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Supreme Court of Texas.
Raul Ernesto Loaisiga, M.D.
v.
Guadalupe Cerda.
No. 10-0928.

February 29, 2012.

Appearances:

Carlos Omar Escobar, Escobar Law Firm, PLLC, McAllen, for Petitioners.

Brendan K. McBride, The McBride Law Firm, San Antonio, for Respondents.

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 now ready to hear argument in 10-0928.

MARSHAL: May it please the Court, Mr. Escobar will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF CARLOS OMAR ESCBAR ON BEHALF OF THE PETITIONER

ATTORNEY CARLOS OMAR ESCOBAR: May it please the Court, Counsel, my name is Carlos Escobar and I represent the appellants, Raul Ernesto Loaisiga and Raul Ernesto Loaisiga, MDPA. That's a professional association for him. I will refer to them as Loaisiga and the PA.

JUSTICE DEBRA H. LEHRMANN: Can I just ask you right upfront? What if this doctor, when the patient walked into the room, would have pushed her down and physically raped her? Do you believe that would be a healthcare liability?

ATTORNEY CARLOS OMAR ESCOBAR: No.

JUSTICE DEBRA H. LEHRMANN: Excuse me?

ATTORNEY CARLOS OMAR ESCOBAR: No.

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JUSTICE DEBRA H. LEHRMANN: Where's the line?

ATTORNEY CARLOS OMAR ESCOBAR: The line is, I think, I think this particular case that the Court may be referring to is that appellate case that I cited in my brief. In that case, you had a situation where a doctor walked in and it was an unprovoked assault just like you described. The doctor punches the, the allegations the doctor punched one individual, threw another individual to the ground and then later on, I believe, the court that was analyzing the case found that there was also another tort alleged where the doctor, the same doctor, prior to the time that this assault occurred, was doing a procedure with a catheter, I believe it was urologist. He had inserted this catheter in a very aggressive manner into this individual's vagina and in that case, the court drew a line between attack claims and medical claims and I believe is where the court may be going, but what it is is there's no medical care being rendered at the time that the assault occurred, the example that you provided. Now in the appellate case, they said all that type of unprovoked violent conduct, that is always going to be just an assault. It's not going to be medical care because medical care is not an inseparable part or is not an inseparable part of what was going on at the time.

JUSTICE DEBRA H. LEHRMANN: But isn't that she what she alleges in this case? If, in fact, [inaudible] and there was [inaudible] then that's not, that's true. That's not part of medical [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, Your Honor, but the distinction is whether medical care was occurring at the same time that the assault was ongoing. In this case, what you have and it's different than any other case that's been briefed in this case is you have and I'm going to read to you the allegation and this is where I'm going, Your Honor. For example, Plaintiff Velez, she says in her petition, in January of 2008, Cindy Velez arrived at work very sick with flu-like symptoms. Dr. Loaisiga offered to examine her and she accepted the offer. At the start of the visit, Dr. Loaisiga asked her to take her top off. Cindy Velez reluctantly complied with her boss' request. Dr. Loaisiga had Cindy Velez sit on the examining table. He undid her bra from the front. Dr. Loaisiga palmed her breasts with one hand during his entire examination. What's been alleged here is that you've got medical care that's ongoing during the time the assault is also being done. He's cupping her breast while he's doing an examination and it's a simultaneous, you're having medical care being rendered and an assault occurring at the same time. It's simultaneous conduct and the example that you prescribed, Your Honor, you can separate. There's no medical care ongoing. It's just a straight assault, but if and the rule of law is if it's inseparable, if the conduct that's being impuned is an inseparable part of medical care, then it sounds under Chapter 74.

JUSTICE EVA M. GUZMAN: Mr. Escobar, what [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, Your Honor, I think the test that we have in Rubio is the test. If the conduct that's being impuned as assaultive conduct is inextricably interwoven with the administration of medical care, then it sounds under the statute. I mean here the way that it's been pled, the way that the plaintiff's pled this case is that he's assaulting in the midst of providing medical care and you can't separate the two. It's not like the example that was raised earlier where you just have a straight assault. This is simultaneous conduct, Your Honor, and some of the other cases, I think that same distinction can be drawn. You have the Buck v. Blum case. You even have the Wasserman case where you have legitimate conduct and then you can draw the line into where the illegitimate conduct occurs.

JUSTICE DALE WAINWRIGHT: Counsel, I understand your point. As you know, we're trying to interpret that when the legislature passed some protection of healthcare providers [inaudible]. The test that you draw, there's an examination going on [inaudible] healthcare liability claim on a different kind of claim [inaudible]. Does that hold water in the context of the examination is ongoing clearly a legitimate examination [inaudible] at the same time the doctor pulls a [inaudible] out and stabs her. They're going on at the same time, but by your test is there still no [inaudible] pocket knife and stabbing him?

ATTORNEY CARLOS OMAR ESCOBAR: Well, I think, Your Honor, it has to, it's a very subtle point that I

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think has to be recognized. If you have in the Buck v. Blum case, you have something that's coming out from left field. In your case, that's also, in other words, they're use, the doctor's using his position as a medical provider to get the person there, get them in a vulnerable position and then enact this aggression or violence upon them. In your case, I would argue that if you have to go through medical care to commit the tort, then it would be considered a tort under Chapter 74 because you're using the practice of medicine to commit the tort. You have them at your office. You have them in vulnerable position. You do these different things. Those are all the different things that are present in all these cases, but the other thing, Your Honor, that I want to raise that I think is a very salient point is safety.

