IN THE SUPREME COURT OF TEXAS

NO. 08-0231

OMAHA HEALTHCARE CENTER, LLC, PETITIONER,

v.

WILMA JOHNSON, ON BEHALF OF THE ESTATE OF CLASSIE MAE REED, DECEASED, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SIXTH DISTRICT OF TEXAS

JUSTICE LEHRMANN, joined by JUSTICE MEDINA, dissenting

Expert testimony is often critical to assist the trier of fact. *See Salem v. U.S. Lines Co.*, 370 U.S. 31, 32 (1962). Complex matters need to be explained to aid in assessing the nature of the claims and separating the meritorious from the frivolous. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 590 (1993). An expert witness may testify regarding "scientific, technical, or other specialized" matters if the expert is qualified and if the expert's opinion is relevant and based on a reliable foundation. TEX. R. EVID. 702; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556–57 (Tex. 1995).

Our Legislature, in enacting the health care liability claim statute, recognized the importance of expert testimony in medical malpractice suits by requiring that plaintiffs serve, within 120 days, expert reports for each health care provider against whom a liability claim is brought. TEX. CIV.

PRAC. & REM. CODE § 74.351(a). The Legislature defined a health care liability claim as one "against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant." *Id.* § 74.001(a)(13). In holding that a spider bite in a nursing home is a health care liability claim for which an expert report is required, the Court reaches a result that is contrary to the Legislature's intent, belies common sense, and contorts the role of experts in health care litigation.

The Court has not, at least so far, expressly held that *all* injuries in a health care setting, regardless of any relationship to medical care, must be filed as health care liability claims. But today's opinion does as much implicitly. In doing so, the Court radically departs from our clear assurances that there can be "premises liability claims in a healthcare setting that may not be properly classified as health care liability claims," *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005), and the plurality's recognition in *Marks v. St. Luke's Episcopal Hospital* that safety-based health care liability claims necessarily implicate medical care standards. 319 S.W.3d 658, 664 (Tex. 2010) (plurality opinion). In *Marks*, the plurality noted that the alleged negligence in health care safety claims must be "*inseparabl[y] and integral[ly]*" related to the rendition of medical services. *Marks*, 319 S.W.3d at 664; *see Diversicare*, 185 S.W.3d at 848–49. In applying that standard, we have heretofore considered a number of factors, among them whether a specialized standard in the health care community applies in the particular circumstances; whether the alleged negligence involves medical judgment related to patient care or treatment; and whether expert

testimony from a medical professional is necessary to prove a cause of action. *See Diversicare*, 185 S.W.3d at 847–52. But the Court considers none of these limiting factors in the present case, effectively holding that *all* premises claims by injured patients are health care liability claims.

In *Diversicare*, we emphasized that the acts or omissions at issue were inseparable from the provision of health care, carefully distinguishing them from garden-variety negligence claims like those stemming from "an unlocked window" or a "rickety staircase." *Id.* at 854. Similarly, in *Marks*, the plurality's holding that an injury caused by a defective footboard on a hospital bed was a health care liability claim turned on the fact that a hospital bed, unlike a typical one, was "[m]edical equipment specific to [the] particular patient's care or treatment," and thus an "integral and inseparable part of the health care services provided." *Marks*, 319 S.W.3d at 664. The *Marks* plurality noted that the Legislature could not have intended that safety standards within the statute's scope "encompass all negligent injuries to patients" in light of the statute's "more specific standards of medical and health care." *Id.* In my view, a spider, in any setting, is more akin to a rickety staircase than a condition resulting from medical negligence or defective medical equipment.

In holding that inadequate pest control is a health care safety violation, the Court essentially declares that all injuries in a health care setting are subject to Chapter 74, without explicitly saying so. As a result of the Court's holding, any patient injured in a hospital will be required to file an expert report even though the injury is entirely unrelated to the delivery of health care services. If it had been the Legislature's intent to subject all claims against health care providers to the statute, "it would have defined a 'health care liability claim' to be any claim against a physician or health care provider in a medical or health care setting." *See Drewery v. Adventist Health System/Tex., Inc.*,

No. 03–10–00334–CV, 2011 WL 1991763 at n. 4 (Tex. App.—Austin May 20, 2011, no pet. h.). Given the sweeping interpretation of "safety" implicit in the Court's conclusion, I urge the Legislature to clarify whether a safety violation must be related to health care.

