what he is going to say is that she came in with different symptoms the next day, different complaints the next day and having had the advantage of looking at the MRI and talking with her about those symptoms and the pain and the numbness, he went ahead and started doing the pressure points again. It is not for the Court, it is not for the Plaintiff or her attorney to say whether it was medically necessary or not. It is for the expert.

JUSTICE EVA M. GUZMAN: So that is an inseparable part of his medical judgment going on to the other things that he allegedly did to her.

ATTORNEY HOLLY H. WILLIAMSON: That's what he will say and that's what an expert will say. That's the reason why you start off with an expert report. That doesn't mean at the end of the day that the experts are going to be agreeing with him, that this won't morph into an assault claim, but at this point, it is a healthcare liability claim.

JUSTICE EVA M. GUZMAN: Let's assume it isn't an assault claim, does the treatment end at the point it becomes a sexual assault because I think the statute uses the words during, during. So this, was this really during the rendition of the services or does that treatment end at the time it progresses into a sexual assault? When does the treatment end? When is it no longer during?

ATTORNEY HOLLY H. WILLIAMSON: If it were truly a sexual assault, he would then be deviating from his giving her treatment and care and evaluating and assessing her.

JUSTICE EVA M. GUZMAN: He would be committing a crime wouldn't he if it was --

ATTORNEY HOLLY H. WILLIAMSON: Exactly, exactly. If a patient dies on the operating room table and a plaintiff claims it's murder, it doesn't make it murder. It doesn't make it a crime. You need an expert report to be able to assess what happened on that operating room table.

JUSTICE DALE WAINWRIGHT: Mrs. Williamson, under Chapter 74, it defines healthcare liability claim as a departure from accepted standards in four different areas, medical care, healthcare, safety, like five, professional or administrative services. Which of those does the Plaintiff claim to fall under? The courts of appeals cases and a lot of the briefing in this area tend to generally say healthcare liability claim without being specific as to which part of the statute their claim falls under. What do you understand the Plaintiff's case to be alleged as, medical care, healthcare, safety, professional or administrative services?

ATTORNEY HOLLY H. WILLIAMSON: To my understanding, it's medical care, Your Honor.

JUSTICE DALE WAINWRIGHT: Medical care.

JUSTICE DON R. WILLET: What do you make of amici's point that essentially we're sort of, were we to allow this to be or say it had to be brought as a Chapter 74 claim, you're essentially turning a medical exam room into a safe haven for battery and assault?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, my response to that is doctors have to touch patients unless you're a psychiatrist or a psychologist. That's just one of the risks of being a doctor. So what they're claiming the reverse is, it turns any examination that a doctor does into a potential assault claim, sexual or otherwise, because a doctor is going to touch their patients.

JUSTICE DON R. WILLET: I think they're concerned that a Dr. Wasserman can get away with what a Mr. Wasserman could not.

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, at the end of the day, if they prove that it was an assault they get to where they want to go anyway. What we're saying here is that they had to start off with a premise of an expert report as mandated by Chapter 74. And had they started off there, we might not be here today because their expert may have said this was totally necessary. It was totally within the realm of what you would do in an examination like this. If I were her treating physician, I would have done the same thing. We don't know because they didn't comply with the statute.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Williamson. The Court is now ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. McKamie will present argument for the Respondent. Mr. Kaiser will present argument for the amicus. Mr. McKamie will open with the first ten minutes.

ORAL ARGUMENT OF REGINALD W. MCKAMIE, SR., ON BEHALF OF THE RESPONDENT

ATTORNEY REGINALD W. MCKAMIE: May it please the Court, good morning. What the Petitioner wants you to do is to eliminate the trial court function of determining whether a healthcare liability claim exists by having a blanket rule that if it occurs in the medical examination room, it's a healthcare liability claim.

JUSTICE DAVID M. MEDINA: It seems to me that's where the cases have been going.

ATTORNEY REGINALD W. MCKAMIE: Well the legislature did not create a blanket rule because they defined what a healthcare liability claim is so that the judiciary would have a guide when looking at these cases. If the legislature wanted a blanket rule, they could have said whatever occurs in the examination room is a healthcare liability claim.

