IN THE SUPREME COURT OF TEXAS

NO. 05-0386

PROVIDENCE HEALTH CENTER A/K/A DAUGHTERS OF CHARITY HEALTH SERVICES OF WACO AND DEPAUL CENTER A/K/A DAUGHTERS OF CHARITY HEALTH SERVICES OF WACO, PETITIONERS,

v.

JIMMY AND CAROLYN DOWELL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JONATHAN LANCE DOWELL, DECEASED,
RESPONDENTS

-consolidated with-

NO. 05-0788

JAMES C. PETTIT, D.O.,
PETITIONER,

v.

JIMMY AND CAROLYN DOWELL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF JONATHAN LANCE DOWELL, DECEASED,
RESPONDENTS

ON PETITIONS FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE MEDINA joined.

Lance Dowell was brought to the emergency room by police after he attempted suicide by slitting his wrist severely enough to require stitches, hid from police officers in the woods all night, and told police officers repeatedly that he would try to kill himself again. Despite these circumstances and the presence of a number of high risk factors — including past hospitalization for attempted suicide, another possible suicide attempt earlier that week, and a family history of severe depression — the hospital discharged Lance within three hours with no psychiatric treatment and instructed him to return for a follow-up exam in three days. Lance committed suicide thirty-three hours later. Lance's family presented expert evidence that the suicide-risk assessment performed in the emergency room was so cursory and incomplete as to breach the standard of care and that, had the proper assessment been performed, the standard of care would have required different treatment to be prescribed. The Court does not dispute the providers' negligence and acknowledges that the doctor and nurse failed to comprehensively assess Lance's suicide risk. ___ S.W.3d ___, ___. Nevertheless, the Court concludes there is no evidence of causation and reverses the trial court's judgment. To reach that result, the Court constructs new legal hurdles that are insurmountable, particularly when, as here, the provider's alleged negligence results in death. Because the Court misapplies the law and disregards relevant evidence, I respectfully dissent.

A proper legal-sufficiency review requires courts to credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not. *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). To establish liability based on medical negligence, a plaintiff must demonstrate that a legal duty exists, the duty was breached, and the breach in reasonable medical probability caused the injury. *See IHS Cedars Treatment Ctr. of Desoto, Tex.,*

Inc. v. Mason, 143 S.W.3d 794, 798 (Tex. 2003); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995). The Court concludes the Dowells failed to prove causation because no evidence was presented that Lance could have been hospitalized if he had been properly diagnosed or that hospitalization would have made his suicide improbable. The Court also concludes that the suicide was too remote from the negligent discharge to constitute legal cause. I disagree.

All of the expert testimony at trial indicated that Lance's medical assessment failed to take into consideration significant suicide risk factors. Lance's examination lasted only two to three minutes, even though the Dowells' expert testified it takes most professionals an hour to do a comprehensive and competent risk assessment for suicide and to evaluate the patient adequately. Moreover, the suicide assessment record that was made was wrong, indicating Lance had never before attempted suicide when clearly he had and the Center had ready access to that information. The Dowells' expert testified that nearly all of the overlooked risk factors, including a family history of hospitalization for depression and suicidal ideation and Lance's suicidal behavior days before, pointed toward a high risk that Lance would commit suicide. That expert concluded: "I think based on the inadequate risk assessment for suicide that was done on Lance, that he should have been admitted to the hospital or a psychiatrist should have been called. I think that . . . it was erroneous for [the emergency room doctor] to discharge him at that time." When asked whether that error rose to a breach of the standard of care, the expert responded that it did. The expert reiterated that point in later testimony, explaining that because a proper evaluation would have found that "Lance was at high risk of killing himself," the standard of care required that he be provided some form of psychiatric treatment before discharge.

Yet the Court holds that the jury's verdict cannot stand because the Dowells failed to prove that, had Lance been properly diagnosed, he would have voluntarily submitted to hospitalization or could have been involuntarily retained. However, nothing in our jurisprudence requires them to do so. Today, the Court adds a causative element to a patient's burden when a health care provider negligently fails to diagnose or diagnoses improperly, requiring the patient to demonstrate that he would have followed appropriate medical advice had it been given. In cases like this, where the patient dies as a result of the alleged negligent treatment, that burden could never be met, as such testimony would surely be excluded as speculative. *See Int'l & Great N. R.R. Co. v. White*, 131 S.W. 811, 812 (Tex. 1910) (holding that a witness may not testify as to what a deceased person would have done because such testimony is mere speculation); *see also* TEX. R. EVID. 602; TEX. R. EVID. 701.