JUSTICE DAVID M. MEDINA: Let's talk about Dr. Kilgore. Why isn't that issue [inaudible]?

ATTORNEY CARLOS OMAR ESCOBAR: Your Honor, it is insufficient. It does not and it cannot meet the requirements of Chapter 74 because it doesn't make any affirmative statement anywhere in the report that any of these things that the Plaintiffs allege occurred actually occurred. It is a hypothetical opinion.

JUSTICE DAVID M. MEDINA: All these are allegations. When they're pled, they're allegations. The doctor's not going to say [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, Your Honor, I mean in every kind of case that an expert is retained on, the expert's going to have to. The expert's supposed to be objective. They're supposed to use their credentials and their education and their training to give an objective report about what they're being retained to opine on. In this case, this expert doesn't have anything. He doesn't have an affidavit from the clients. He doesn't have a letter. He doesn't have an email. He has nothing. He's just looking at an unsworn petition and saying well, if these allegations are true, then negligence has been committed or a tort has been committed and this is exactly what he says. Dr. Kilgore says, it is my opinion that if the facts contained in the Plaintiff's Petition are true, then the manner in which these patients were examined by Dr. Loaisiga failed below the standard of care. That does not arise, rise to the level of being anything. There's no way that a trial court can determine whether a claim has merits.

JUSTICE DAVID M. MEDINA: What about 20 years of experience?

ATTORNEY CARLOS OMAR ESCOBAR: Your Honor, I think that goes to whether or not in his opinion if these facts are true that occurred, well, obviously that holds water.

CHIEF JUSTICE WALLACE B. JEFFERSON: You're saying that if the Plaintiff had sworn to what was in the petition, then the report would be adequate?

ATTORNEY CARLOS OMAR ESCOBAR: Well, Your Honor, all I'm trying, the point I'm trying to make is you've got to give the expert something. You've got to give them some facts.

CHIEF JUSTICE WALLACE B. JEFFERSON: And I'm trying to understand what it is that you give them. You just said an affidavit. Would that be enough? Would an interview with the, I mean this is a he-said, she-said type situation that's occurred with this doctor so how is the doctor supposed to have sufficient facts under your views to make the report adequate?

ATTORNEY CARLOS OMAR ESCOBAR: Well I just think the effort involved is minimal, Your Honor. He could pick up the phone and call the Plaintiffs. What happened? Where were you? How did it occur? What'd you do? An email, a letter, any way that the expert can say I spoke to this Plaintiff.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well many of these cases that don't involve this sort of credibility determination, the doctor's looking through medical records, not talking to the doctors who perform the surgery or the nurses and very often not the patient, but just reviewing documents and saying based on this re-

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view, I feel that the standard of care was breached or damaged. None of that was sworn to, but courts all the time say that those kinds of reports are sufficient.

ATTORNEY CARLOS OMAR ESCOBAR: Right, Your Honor, because they represent the facts that occurred at the time. I mean, there's nothing other than the actual petition, there's nothing that this expert's reviewed. He's got to have some information.

JUSTICE NATHAN L. HECHT: The petition is subject [inaudible] right?

ATTORNEY CARLOS OMAR ESCOBAR: That's correct.

JUSTICE NATHAN L. HECHT: Why isn't that enough?

ATTORNEY CARLOS OMAR ESCOBAR: Well, it's not enough, Your Honor, because that's what, all allegations are in a petition are just allegations.

JUSTICE NATHAN L. HECHT: Yes, but if you say pick up the phone and call [inaudible] is subject to sanctions [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Right, Your Honor, but the role of the expert, the role of the expert is to obtain some objective facts other than just allegations because a lawsuit is an allegation. The claims in a lawsuit don't become true or not until the jury rules on it, but what I'm saying is for the expert to do his task or his role in being an expert under Texas jurisprudence is he needs to look at what the parties are looking at, what they're talking about and then come to his own conclusion.

JUSTICE EVA M. GUZMAN: Would it be any different if you picked up the phone [inaudible] tell me what happened [inaudible]? How would that [inaudible]?

ATTORNEY CARLOS OMAR ESCOBAR: Well I think it would make a world of difference, Your Honor, because he wouldn't say it is my opinion that if the facts contained in the plaintiff's petition are true. He would know that they're true because he spoke to the-

JUSTICE EVA M. GUZMAN: But even if he said there [inaudible]. So my question is how would he and he may have called her [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, Your Honor, because again it's the absence of facts or having facts. That's the way I look at it. It does, if the expert is going to fulfill his role as an educated, trained person, has specialized knowledge of, he's going to be able to apply that, he needs to know what to apply it to and I-

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: Your Honor, I can only say that based on what his report indicates, he doesn't identify anything other than the petition that he relied upon so I'm not, I can't say that.

CHIEF JUSTICE WALLACE B. JEFFERSON: What case do you rely on that says that the expert has to interview the plaintiff before the reported [inaudible]?

ATTORNEY CARLOS OMAR ESCOBAR: I'm not relying on any particular case, Your Honor, but in all the other cases, you have in terms of medical malpractice cases, you have the expert being, he is able to look at the medical records. He's able to look at, I mean if there was-

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CHIEF JUSTICE WALLACE B. JEFFERSON: That's all hearsay.