JUSTICE DEBRA H. LEHRMANN: Do you think that there are any instances when an expert report would be necessary to determine whether an alleged sexual assault departed from accepted standards and medical care?

ATTORNEY REGINALD W. MCKAMIE: I think that each situation has to be determined based upon the facts of that case on the allegations of that case and there may be some that require a report. I think it depends on the allegations of the case.

JUSTICE DEBRA H. LEHRMANN: And what makes this different from the times when it would be required?

ATTORNEY REGINALD W. MCKAMIE: The actual facts of the case make it different. Here we had an examination the day before the consult was to occur. She went to the consult the next day. He told her from the examination I gave you yesterday and the MRI, this is what needs to be done. You do not need surgery. He then departed from the medical, the provision of medical services, walked her into an examination room and closed the door.

JUSTICE DON R. WILLETT: Hold on, you're saying he departed from medical services. I'm going to jump back to Justice Wainwright's question, which specific subpart, which part of the definition of healthcare liability claim is your client suing under?

ATTORNEY REGINALD W. MCKAMIE: She's not suing under any of these. She has said this was an assault.

JUSTICE DON R. WILLETT: I understand. Which one of those parts of the definition and, for example, let me rephrase it this way. Healthcare liability claim is defined statutorily as a claimed departure from accepted standards of medical care or healthcare ... Do you disagree that an assault like this departs from accepted standards of healthcare and medical care ...?

ATTORNEY REGINALD W. MCKAMIE: Yes. I don't believe this was a departure from a healthcare services. To believe this was a departure from the healthcare services, one would have to believe that a person can digitally assault someone, smell his finger, call her on the telephone after he did this, request that she see him at a hotel, call her later on and ask her if he can meet her at her sister-in-law's house and one would have to believe all of those things are a departure from medical care and they are not. They are --

JUSTICE EVA M. GUZMAN: Under 13 though, the definition of healthcare liability claim also the dot, dot, dot says or administrative services directly related to healthcare. Can you give a little more of your views on how this is not directly related to healthcare?

ATTORNEY REGINALD W. MCKAMIE: It's clearly, in my opinion, not related to healthcare services. When he starts calling and one of the things that this Court has said is that in the Diversicare case, the Court has said that there may be circumstances that give rise to, in this case, premises liability claims in a healthcare setting that may not be properly classified as healthcare liability claims. And to get back to your question, in this situa-

tion when he, and looking at the totality of the circumstances, when he started calling her at home saying I want to do to you what I did in the examination room, we now know that was not medical care. That was not the provision of medical services and this Court--

JUSTICE NATHAN L. HECHT: Was that part of the criminal charges that were not? There were some related criminal chargers were there not?

ATTORNEY REGINALD W. MCKAMIE: There were, she taped the conversations because the sheriff's department asked her to tape the conversations. No criminal charges came of that. So that information came from those, from trying to create or make the criminal case for the sheriff's department.

JUSTICE DAVID M. MEDINA: What if the other evidence doesn't come in for whatever reason and the only testimony is what occurred in the examination room? Would a medical expert report be required for that?

ATTORNEY REGINALD W. MCKAMIE: No, I don't think so, not under the facts of this situation. And I think it's important that we look at what this Court has said regarding the cases in Diversicare that each case. In Diversicare, the Court said the determination of whether a cause of action is a healthcare liability claim requires an examination of the claim's underlying nature. And I think when you look at the underlying nature of this claim, a healthcare report would not be necessary. And I don't think that the legislature wanted a blanket rule or else they would have said whatever happens in the examining room --

JUSTICE NATHAN L. HECHT: What do you think the rule should be? Because sometimes doctors do have to touch people and, in most instances, if a stranger did that, it would be at least an assault and maybe a sexual assault? So what should be the rule that distinguishes between the part of treatment, legitimate part of treatment and something that's across the line?