Though we have never required a health care liability plaintiff to prove he would have followed a doctor's proper diagnosis and recommended treatment had it been made, we do require a plaintiff who alleges lack of informed consent to show that a reasonable person would have refused consent had the risks been explained. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989). The Dowells presented evidence that a reasonable person similarly situated would have consented to hospitalization. The evidence presented indicated that suicidal patients generally consent to hospitalization when it is properly advised. All three of the Dowells' experts testified that, in their experience, all or nearly all of their patients agree to hospitalization when the consequences of not doing so are explained. In sum, the Dowells presented evidence that a reasonable person in Lance's position would have agreed to hospitalization, and there is no legal support for requiring more.

The Court concludes that Lance's statement that he would rather not stay negates the experts' testimony. However, unlike the patients described in the experts' testimony, Lance was never advised to stay. There is no evidence that, had it been explained to Lance that it was in his best interest to stay, he would have refused. If anything, the nurse in this case appeared to *discourage* Lance's hospitalization, advising his mother that a stay "would just run up a big bill" and admonishing Lance that he should have insurance. And although Lance's mother was present when the nurse instructed him to stay with his parents, she testified that the nurse never gave her any instructions with regard to Lance's care. The written "instructions" Lance received were cursory and stated in their entirety: "Be seen at MHMR on Tuesday. Stay w/ parents until seen & assessed by counselor." This evidence, a reasonable factfinder could have concluded, likely indicated to Lance and his mother that his condition did not warrant serious immediate concern. Because Lance was never properly advised, we cannot know whether he would have consented to treatment, and nothing in our jurisprudence requires such a showing.

The Court further concludes there is no evidence that hospitalization would have made Lance's suicide "unlikely." ___ S.W.3d at ___. Yet the Dowells' expert testified, as the Court acknowledges, that the probable outcome of hospitalization would be that Lance's risk of suicide would be significantly lowered. The expert went on to explain that a significant drop in suicide risk occurs after treatment in ninety to ninety-five percent of patients in Lance's situation and that, with proper treatment, suicidal ideation passes after twenty-four to ninety-six hours. As the Dowells' expert noted, Lance's prior suicide attempt and emergency room visit were under very similar circumstances. Then, Lance was admitted for six days and no further suicidal episodes occurred

until this one two years later. The Dowells' expert considered that "if [Lance] were admitted this time, most likely, the same outcome would have occurred." In my view, the Dowells presented some evidence that, in reasonable medical probability, Lance's suicide would have been prevented but for the providers' negligence, which is all that the law requires. *See Park Place Hosp.*, 909 S.W.2d at 511.

Citing our decision in *IHS Cedars Treatment Center of Desoto, Texas v. Mason*, the Court concludes as a matter of law that Lance's suicide was too attenuated from the providers' negligence for causation to exist. *See* 143 S.W.3d at 794. In *IHS Cedars*, the plaintiff was discharged from a mental-health facility along with a fellow patient who had allegedly befriended her and asserted unnatural influence over her. Twenty-eight hours after their discharge, the plaintiff was riding in the friend's car when the friend experienced a psychotic episode that caused her to speed and drive erratically. When a dog ran out in front of the car, the friend swerved to avoid it and crashed the car, causing plaintiff's injuries. We held the chain of causation was too remote for liability purposes because the defendants could not have foreseen at the time of plaintiff's discharge that she would later be riding with the friend, who would experience a psychotic episode, drive fast, and swerve to avoid an animal that ran out into the road. Unlike *IHS Cedars*, in this case there was a causal connection between Lance's negligent treatment and his later injury. Lance was taken to the emergency room precisely because he had attempted suicide. The Dowells alleged, the jury found, and the health care providers no longer contest that the providers were negligent in not properly assessing and treating Lance's suicide risk. The experts testified that when he was discharged, "Lance was at high risk of killing himself." That high risk became a reality thirty-three hours later.