ATTORNEY CARLOS OMAR ESCOBAR: I understand that, Your Honor, but what I'm saying is is that he's got to have some level of evidence other than just an allegation.

CHIEF JUSTICE WALLACE B. JEFFERSON: If the facts as are alleged in the petition are true, is it, would you think it's medical malpractice?

ATTORNEY CARLOS OMAR ESCOBAR: I still believe it would be medical malpractice, Your Honor, because, again, it's simultaneous conduct. You don't have a situation where someone, again, the doctor gets the person there, gets into the normal position and then enacts the violence upon them. In this case, the way it's pled, you have it occurring simultaneously and if it occurs simultaneously, it's inseparable from medical care.

JUSTICE EVA M. GUZMAN: Are there [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: Well I think you can distinguish, yes, Your Honor, but the fact that they occur-

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: The fact that they occur simultaneously is the fact that's different from any of the other cases that have found that such conduct would not be considered medical care.

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: They are different acts, but in this case, you have the same doctor at the same place at the same time with the same patient with one hand enacting assaulted conduct and the other conducting medical care.

JUSTICE DON R. WILLETT: Well, because he's [inaudible] somehow [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Your Honor, it's twofold. Number one, it's inseparable because they're occurring at the same time and, secondly, the issues of safety are also implicated under the statute.

JUSTICE DON R. WILLETT: You were going to talk about safety earlier. I don't think you got a chance to [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Right, well-

JUSTICE DALE WAINWRIGHT: And just before you go there on the topic of inseparable [inaudible] inseparable just mean [inaudible] related to the provision of healthcare.

ATTORNEY CARLOS OMAR ESCOBAR: Your Honor, I think it's both.

JUSTICE DALE WAINWRIGHT: Your focus is on the [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, it's not just time, Your Honor. He's doing both. He's multitasking, I guess, that's, it's happ-it's the same person doing two separate things at the same time and I don't see how you can separate the-

JUSTICE DALE WAINWRIGHT: Is there any legitimate medical reason [inaudible]?

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ATTORNEY CARLOS OMAR ESCOBAR: I don't know, Your Honor, and I think at some point, medical testimony may be required to say how far you can go with respect to that. How far can a doctor place his hand or a stethoscope on a woman, on a female's breast before it's considered inappropriate or it's outside of the realm of accepted conduct, of that kind of conduct.

JUSTICE DAVID M. MEDINA: Inappropriate [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: That would be correct, Your Honor.

JUSTICE PAUL W. GREEN: And would it matter what kind of doctor it was, podiatrist?
ATTORNEY CARLOS OMAR ESCOBAR: Right, the example is an optometrist is touching somebody's genitals and obviously that's, again, out of left field, that's something that would not be appropriate. That's something that I would think would be not medical care or an inseparable part.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you're going to answer Justice Willet's question about the [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Yes, Your Honor, the Rubio case specifically says that safety is not a medical term of art. Safety is included in the statute and safety, if I recall the language correctly, it expands the scope of Chapter 74 beyond just health care and here, if the Plaintiffs have alleged that they're endangered or hurt or assaulted by this physician while he's practicing medicine, then I would argue, Your Honor, that safety is implicated under the statute and it falls under Chapter 74.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The Court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. McBride will present arguments for the Respondents.

ORAL ARGUMENT OF BRENDAN K. MCBRIDE ON BEHALF OF THE RESPONDENT

ATTORNEY BRENDAN K. MCBRIDE: Good morning, may it please the Court, Brendan McBride here on behalf of the Respondents, Guadalupe Cerda v. Cerda and Cindy Velez.

JUSTICE DEBRA H. LEHRMANN: [inaudible] do you agree that there are two inseparable acts that is the provision of providing health care [inaudible] and an assault?

ATTORNEY BRENDAN K. MCBRIDE: I think in this case, they are definitely separate acts and my thought on that is essentially that the Court is faced with a choice between three tests. Under two of those tests, the Court would affirm what the trial court did here and I know the Court is looking at other cases that raise this issue so I want to kind of explore what those three options are and what I think is the best way to harmonize the language of the statute, its purpose and the actual practical procedural requirements that this particular issue raises. The first is the one that you've heard, the one that you're discussing and that is the idea that Chapter 74 would apply to any action for damages against the healthcare provider for any kind of assault provided there's some kind of medical or healthcare activity going on at the same time. The idea that we heard was that that's regardless of how severe and obvious the assaultive conduct is. I think that both the legislature and the general public of Texas would be shocked to find out that Chapter 74 was being construed to protect that kind of conduct. The second rule or test is actually the one applied by the court of appeals in this case and it's been applied by a couple of other courts of appeals on this issue and that is the notion that there are instances where the allegations are such that they obviously don't involve any act and furtherance of the healthcare. There's a couple of problems with that test. The one thing I'll say is that that test applied in this case, the Court will still affirm. That's the court of appeals analyzed it and you can confirm the trial court's denial of the motion to dismissal on this second test, but the problems with that test that I ask the Court to consider and I will give a third option in a

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moment are, number one, I think it's hard to apply. It's hard to give somebody a test where they're deciding what is and isn't obvious as a sitting appellate.