ATTORNEY REGINALD W. MCKAMIE: Absolutely doctors have to touch people, but in a case such as this and each case, you have to look at the underlying nature of the claim. In a case such as this when the examination had been done the day before and the consult and Justice Guzman--

JUSTICE NATHAN L. HECHT: Let me interrupt there. Does that really matter to you that it happened the day after? I mean wouldn't you have the same complaint if this had happened the first day?

ATTORNEY REGINALD W. MCKAMIE: Well I think it makes it more clear here and I think Justice Guzman asked a very good question. What was supposed to happen that day? What was supposed to happen that day was a consult. She was supposed to come in and merely be told whether she needed surgery.

JUSTICE EVA M. GUZMAN: And along those lines what we actually said in Diversicare was a cause of action alleges a departure from accepted standards of medical care or healthcare if the act or the omission complained of is an inseparable part of the rendition of medical services. What do you contend is the medical service to be rendered that day?

ATTORNEY REGINALD W. MCKAMIE: The medical service to be rendered that day, our allegation is that it was a consult. She was merely to be there to be told whether she was going to need surgery or not. JUSTICE

DALE WAINWRIGHT: Counsel, since your time is winding down, I don't know if you got a chance to finish Justice Hecht's question about what the principle should be in determining when it is and when it's not and I'm interested in that answer as well.

ATTORNEY REGINALD W. MCKAMIE: Yes. I think you have to look at each individual case. Each individual case has to be looked at. The trial court has to act as a gatekeeper. It has to use its traditional role as a gatekeeper and look at each individual case and I think when they look at the case, if it's a sexual assault and that's

what we're saying happened here is a sexual assault, no report is needed. I guess somebody on the Supreme Court said I don't know what --

JUSTICE DON R. WILLETT: Obscenity.

ATTORNEY REGINALD W. MCKAMIE: Excuse me.

JUSTICE DON R. WILLETT: Obscenity.

ATTORNEY REGINALD W. MCKAMIE: Obscenity is, but I know it when I see it. I think it's one of those situations.

JUSTICE EVA M. GUZMAN: Well, and how important is the rendition of medical services to that analysis or to inform that the trial court of that question, you know those words from *Diversicare*, the rendition of medical services. How important is that?

ATTORNEY REGINALD W. MCKAMIE: I think it's absolutely key and critical that when it's separate, when you can separate the assault from the rendition of medical services, then a report is not necessary.

JUSTICE DON R. WILLETT: Mr. McKamie, I agree we have to take cases as they come. They're all very fact specific and they're all very distinguishable, but, of course, you know this Court, we have to make a decision that applies across 254 counties from border to border. And I guess one question I have and it kind of goes along the lines of Justice Hecht's question on kind of the overarching principle that we ought to be aiming for here is we have to be mindful that we're, you know our ruling applies statewide and touching of patients does occur. It has to occur. It must occur. It is indispensable. So what would be the principle that would permit appropriate touching, but also not encourage lawsuits based on subjective misinterpretations of inappropriate touching? I mean how should be balance that?

ATTORNEY REGINALD W. MCKAMIE: Yes, I think when there is a clear intrusion into the personal space, such as here, and where there are clear indications that it was not the provision of medical services, such as in this case where he called her after it happened, where he smelled his finger after it happened.

JUSTICE DON R. WILLETT: I understand the very forceful facts of this case, but we have to apply generally and I'm just wondering where that dividing line is between recognizing the need for appropriate touching, but also not encouraging suits based on subjective misinterpretations of what they consider inappropriate, but it's tough.

JUSTICE DEBRA H. LEHRMANN: And bearing in mind that in any of those types of examinations, the activity or the conduct is going to be very intrusive. So I don't know that that really answers it.

ATTORNEY REGINALD W. MCKAMIE: And I don't think that you can do a blanket rule. I think that you have to say that, as you said in *Diversicare*, that it requires an examination of the claims, the underlying nature and when you look at the totality of the facts in a particular situation, I think that's when you determine whether the report was needed or not.

