

Reversed and Remanded and Majority and Concurring Opinions filed April 20, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-00098-CV

MAHESH RAMCHANDANI, M.D. AND TEXAS SURGICAL ASSOCIATES,

Appellants

V.

GONZALO JIMENEZ, Appellee

**On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2008-36498**

CONCURRING OPINION

I agree with the majority's conclusion that all of Jimenez's claims constitute health care liability claims. However, the majority does not clearly explain the rationale behind its conclusion. The majority merely asserts that Dr. Ramchandani's alleged failure to perform the surgery as agreed and designation of another doctor to do so are "an inseparable part of the rendition of health care services" because they are "necessarily part of the rendition" of those services. I write separately to explain why.

In assessing whether a plaintiff's claim is inseparable from the rendition of medical services, a key consideration is the role of medical judgment. *See Marks v. St. Luke's Episcopal Hosp.*, No. 07-0783, ___ S.W.3d ___, 2009 WL 2667801, at *4, 6 (Tex. Aug. 28, 2009); *see also Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847–52 (Tex. 2005). An action, or lack thereof, is inseparable from patient treatment or care if it involves professional judgment. *See Marks*, 2009 WL 2667801, at *6. The challenged conduct is Dr. Ramchandani's decision to not perform the surgery (at least as the lead surgeon) and to allow Dr. Tripathy to do so. The jury will necessarily be called on to assess whether Dr. Ramchandani acted reasonably and in furtherance of Jimenez's care when making that decision. Even though framed as a breach of contract action, Jimenez's claim is still, at its essence, a complaint that Dr. Ramchandani exercised poor judgment in allowing Dr. Tripathy to perform the surgery. Many courts have held that breach of contract allegations based on the failure to follow an agreement to provide a certain type of treatment constitute health care liability claims because they involve the assessment of the medical judgment around whether those decisions were appropriate. *See, e.g., Murphy v. Russell*, 167 S.W.3d 835, 837–39 (Tex. 2005) (holding that breach of contract claim based on breach of agreement by anesthesiologist not to administer general anesthesia was health care liability claim because circumstances during surgery may have warranted the conduct); *Smalling v. Gardner*, 203 S.W.3d 354, 364--65 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (finding that breach of contract claim based on failure to provide treatment to newborn surviving only a short time was health care liability claim because those decisions required assessment of what a prudent doctor would do); *see also Hunsucker v. Fustok*, 238 S.W.3d 421, 429 (Tex. App. —Houston [1st Dist.] 2007, no pet.) (concluding that providing care in a manner contrary to parties' agreement is inseparable from the care itself and thus breach of contract claim constituted

health care liability claim). It is for this reason that I conclude that all of Jimenez's claims are health care liability claims.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Frost (majority), and Brown.