JUSTICE DALE WAINWRIGHT: May require [inaudible]

ATTORNEY BRENDAN K. MCBRIDE: Exactly and-

JUSTICE DALE WAINWRIGHT: Defeat the efficiency purposes.

ATTORNEY BRENDAN K. MCBRIDE: Yes and, Your Honor, you're anticipating exactly why I'm suggesting a third alternative.

JUSTICE DALE WAINWRIGHT: The third alternative?

ATTORNEY BRENDAN K. MCBRIDE: The third alternative would be that where the cause of action in line with what the Court said in Rubio, which is a cause of action alleges a departure from accepted standards of medical care or healthcare, if the act or omission complained of is an inseparable part of the rendition of medical services. So the threshold question is what is the act or omission complained of?

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY BRENDAN K. MCBRIDE: Certainly.

JUSTICE EVA M. GUZMAN: [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: The second problem I think is the more fundamental problem and it's actually the very problem Justice Wainwright is getting at. These cases, the fact issue that sits right at the center of them is the very issue of whether or not this was healthcare and so the problem with the obvious rule is that you have a situation where you can require a claimant who's alleging that they were assaulted to have to comply with Chapter 74 even though at the end of the trial, the jury may actually decide that this was an intentional sexual assault. This might have an intentional rape, for example, but we've decided that because it's somehow involved a healthcare provider in some kind of healthcare service going on regardless of the fact that the jury has decided that it had nothing to do with the healthcare, we're going to apply Chapter 74 and that I want to emphasize doesn't just mean having an expert report at the outside of this case. That means that if you have a child who's been raped by a healthcare provider, you're also telling them that the legislature's capping their damages at $250,000 for all the nightmares and treatment and mental anguish they're going to suffer for the rest of their life because even though the jury found this had nothing to do with the healthcare being provided, it's still Chapter 74 because we presumed at the outset of the case that it was a healthcare liability claim. A simpler, cleaner rule is the third option and that is to say where it is alleged that the conduct was an intentional tort, intentional assault on a patient, sexual assault with a knife, throwing the patient down in the office, then Chapter 74 doesn't apply. There are cases where there will be pleadings in the alternative where it's alleged that the doctor assaulted somebody.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, but there's a problem with that as I see it with that test because then everything's in the hands of the claimant. The claimant may in a medical proceeding believe that it was an intentional assault, but it may have just been essential medical care. The part of medical care is laying hands on and manipulating and that sort of thing and it's uncomfortable. It can be painful, but sometimes it is required to dispense medically so how do you parse that?

ATTORNEY BRENDAN K. MCBRIDE: The way I parse that is that without playing Chapter 74, there are cases and a good example might be the Vanderwerff case from Dallas, which could have been decided the same way under this third rule as it was and that is that in instances where the defense to the allegation of assault is

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that it was a part of the medical care I was providing, then you essentially do put the burden on the claimant in those cases to come forward with an expert at trial, not a Chapter 74 expert report, but they may have just as the practical requirements of the type of case they're making in certain types of cases an obligation under the ordinary rules of evidence and burdens of proof to have expert testimony proving up that this was beyond the scope of healthcare treatment. The problem is is if you don't do it that way then you end up with this odd paradox where you presume that the claimant is lying at the outset of the case and then you end up with the situation where the jury might completely agree with the claimant, in which case the report of the outset of the case under Chapter 74 never was required in the first place.

JUSTICE PHIL JOHNSON: But if you have allegations against the doctor in this particular case, no question, apparently no question that there was some type of treatment going on.

ATTORNEY BRENDAN K. MCBRIDE: Yes, Your Honor.

JUSTICE PHIL JOHNSON: And the allegation is it went beyond that treatment so isn't there a presumption under the statute that if in the healthcare setting like that [inaudible] this treatment, isn't there a presumption that it's a healthcare liability claim and that's why the expert report requirement is there?

ATTORNEY BRENDAN K. MCBRIDE: No, I wouldn't say there's a presumption. I think that this Court has clarified the test in Rubio to distinguish between when the conduct is being complained of is inseparable from the healthcare. I think it's hard to say. I think it's impossible to say that an allegation that a person sexually or physically assaulted during the course of healthcare treatment is inseparable from the healthcare treatment itself.

JUSTICE PHIL JOHNSON: But you could make that allegation on almost anything when someone goes into a physician and some physicians may examine without a full undressing of the patient and some for the same type of examination may want the patient completely undressed, put on a gown and examine different so there may be different schools of thought on that and isn't that what we're talking about here, schools of thought that we as lawyers are really not trained in and that's why the legislature put this requirement in there.

ATTORNEY BRENDAN K. MCBRIDE: Well, I-

JUSTICE PHIL JOHNSON: To get away from allegation. Allegations that end up trying lawsuits when they end up trying with experts later on instead of [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: Your Honor, I agree that there will be cases where there will be a difference of opinion between experts and Vanderwerff might be one of them where there would be a difference of opinions between experts, but the question is really for this purpose is whether or not Chapter 74 applies to the claim that's being alleged and-

JUSTICE DALE WAINWRIGHT: But his point is like [inaudible] point that any time there is a touching of a person [inaudible] that can be pled [inaudible]. If someone doesn't want to be touched [inaudible] that we don't fall back and rely on pleadings because [inaudible] going on here because any claim, the creativity [inaudible] can be pled in multiple ways to get around the statute.