JUSTICE EVA M. GUZMAN: Do we need to write a new rule or does *Diversicare* inform our decision in this case sufficiently so that we don't need to articulate a brand new rule, a new bright-line rule?

ATTORNEY REGINALD W. MCKAMIE: I think *Diversicare* articulates it sufficiently. I think the Court needs to clarify it for the appellate courts and I truly believe that if you come down with just one hard rule, that that will not work for the State of Texas.



CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. McKamie.

ATTORNEY CHRISTOPHER A. KAISER: May it please the Court, sexual assault is sexual assault regardless of where it occurs or who perpetrates it.

JUSTICE PHIL JOHNSON: Now how do you know if someone's gynecological examination is a sexual assault? I mean, clearly, that's a sexual assault under some circumstances, but clearly it is not under other circumstances. How do we know the difference?

ATTORNEY CHRISTOPHER A. KAISER: And that's the perfect question, Justice Johnson. You find out by engaging in the analysis that this Court laid down in *Diversicare v. Rubio* to examine the underlying nature of the claim.

JUSTICE PHIL JOHNSON: In this claim, she sued a doctor that she had gone to for treatment and she was in the office for a follow-up visit and the question is exactly how far does the doctor's treatment go during the follow-up visit.

ATTORNEY CHRISTOPHER A. KAISER: Exactly.

JUSTICE PHIL JOHNSON: And so how do we know that from the pleadings, which is what we say we look at? How do we differentiate?

ATTORNEY CHRISTOPHER A. KAISER: Let me use an example. I would analogize to the case that the 13th Court of Appeals decided in *Christus Spohn v. Sanchez*. In that case, the court rightly noted that it does not view the injurious conduct alleged in isolation, not just in a vacuum. But instead it considers it in the context of the surrounding circumstances. Recall in *Sanchez*, the plaintiff was a patient who had been sedated in bed, in a hospital and alleged that she had been sexually assaulted by two nurses. Put it, in addition to that claim, she also alleged facts like, that one of the nurses tried to climb into bed with her while she was sedated and they danced with her in the hospital room and they made lewd comments to her and wrote a note on a dry erase board that said I love you. And in this case, the 13th Court of Appeals had little trouble determining that in the context of the surrounding circumstances, the alleged sexual assault was just that. It had absolutely nothing to do with medical profession [inaudible].

JUSTICE DALE WAINWRIGHT: What if there are no surrounding circumstances?

ATTORNEY CHRISTOPHER A. KAISER: Parton me, Justice?

JUSTICE DALE WAINWRIGHT: What if there are no surrounding circumstances, just what happens in the examination room one incident could be a sexual assault as claimed by one side, perhaps not is claimed by the other side.

ATTORNEY CHRISTOPHER A. KAISER: And, admittedly, that is a much more difficult case and I think that's the complication that *Vanderwerff* presents.

JUSTICE EVA M. GUZMAN: In a gynecological exam, the example just used would a woman know or understand the difference between an exam and a sexual assault when it goes progresses further than an exam?

ATTORNEY CHRISTOPHER A. KAISER: Perhaps not always.

JUSTICE EVA M. GUZMAN: Such to be able to plead that.

ATTORNEY CHRISTOPHER A. KAISER: Perhaps not always and I take no issue with the existence of Chap-

ter 74's expert report requirement. There will, no doubt, be some cases where an alleged, a sexual assault will be alleged, but, in fact, it was part of medical services unbeknownst to the patient. Likewise, there will be cases in which a sexual assault was perpetrated, but the healthcare provider cast them artfully as part of the rendition of medical care.

JUSTICE PAUL W. GREEN: What about a case where the sexual assault is pled, alleged and the defendant maybe doesn't contest it. Maybe that falls with the category that we're talking about here. Or a case where the assault is alleged and the defendant flatly denies it. One case is a healthcare liability case and the other one is not?

ATTORNEY CHRISTOPHER A. KAISER: Was the for, I'm sorry I didn't quite understand the two types of case?