On this record, I simply cannot agree that Lance's suicide was so attenuated from the providers' negligence as to vitiate causation as a matter of law. In addition, there was no intervening tortious conduct here. The Court implies that Lance's family was contributorily negligent in letting Lance out of their sight. But parents have no legal duty regarding the behavior of their adult children. *Villacana v. Campbell*, 929 S.W.2d 69, 75 (Tex. App.—Corpus Christi 1996, writ denied). In any event, Lance's parents' ability to supervise and assess his behavior more properly speaks to whether the providers breached the standard of care. As the Dowells' expert explained, given that Lance's brother and the police had been unable to keep Lance safe the night before he visited the emergency room, it was a breach of the standard of care to believe his parents would have been able to effectively do so. Furthermore, the fact that Lance showed no signs of his impending suicide that were discernible to his family is precisely why the intervention of trained mental-health professionals is so important. Although Lance's mother was a nurse, she had no training or experience with mental-health patients or in identifying the indicia of severe depression. She relied upon the nurse's assessment, and only a proper medical evaluation could have revealed the severity of Lance's illness. Lance's family was not an adequate substitute for professional care. Thus, releasing Lance into the care of his family could not have been an intervening cause.

Finally, by imposing additional evidentiary burdens on mental-health patients when improper diagnosis leads to death, the Court seems to imply that suicide is simply not preventable. This premise, however, is contrary to the Civil Practice and Remedies Code, Section 93.001(a)(2), which provides: "if the suicide or attempted suicide was caused in whole or in part by a failure on the part

of any defendant to comply with an applicable legal standard, then such suicide or attempted suicide shall not be a defense." TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2).

Recognizing that the statute precludes an affirmative defense of suicide when, as here, an applicable legal standard has been breached, JUSTICE WAINWRIGHT would nonetheless require the jury to assess and allocate Lance's proportionate responsibility. According to JUSTICE WAINWRIGHT, Lance's failure "to take a prescribed medication and remain with family members" could be a contributing cause of his death "apart from the act of committing suicide . . . ." ___ S.W.3d at ___. Under such an approach, a factfinder would have to somehow separate Lance's suicide from the events leading to his suicide. However, I find it unlikely that, in drafting the statute, the Legislature intended parties who breached the standard of care to be absolved from liability because the act of isolating one's self in order to commit suicide is somehow separable from the act of suicide itself. Notwithstanding the difficulties inherent in requiring the factfinder to divorce actions leading to suicide from the actual event, there is no factual support for such a submission in this case. Undisputed evidence indicates that the medication Lance was prescribed was to help him sleep, not specifically to treat his psychiatric needs. In addition, the Dowells' expert testified at length about "no-suicide" contracts and similar instructions to and agreements with patients. He opined that such agreements are generally ineffective at preventing suicide unless they are part of an inpatient treatment plan. The expert stated that it was "foolish" to expect a patient at a high risk of suicide to comply with a "no-suicide" contract or other post-release instructions relating to suicide prevention. He explained that "the debilitating effect of depression on a person's mental processes" inhibits an individual's ability "to use self-control and good judgment," and that an impulsive

suicidal patient such as Lance would be at risk for violating any promises about his post-release behavior. This would include following the providers' terse instruction to "[s]tay w/ parents." JUSTICE WAINWRIGHT's approach would attribute causation for breach of a mental health standard of care to the patient whose undiagnosed mental impairment was the very cause of injury, which is clearly contrary to the statute's intent. See TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2). The providers' release of Lance with only a few words of generalized instruction breached the standard of care precisely *because* Lance could not be expected to follow it. The cases JUSTICE WAINWRIGHT cites for support do not concern patients with mental illness whose abilities to comply with treatment plans were substantially impaired. *See Jackson v. Axelrad*, 221 S.W.3d 650 (Tex. 2007); *Elbaor v. Smith*, 845 S.W.2d 240 (Tex. 1992).

In sum, I do not agree that the evidence in this case is legally insufficient or the injury too attenuated to support the jury's findings, or that the case was improperly submitted, and would affirm the judgments of the trial court and the court of appeals. Because the Court does not, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: May 23, 2008