ATTORNEY BRENDAN K. MCBRIDE: Well, I-

JUSTICE DALE WAINWRIGHT: Just because it's pled [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: Well if the facts pled are that it was an intentional assault, I think that it does end the ballgame and a couple reasons for that.

JUSTICE DON R. WILLETT: The patient could be completely mistaken [inaudible].

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ATTORNEY BRENDAN K. MCBRIDE: Sure and the jury would decide that. There's a whole set of additional procedural safeguards for those kinds of cases. The question is is in a sexual assault allegation something the legislature intended to protect. What the tort reform package was for originally in the 1990s and then when it was reformed in 2003 with this Chapter 74 statute was to try ostensibly to reduce healthcare costs by reducing liability for medical malpractice premiums for treating physicians. These cases, when they're pled is intentional torts aren't going to cover it under any of those policies anyway.

JUSTICE DAVID M. MEDINA: What about this Dr. Kilgore?

ATTORNEY BRENDAN K. MCBRIDE: Yes, Your Honor.

JUSTICE DAVID M. MEDINA: Why is it this [inaudible]?

ATTORNEY BRENDAN K. MCBRIDE: Yeah, I'll address that. The problem with the Defendant's argument is that it's impossible for him to make a credibility determination within the scope of his expertise as a doctor. Essentially that's what they're asking these experts to do. Unless they're fact witnesses and were in the room, they can't do that. All they can do is look at whatever reasonable facts are available to them and then make a determination about whether or not it falls below the standard of care and that's what the doctor did here.

JUSTICE DAVID M. MEDINA: [inaudible]

ATTORNEY BRENDAN K. MCBRIDE: Pardon?

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

ATTORNEY BRENDAN K. MCBRIDE: The purpose of these reports is to make a good-faith showing that the claim has merit at the outset of the case. Obviously, with the intention and understanding that there's going to be a large volume of evidence, testimony, cross examination, all of that other stuff that's going to follow so it's to flush out all the facts that are initially discussed in some of these preliminary reports. For purposes of what the statute requires, assuming that the Court were to conclude that Chapter 74 applied to a case like this one and rejected both the second and third rule that I've been discussing, then I think this report is a good-faith effort to comply with what the statute would require for a case like this where-

JUSTICE DON R. WILLETT: [inaudible] considered battery [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: My understanding of that case and I will confess that I have not read it recently was that it was against the facility or the hospital or whatever the thing was where the care was taking place and I think that when you're suing somebody for not protecting them against a battery or an assault, that is a safety point so I think and this is the distinction that's been made by two courts of appeals. It's been made by the San Antonio Court of Appeals in the Healdburg case I think it's called and it's also the Buck v. Blum case and it's mentioned as well in the Jones case and that is where you're suing the person who actually intentionally assaulted you, that isn't healthcare, but when you're suing the facility or the hospital or the practice group on the allegation that they should have taken steps to supervise or oversee, that is a safety issue so the claim against the person doing the assaulting, not a healthcare liability claim, but the claim against the facility for not guarding against the person assaulting, that is a healthcare liability claim and I think that's the distinction the courts of appeals have made and I think I agree with that and I think that answers your question about that case.

JUSTICE NATHAN L. HECHT: [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: Except that you would have a situation, Justice Hecht, where you

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might have a case that the jury would have believed and so that the report would have never been required, but yet the case got dismissed on some procedural irregularity that frankly never actually ended up or would end up having to apply to the case in the first place. You end up with this odd paradox where you presume that Chapter 74 applies and that's the problem these cases present.

JUSTICE NATHAN L. HECHT: But is there any problem other than [inaudible] surely almost any doctor [in audible].

ATTORNEY BRENDAN K. MCBRIDE: Well, as I'm sure this Court is aware, there's legion interlocutory appeals for the enormous number of little procedural hurdles that are implicated by that statute. It is very easy to blow a medical malpractice case and to have somebody lose the right to recover for mental anguish damages for being raped because of some burdensome procedural requirement that was instituted for a different kind of claim when at the end of the day if what they said was true, the statute never applied to the claimant in the first place.

JUSTICE PHIL JOHNSON: Well we're not talking about a rape case here. We're talking about an examination. I mean there are degrees that we're talking about. I think maybe a patient if it's raped in a hospital bed is one case, but a patient who is being examined in the chest area and the question is where did the doctor's hands, where they can touch reasonably, that's a different case, so let's make sure we're there, but I do have another question. What this physician report does not indicate that he looked at any patient records or anything. Of course, we're bound by the face of the report on whether [inaudible] but it seems as though the he ordinarily would want to see is the doctor report is based upon an examination of the physician's record about what was reported to the physician, what the physician was doing and then we evaluate that if we see that evaluation of the report. That didn't take place here?

ATTORNEY BRENDAN K. MCBRIDE: There's no indication in the record that it took place here. I agree with that. I will say this that in these kinds of cases, you're not likely to find somebody because the physician controls the content of those records so they're not going to write in there that during the course of their examination, they unnecessarily fondled the patient's breasts so there's no point at looking at that. It is--

JUSTICE DAVID M. MEDINA: I think the question was more why was, I mean, those notes read [inaudible] accidentally or intentionally [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: Yes and the way the record reads, he reviewed the allegations about why the patients were being examined, the basic facts of why they were there from the Petitioner, which as Justice Hecht points out is certified to comply with Rule 13 when it's filed so I think it's fair for an expert to rely on the patient's own recounting of what occurred and why they were there.