JUSTICE PAUL W. GREEN: Well I mean it's allegation so if the allegation exists of a sexual assault in the course of a medical examination, then that takes it out of a healthcare liability context.

ATTORNEY CHRISTOPHER A. KAISER: Absolutely, absolutely and that's why I think --

JUSTICE PAUL W. GREEN: But if the defendant flatly denies it, that never happened, it, in that event, it may clearly be a healthcare liability case in terms of what the true facts are, but because the allegation is made, it takes it out of that category?

ATTORNEY CHRISTOPHER A. KAISER: I, I believe so. And I think that that's why the court in Vanderwerff would have been within its rightful discretion to not dismiss the case for failure to file an expert report requirement.

JUSTICE NATHAN L. HECHT: But then just to follow up on that, if it should be determined later in the case that the extra allegations were false, they just don't bear out then there's no, suppose there's no question about it. There's a videotape of the room and it shows it just didn't happen. Then it's too late to file an expert report and the claim is just dismissed, I suppose?

ATTORNEY CHRISTOPHER A. KAISER: But, yeah, right in that case, it would just be a dismissed lawsuit for sexual assault.

JUSTICE NATHAN L. HECHT: Does the association get reports about things like this or --

ATTORNEY CHRISTOPHER A. KAISER: Absolutely.

JUSTICE NATHAN L. HECHT: -- is there a database of this kind of occurrence?

ATTORNEY CHRISTOPHER A. KAISER: In my day-to-day job what I do is take calls. I basically sit by the phone and take calls from rape crisis center advocates and survivors alike. What I can tell you is that what we know about sexual predators, which is what this case is about. It's not just about healthcare providers, but about sexual predators who happen to be healthcare providers. And what we know about health care, or about sexual predators who happen to occupy positions of power like doctors, employers, landlords, clergy members, lawyers, what we know about those specific predators is that they conscientiously exploit their positions of power relative to their victims in order to facilitate their assaults. And that's what makes this case so especially important for sexual assault survivors and really the reason that I'm here this morning as amicus is to emphasize how particularly unjust the Petitioner's position would be in a specific context.

JUSTICE PHIL JOHNSON: Well, we understand that and those are egregious, they are egregious circumstances. But in this case say the pleading, say someone goes in for a scheduled exam of some nature and what

they plead is during the time they feel it didn't go as well as they thought and their pleading is I went into see the doctor and I was sexually assaulted and I am suing them for X number of dollars and all of that. It seems as though the requirement of an expert report aids the trial court because the expert then goes through the medical records and takes statements that may have been made and goes through the treatment and it actually helps the trial court determine those matters. Whereas otherwise you just have bald allegations and we have to go forth with the lawsuit and develop all that, which is part of what the legislature has tried to curtail by requiring an expert report. You get an, you get a third party to look at all of these facts and tell the trial court something.

ATTORNEY CHRISTOPHER A. KAISER: I acknowledge that and I don't, I don't dispute that specifically, but I think that that's not the whole story. And the reason for that is that another thing that we know about sexual predators, which is what we're talking about here, is that they purposely choose victims who they perceive as venerable.

JUSTICE DEBRA H. LEHRMANN: Let me ask you isn't it true that in medical exams of this nature that typically a doctor is going to have a third party present in order to protect the physician?

ATTORNEY CHRISTOPHER A. KAISER: I would presume that that would be a best practice, but that would be a presumption on my part. I don't know what the medical standards are.

JUSTICE DALE WAINWRIGHT: In terms of the breadth of the definition of healthcare liability claim, medical care, healthcare, safety, professional administrative services, how broad do you think safety is?

ATTORNEY CHRISTOPHER A. KAISER: I think safety would extend to the kind of situation that this Court considered in *Diversicare*, a failure to protect one patient from another.

JUSTICE DALE WAINWRIGHT: *Diversicare* held that that situation was medical care, or healthcare.

ATTORNEY CHRISTOPHER A. KAISER: Right, when the plaintiff is suing the facility or the employer.