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY BRENDAN K. MCBRIDE: That's, I think that's where you can affirm under the second rule, which is the rule that's been applied by this Court. It's the rule that was used in Vanderwerff. It was the rule used in Wasserman. I don't think there really is a fair and reasonable dispute that it was unnecessary to have this girl take off her bra and cup her breasts while listening to her chest.

JUSTICE EVA M. GUZMAN: Let me ask [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: Well I have a couple things to say about that. The first is and to address the last question first, as I had mentioned in response to Justice Hecht's question, you end up with the possibility that a legitimate sexual assault claim gets thrown out on a procedural requirement that was never supposed to apply in the first place.

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JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY BRENDAN K. MCBRIDE: Well, that's true. Not for Chapter 74, but for other procedures, certainly, yeah, but the issue here is that the legislature then will he put in the position of having the statute construed to apply all those additional procedural safeguards to cases that are way beyond the scope of and, granted, this isn't what most people would consider a rape, but we could certainly be involved about a case that was and we'd have this exact same question.

JUSTICE DEBRA H. LEHRMANN: Could you be more specific exactly about what you're talking about other than the requirement of an expert?

ATTORNEY BRENDAN K. MCBRIDE: I'm sorry, I don't understand your question.

JUSTICE DEBRA H. LEHRMANN: In answer to following up on [inaudible] were saying that, you know, I think where we're going is that if at the outset, we presume that it was a healthcare liability claim and at the end, the jury says it wasn't, you're saying that it could get tossed out because of all these procedural problems be specific in what you're talking about.

ATTORNEY BRENDAN K. MCBRIDE: Okay, there's a number of deadlines that apply to when these reports are supposed to be filed that are unique to these types of cases that would not apply if this were an ordinary sexual assault case against you or I.

JUSTICE DEBRA H. LEHRMANN: Meaning expert report.

ATTORNEY BRENDAN K. MCBRIDE: Yeah, because we aren't healthcare providers and so those are the ones. There's a myriad of cases out there where healthcare liability claims have been dismissed for failing to comply with the specific requirements of this statute.

JUSTICE DEBRA H. LEHRMANN: But you're mainly talking about the expert report.

ATTORNEY BRENDAN K. MCBRIDE: I'm talking about the expert report requirements for the most part that are required by Chapter 74.351.

JUSTICE DEBRA H. LEHRMANN: And though if we do have a rule that says now okay, if anything happens within the examination [inaudible] healthcare liability claim and everyone knows that they need to get an expert and file it, doesn't that simplify things?

ATTORNEY BRENDAN K. MCBRIDE: Well I do want to go back to the other thing I wanted to say in response to Justice Guzman and I think it answers your question as well to some extent is in these cases, what happens at trial, I don't the jury decides whether it was a healthcare liability claim or not. The jury will be charged on a sexual assault or an assault tort and they will answer yes or no on it. There are a number of different reasons why they might answer no. One could be that they agree with the doctor that what he was doing was within the scope of ordinary medical care. Possible. The answer still is just going to be no. But the other possibility is that the doctor never defended on that basis at all, in which case the jury just disbelieves the testimony about what happened in there that the claimants kept coming forward with in which case the doctor never was defending a healthcare claim. It was just a he-said, she-said about an assault just like any other assault case. That's what the jury's going to be charged with and if the jury at the end of that kind of case comes back and says yeah, we agree with the plaintiff. We believe her. We think the doctor's lying. He did these things she says that he did to her then you end up with the weird result that this case that jury decided was an assault might have been thrown out on a technicality that wouldn't apply to an assault case, but for the fact that there was a presumption at the outset of the case that it was a healthcare liability claim when the jury ultimately decided it wasn't.

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JUSTICE DON R. WILLETT: Can you say it one more time, the particular [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: I'm proposing either of two tests and the Court can affirm under either of them, but the first test is the one that's been applied in this case by the court of appeals, Vanderwerff and Wasserman and that is the test where the court of appeals can determine whether or not it's obvious where there's a genuine dispute about whether or not the alleged assault was in furtherance of the healthcare that was being provided.

JUSTICE DEBRA H. LEHRMANN: Are you saying it's obvious from the allegations [inaudible]?

ATTORNEY BRENDAN K. MCBRIDE: Essentially, that's what those courts have done, yeah, based on the al legations, is it obvious that's what being alleged was not in furtherance of the healthcare services.

JUSTICE DON R. WILLETT: But if you say that's hard to apply [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: Yeah, you can affirm under that rule, but yeah.

JUSTICE DON R. WILLETT: Right, but if you go to your third [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: The second test would be that you look at the facts alleged under Rubio and see what, and define what the act complained of is and determine whether or not it is alleged that it is an intentional assault case as opposed to an allegation that the doctor accidentally touched me or didn't do the exam right. Now I was going to mention this early. There are, there may be a case where somebody decides to plead it in the alternative. They might plead it to say it was intentional assault or in the alternative, he did this the wrong way and it ended up hurting me or offending me. To the extent that it's pled in the alternative like that having pled it as a negligence case based on inadequate healthcare, that part of the case, that cause of action would require you to have an expert report. Otherwise, it won't see the light of day when it comes to the jury, but that wouldn't affect your ability to go forward with the pure assault case because those are usually going to be just a he-said, she-said and to presume that it's one side of that story rather than the other at the outset of the case is a procedural paradox. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Wainwright.

JUSTICE DALE WAINWRIGHT: Thank you, Chief. One final question. You have a case pending. You alluded to other cases we have pending [inaudible] up and down her leg, her thighs, examination the doctor touched her in her private parts [inaudible] inappropriate. Someone could allege that [inaudible] pain going up and down her leg. I need to examine all [inaudible] how does that fit in your [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: Well, it might come out differently under those two tests and that's why I distinguish between the two tests. Under the obvious test, is it the Vanderwerff case that you're referring to or is it the Wasserman?

JUSTICE DALE WAINWRIGHT: No, pending in this Court.

ATTORNEY BRENDAN K. MCBRIDE: Oh, okay, under the obvious missed test, it might be that that's not as obvious as fondling a woman's breast during a stethoscope examination and, therefore, it's a healthcare liability claim, but under the third test that I'm proposing, if it were pled in the alternative both as a medical negligence case and as an intentional tort case and there were no expert report, the case would only go forward as an intentional tort case and the jury would only be charged on assault.

JUSTICE DALE WAINWRIGHT: One final [inaudible], Chief. The question, we have a number of cases spe-

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cifically that claim [inaudible] is not allowable otherwise always, almost always [inaudible] conduct that occurred that can be [inaudible] healthcare liability claim and it can be pled that it's not a healthcare liability claim. We're not going to allow [inaudible] pleading around the statute the legislature put in place for healthcare claims. How does your argument about pleading the alternative, pleadings govern. How does it deal with those [inaudible]?

ATTORNEY BRENDAN K. MCBRIDE: You wouldn't be able to plead around it. If you're going to allege it as a negligence case, you would have to have an expert report. I think that these cases present a unique problem for that particular rule and that is that you have as the central factual issue to be determined, ultimately determined by a jury whether or not this was a healthcare liability claim in the first place. Ultimately, the decision on that assault question that the jury asked is going to be asked, is actually going to determine whether or not from day one this was a healthcare liability claim and you still end up with the same problem if you follow any other rule that you have a case that was that can be dismissed on a procedural technicality or requirement that never actually would have ever applied to it because the allegation, the very allegation is that this wasn't healthcare.

JUSTICE DALE WAINWRIGHT: So your answer is just [inaudible].

ATTORNEY BRENDAN K. MCBRIDE: My answer is that if they pleaded as a negligence case, then they would have to produce an expert report, but if it's pled and there are instances where somebody could say that in the course of the examination, he didn't do it the way he should have and brushed a breast or brushed genitals or something like that and that's the way it's pled, then that's, there's little question that would be a Chapter 74 claim. But where it's alleged that there was an intent to assault a person, that isn't. That is not inseparable from the provision of healthcare and if there's no further questions, I thank the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. McBride.

ATTORNEY BRENDAN K. MCBRIDE: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

REBUTTAL ARGUMENT OF CARLOS OMAR ESCBAR ON BEHALF OF PETITIONER

JUSTICE PHIL JOHNSON: Counsel, before you start, let me just ask were there medical records on these two patients?

ATTORNEY CARLOS OMAR ESCOBAR: The record reveals no medical records that I'm aware of, Your Honor.

JUSTICE PHIL JOHNSON: I know our record does not.

ATTORNEY CARLOS OMAR ESCOBAR: Right and based on the record, based upon what you all have, Your Honor, that's all I know that exist. There were, there was no and the expert in this case that reviewed the petition didn't have any medical records either. Two things I wanted to make sure the Court is aware of. This particular case is not just an assault that was pled. They pled a medical negligence case and they pled that specifically. They said that Dr. Loaisiga's conduct fell below the standard of care. That is in the pleading and that in and of itself I would argue is a medical negligence case.

JUSTICE NATHAN L. HECHT: But if they had only pled assault, you'd still be here?

ATTORNEY CARLOS OMAR ESCOBAR: I would still be here, Your Honor.

JUSTICE NATHAN L. HECHT: You would still be, you would?

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ATTORNEY CARLOS OMAR ESCOBAR: I would still be here.

JUSTICE NATHAN L. HECHT: Yeah, so what different does it make?

ATTORNEY CARLOS OMAR ESCOBAR: Well, I guess the difference is, Your Honor, is that we would still be here regardless, but they actually pled the negligence case. They could have proceeded without pleading the negligence case. We'd still be here and I believe that would still be correct, but in this case, they've done that. They've affirmatively pled under the Chapter 74, they've made that claim.