JUSTICE DALE WAINWRIGHT: And then later at the end safety as well, but that wasn't the focus of *Diversicare*. So it's more about medical care and healthcare. How far do you think safety extends?

ATTORNEY CHRISTOPHER A. KAISER: I think safety would be things like a, leaving a sponge in someone's body during surgery. Keeping a person from slipping on a sponge moving from one room to another. Kind of, things that are more closely related to premises liability except you're dealing with a patient and there's the physician-patient relationship. When you stop providing medical services, when you stop rendering medical services and then in the middle of medical services choose to commit an intentional tort or in this case a degree of felony, that is no longer a departure from standards of safety. That's just a crime.

JUSTICE DALE WAINWRIGHT: Well there's an argument that by putting safety in the statute that it may have been intended to, at least there's an argument that while, for example, a patient is in a hospital perhaps in a weekend condition that there's an obligation to keep them safe from slipping on the sponge, from perhaps a coke machine in the, on the floor falling on them. At least there's an argument that that's, so it's not just related to healthcare or it may be related to healthcare. That's why I'm asking you how far safety goes. Does it go as far as protecting against assaults?

ATTORNEY CHRISTOPHER A. KAISER: I could accept that and I think that that's, what's most important to me is that, regardless of how that's resolved, even if we say that safety encompasses all of that, what it can't include is the intentional decision by a healthcare provider to commit the assault.

JUSTICE DEBRA H. LEHRMANN: I mean I guess the question is can safety be defined such that part of being safe is for a doctor not to commit sexual assault?

ATTORNEY CHRISTOPHER A. KAISER: I think that is what the court in Holguin and so many others have said would defy logic.

JUSTICE PAUL W. GREEN: We have held also, I think it was Marks case, where it was a healthcare provider case and that the expert report, I suppose, would look like a building maintenance somebody coming up in a report saying that these bolts need to be tightened down a little bit more, it will keep the foot board from falling off. It seems to me if we're, if the Court is in the direction of that, why wouldn't it seem logical that in a circumstance such as this that an expert report would be required to show that either this was or was not a service of healthcare at the time.

ATTORNEY CHRISTOPHER A. KAISER: Because I think that if trial judges are in the position to do anything it is to exercise what Justice Medina referred to as common sense. If you have facts, especially as egregious as in this case or Sanchez, a judge is in a perfect position to look at that and say I don't need an expert to tell me that what this healthcare provider did was not part of the rendition of medical care and, in fact, had nothing to do with medical professional judgment. It was just an intentional tort and that, that is within the common knowledge of general public.

JUSTICE DEBRA H. LEHRMANN: Let me say we recently held that in a spider bite case that, in fact, an expert report was required. How's this different?

ATTORNEY CHRISTOPHER A. KAISER: Who was the defendant in that case?

JUSTICE DEBRA H. LEHRMANN: It was the doctor, right? I mean it was a hospital.

ATTORNEY CHRISTOPHER A. KAISER: I think that it becomes different when the healthcare provider is failing to protect from some other third party, if you can call a spider a party. It's different when you're alleging that the doctor himself committed the act to the patient, made a conscious decision to commit an intentional tort or a felony.

JUSTICE DON R. WILLETT: So if there had been a lawsuit filed against the employer of Dr. Wasserman, would that encompassed as a healthcare liability claim as opposed to suing him directly?

ATTORNEY CHRISTOPHER A. KAISER: For example alleging that the--

JUSTICE DON R. WILLETT: For his conduct in this case.

ATTORNEY CHRISTOPHER A. KAISER: Alleging that they should have protected the patient from him? I think that that's, that's how I read Diversicare, yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you Counsel. Court will hear a rebuttal.

REBUTTAL ARGUMENT OF HOLLY H. WILLIAMSON ON BEHALF OF PETITIONER

JUSTICE EVA M. GUZMAN: Ms. Williamson, may I ask you one question?

ATTORNEY HOLLY H. WILLIAMSON: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: On page 14 of your brief, you talk about how the justices in the 14th Court of Appeals that you've looked at their bios and they don't have any medical expertise and how would they know that this touching or inserting the finger was not medically necessary as a matter of law? So my question is

there's been some discussion this morning about considering the circumstances and the facts pled. Should those inform the analysis, this is a very unique case, in some ways and it is in the context of coming back a second day after an initial exam. So how do you think we should consider the circumstances, how should they inform our analysis?

ATTORNEY HOLLY H. WILLIAMSON: I'm sorry?

JUSTICE EVA M. GUZMAN: Should they ever matter, should it ever matter that it was the second day of the exam? That she had gone through a full exam the first day, that she alleges that he told her he was going to do only the surgical consult, that, so does all that matter? Should that inform our analysis or should we just say well you judges are not doctors, what do you know?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, in this situation, no, it should not. And unless there's a clear deviation it should not because what we have here is the need for someone who is trained in this area who knows what is appropriate and inappropriate in terms of what he was doing and whether he should have examined her again the next day.

JUSTICE EVA M. GUZMAN: And a quick follow-up, I left out the phone calls, if it's true the phone calls and telling her I want to do it again. I'm sorry should we consider that, should that inform the analysis.

ATTORNEY HOLLY H. WILLIAMSON: First of all, Your Honor, that's not what's pled. What's pled in this case is that he called her.

JUSTICE EVA M. GUZMAN: I mean, we assume that it's true; should we consider that? Let's just assume that it's.

JUSTICE PHIL JOHNSON: Assume it had been pled.

JUSTICE EVA M. GUZMAN: Yeah.

ATTORNEY HOLLY H. WILLIAMSON: Assuming it was pled? No, Your Honor, because he is attempting to arrange appointments with her for medical care because she has, for lack of a better word poor malitem. Told him she cannot afford the treatments, she cannot come back, she cannot do this. So it is part of the rendition of the medical services, perhaps the administrative part of that.

JUSTICE EVA M. GUZMAN: So I guess, I'm sorry, go ahead.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was there a pleading that, an allegation in the pleadings that the doctor forcibly removed the patient's clothes without her consent?

ATTORNEY HOLLY H. WILLIAMSON: No, Your Honor, what was pleaded was that when she came in that he, he took her sweat pants and he pushed them down a little bit over her pubic area in the beginning, did some poking and prodding. She was not wearing underwear, that's not something that he would have known.

CHIEF JUSTICE WALLACE B. JEFFERSON: Was there an allegation that she did not consent to that conduct?

ATTORNEY HOLLY H. WILLIAMSON: She, I believe that there's an allegation that she did not consent, but once again that gets back to whether an expert would say that under these circumstances, you would go ahead. She didn't object. I will tell you that. There's nothing in the petition that says she objected and, in fact, following the exam she had to go to a relative, tell the relative what she says occurred and let the relative tell her oh that's not good, that's bad. So she didn't go back to the referring doctor. She went to a relative who gave her the opinion based upon what Ms. Gugel told her.

JUSTICE DAVID M. MEDINA: What's the purpose of the statute?

ATTORNEY HOLLY H. WILLIAMSON: The purpose of the statute, Your Honor, is to weed out claims that are brought against healthcare providers, against doctors that lack merit. That there should be this threshold issue, this, it's not even a high threshold, but a threshold issue that before you get to take your claim to court in front of a jury or get to engage in a live discovery, that you meet his threshold of whether this treatment, whatever was going on was medically necessary.

JUSTICE DAVID M. MEDINA: McKamie says that if the legislature intended for all these types of incidents or any incident that occurs inside of a hospital or healthcare facility would be deemed to fall under the statute, it would simply have said so. That seems to make sense to me and they didn't make that specifically clear.

ATTORNEY HOLLY H. WILLIAMSON: What they did make clear, Your Honor, is that when you're talking about a situation where, in effect, what she's claiming is that he deviated from the standard of care, that it falls under Chapter 74. She's claiming I disagree with what he did. He deviated from what he should have been doing. That falls squarely under Chapter 74 and requires an expert report.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, could you please answer what Justice Hecht's question was previously and that is what should the rule be?