JUSTICE DAVID M. MEDINA: Maybe that was the prudent thing to do [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: I would agree with that, yes, Your Honor, but I think, I don't really think the tests need to change. I think what we have with respect to the artful pleading exclusion, you can't plead around what Chapter 74 requires. I think that has to remain intact. Otherwise, you could just plead something that circumvents the statute and that's not allowable under the law. The other thing, Your Honor, is that the scope of Chapter 74 again, I'm going to go back to talking about safety, again, Rubio says the statute because it includes safety, safety was defined not as a medical term of art. Safety, Justice Wainwright used the dictionary definition of safety. Now does this case make a claim that safety was is involved? I think that it does. I think it most certainly involved the safety, but the doctor has to, if the doctor's doing his procedure, he has to ensure that his patients are safe. That's what-

CHIEF JUSTICE WALLACE B. JEFFERSON: Let's go to the most extreme example and it's one that started this argument and that is the doctor raped the patient, okay, and you're defending the doctor and you come up here saying the report that was filed is inadequate, but if it were true and that actually occurred and you prevailed in your defense, then not only would the plaintiff go away with nothing, no mixed language, damages, no remedy against the doctor, but then you would go after the plaintiff or attorneys for filing this claim with an inadequate expert report. Where is the justice in that because that is a scenario that you have [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, Your Honor, I don't know if that's my argument. I don't think that's my argument. My argument is the, like you said, the very first example, if a rape occurs. Well, that's just assaultive. That's just violence. There's no medical--

JUSTICE DON R. WILLETT: Then why is that not a violation of the safety [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, Your Honor, and that's what I was trying to get to. I think because this case deals with both things. I think it deals with the inseparable part of medical care. We've got that involved and we also have safety, but I think if it goes to like the Buck v. Blum and maybe the Wasserman case, I'm not very sure about that, but if it's just an attack like the appellate case, if it's only the rape. If it's only the attack and there's nothing else involved other than a doctor beating a patient up or committing violence upon that patient and there's nothing, there's no subtlety involved with it and that's why I think this case is distinguishable because it's a very subtle area. The doctor had consent to touch the patient's chest area. There's different things that a doctor could do that a layperson or a patient may construe as being offensive or violent for that matter, but if it's within the realm of medical care, then it's in the realm of medical care.

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: Right.

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: Right and I think most of the cases are like that. Buck v. Blum,

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you have legitimate medical care and it goes right into an assault. All, those are the types-

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: Right, Your Honor, but what I'm saying here the reason that this particular case is different is because how are you going to, I mean if it's the same doctor, same patient, same time, same examination, had consent to touch the person's body and it's more of a subtle tort that's alleged, if you will, Your Honor, and this particular case, I just don't see how you can separate it under the statute because he is committing this alleged tort while he's doing legitimate medical treatment or examination of this particular plaintiff.

JUSTICE EVA M. GUZMAN: [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: Right, Your Honor, I just think that the test as it is is sufficient. If the court because here's the other thing, Your Honor. If we go through all these tests, I mean how is the trial court, is the trial court going to be armed with all these different three tests and then you're going to have to figure out the procedural rubric as well. Is this test abuse of discretion? Is this test a legal question? I mean there's different things that a trial court has to do to do. I mean that's going to require a lot more on the trial court to have to decipher which test is applicable to this particular tort and did he apply that right test. Here, it's a threshold requirement. Does the claim have merits and if the claim has merit and the report says that it does, then it continues. If it doesn't, it stops there, but respect to crafting the test, I think you needed to look at just on top of the inseparable test, you need to look at the safety issue and that's what I was trying to get to. If it doesn't sound under the inseparable conduct test, then you look at safety. Are there safety issues involved with it that are, again, safety is not a medical term of art as Rubio describes. If you get past that point, then obviously I think the Court can rule on it, but in terms of making these different tests, I just don't that makes sense for a trial court to have to be burdened with all those different things. If we have what's set up now, I think it's sufficient.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Lehrmann.

JUSTICE DEBRA H. LEHRMANN: [inaudible] in regards to safety, were you saying in the other [inaudible] we basically said that a hospital [inaudible] and that you have to have adequate [inaudible] that's part of safety. Are you saying now that the definition of safety [inaudible]

ATTORNEY CARLOS OMAR ESCOBAR: Your Honor, in this particular case, again, I have to go back and just talk about the subtleties of this case.

JUSTICE DEBRA H. LEHRMANN: Well I just want to know how you're defining safety [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: I'm defining safety the way Rubio defines it, which is untouched by danger, not exposed to danger, secure from danger, harm or loss.

JUSTICE DEBRA H. LEHRMANN: Does not commit [inaudible].

ATTORNEY CARLOS OMAR ESCOBAR: Well, I mean, that's what the definition is, Your Honor. That's the dictionary definition of safety and look, a lot of these cases, they only look at the inseparable test. Is this what the doctor's doing, is that an inseparable part of the medical care, but they don't really look at the safety. The safety issue is really concerned with, again, is the hospital making the premise that it's linked to premises types of liability, but the definition is so broad and, again, as Justice Wainwright said in Rubio, it expands the bounds of Chapter 74 beyond what healthcare is. That's what Rubio says so with that understanding, I think Chapter 74 would apply under a safety analysis as well.

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

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cause is submitted. You have seen a very good demonstration from excellent lawyers on how to present a case and how difficult the issues that we face can be and just think in your mind, we hear a lot of these healthcare cases with oil and gas, water rights, insurance disputes, very serious family law issues, that's what makes up our docket and we rely on counsel like these to help us hone the argument to make law the best that we possibly can for the state Texas. We are going to come back in a few moments for a question-and-answer period, but for now, we need to officially adjourn this session of the court and for that, I call on our Clerk, Blake Hawthorne.

CLERK: Thank you, Your Honor. All rise.

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