ATTORNEY HOLLY H. WILLIAMSON: The rule should be, Your Honor, that in any case involving a healthcare provider or a doctor where there is a claim that something occurred during the course of their treatment, the rendition of that treatment, that they disagree with, that they characterize as an intentional tort that there ought to be, they ought to fall with under, under the act and provide that report as that threshold. It may change later on. As a threshold requirement provide that report. There will be certain circumstances that are black and white. Justice Guzman's example of someone shooting someone in the head.

JUSTICE DEBRA H. LEHRMANN: So you're saying it would have to be that extreme?

ATTORNEY HOLLY H. WILLIAMSON: It would have to be a certainty that they stepped outside of what they were supposed to be doing in the rendition of medical services.

JUSTICE DEBRA H. LEHRMANN: Do you agree with the argument that we look at the totality of the circumstances?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, I think that in terms of the claim of assault, we look at what happened on that day. In terms of the phone calls, which I will tell you, the petition is different than what he described. There were no criminal charges. I talked to the police officer and they didn't believe her. You look at that particular situation and then determine whether that particular situation also involved the administrative or rendition of medical services in terms of arranging appointments and payments and that sort of thing.

JUSTICE DON R. WILLETT: If Dr. Wasserman weren't an orthopedist, but an optometrist and the allegations were as they are here, what kind of claim would that be?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, just from that hypothetical, nothing more.

JUSTICE DON R. WILLETT: Yep.

ATTORNEY HOLLY H. WILLIAMSON: If he's an optometrist and he is examining her lower extremities, I believe that that's one of those black-and-white examples. Why would an optometrist or a dentist have any reason to be examining the lower part of a woman's body? Orthopedic surgeon trying to determine the origin of the

pain and the source of the pain in the lower part of her body would have that reason.

JUSTICE PHIL JOHNSON: Well would you have, let's assume for a moment that she pled in this case, her pleadings were that she went in for an examination and while she was in the examination room, he had sexual relations with her. He had intercourse with her. Would at that point your position be that an expert report was necessary?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, at that point no. That's when I, there is a clear, there is a clear separation in what he was supposed to be doing in terms of rendering professional medical services to her and his own desires, which would be raping her.

JUSTICE PHIL JOHNSON: So to a certain extent you agree with opposing Counsel that you do have to look at the particular circumstances, but in this particular, but in this case, your position is that there is no clear demarcation and in those cases, an expert report would be necessary?

ATTORNEY HOLLY H. WILLIAMSON: Your Honor, my point is is that you look at the circumstances as they are when they make the complaint and if they make the complaint that I went in for an eye exam or I went in for an exam and I was raped that's what occurred on that day and that's what physically happened. He stopped being her optometrist or her dentist.

JUSTICE PHIL JOHNSON: It will still go on to the pleadings though?

ATTORNEY HOLLY H. WILLIAMSON: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: And sexual assault can be more than the actually act of sexual intercourse. So that if that inappropriate touching was sexual assault, it would be no different than had the act been consummated and it was sexual intercourse?

ATTORNEY HOLLY H. WILLIAMSON: Yes, Your Honor, sexual assault could be more than just a rape, but when you're dealing with the examination of someone's lower body and you're an orthopedist surgeon trying to determine origin, you're going to be touching of that area.

JUSTICE DON R. WILLET: Final question, but if the plaintiff had sued the employer, the physician group or the hospital or the healthcare entity for what alleged happened here, well let me describe it differently. If it were a more extreme example, a forcible rape or something else and there was a lawsuit brought against the employer, would that go under the safety definition of healthcare liability claim and have to be brought as a Chapter 74 claim?

ATTORNEY HOLLY H. WILLIAMSON: Yes, Your Honor, I believe given the decisions of this Court the Omaha decision and the Diversicare decision whether it's safety or medical care, however it's identified, I believe that the report would be required. And, in fact, she did sue the employer in this case and in fact it was dismissed because she didn't provide a report.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you Counsel the cause is submitted. That concludes the arguments this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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