The present case is the Court's second opinion in two months to hold that a health care provider's departure from general safety standards gives rise to a health care liability claim. *See Harris Methodist Fort Worth v. Ollie*, ___ S.W.3d ___ (Tex. 2011) (per curiam). In *Harris Methodist*, we held that a patient's post-knee-replacement slip and fall on a slick bathroom floor was a health care liability claim. I agreed with the Court's decision because the underlying nature of Ollie's claim—the hospital's failure to supervise her or warn her of the slick floor—bore on the staff's medical judgment in assessing her post-surgery condition and her ability to safely bathe. *See id.* at ___. Applying *Diversicare*, it was logical to presume that health care providers generally adhere to specialized standards governing post-surgical patient care, including assessing the patient's ability to safely bathe without assistance, necessitating expert testimony on that issue. Likewise, expert medical testimony may have been necessary to prove that lack of supervision or assistance specific to the patient's condition resulted in the injuries. None of those factors are present in *Omaha*.

In *Harris Methodist*, we noted that the underlying nature of the patient's claim determines "whether the claim is for a departure from accepted standards of safety" relating to an act that should have been performed on the patient's behalf during the patient's medical care, treatment, or confinement. *Id.* at ___. Because medical expert testimony would have been necessary on whether the hospital should have provided special equipment or staff supervision to allow the patient to safely

bathe, the claim was the type the Legislature intended to be governed by the statute. The same cannot be said, though, of a nursing home's extermination procedures. Wilma Johnson's claim against the nursing home involves the home's failure to keep the premises properly treated for pests, leading to her sister's death as the result of a brown recluse spider bite. The nursing home's alleged negligence did not involve defective medical equipment or a lapse in medical judgment, but instead a general, common-sense duty to keep the premises clean and bug-free. This is not a situation where the jury would be aided by expert medical opinion. No medical judgment or expertise is implicated in determining whether Omaha adopted proper extermination standards.

The Court's holding that Omaha's failure to prevent a spider infestation is a health care liability claim, of course, means that Johnson was required to serve an expert report in order to avoid dismissal. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). An expert qualified to file a report on the health care provider's departure from accepted standards of care must "practic[e] health care in a field of practice that involves the same type of care or treatment," "ha[ve] knowledge of accepted standards of care for . . . the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim[, and be] qualified on the basis of training or experience to offer an expert opinion regarding" those standards. *Id.* § 74.402(b); *see also id.* § 74.351(r)(5)(B). In assessing witness qualifications, the court should look at licenses, certifications, or substantial training or experience "in the area of health care relevant to the claim," as well as active practice in the health care industry relevant to the claim. *Id.* § 74.402(c). In making this determination, the court is permitted to depart from the above criteria only if it determines, and states so on the record, that there is good reason to admit the proffered testimony. *See id.* § 74.402(d).

Applying the Court's holding, Johnson's experts would need to testify on what the applicable standard of pest control would be in providing a safe nursing home environment, whether allowing a spider infestation departs from that standard, and whether that departure caused the patient's injuries. *See id.* § 74.351(a), (r)(6). Presumably, the expert report would outline the standard of care in selecting pest control services for a prudent nursing home, as well as Omaha's breach and causation. *See id.* § 74.351(r)(6) (expert report must state "applicable standards of care, the manner in which the care . . . failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed").

Omaha argues that in addition to physician testimony on causation, Johnson had to produce testimony from an "expert qualified to address application of pesticide in the context of a nursing home" to establish the "correct dosage . . . to prevent a breach of the standard of care by allowing a brown recluse to harm a resident, without the pesticide harming the resident." It is hard for me to imagine how this expert could be anyone other than a professional exterminator, not the health care practitioner that the statute contemplates. And even if the court were to use the "good cause" exception in section 74.402(d) to qualify an exterminator as an expert on measures necessary to prevent spider infestation, I cannot imagine how the exterminator could be qualified to testify that the nursing home's practices breached a *medical* standard of care. *See Marks*, 319 S.W.3d at 664; *see also Diversicare*, 185 S.W.3d at 854 (suggesting that unsafe conditions unrelated to provision of health care might not be health care liability claims). The Court's imposition of Chapter 74 requirements in a way the Legislature never intended is what leads to this jarring result.

The Court's contorted reading of the statute will disserve both patients and health care providers. As the dissent in *Marks* warned, "[b]y sweeping even simple negligence claims under the umbrella of medical malpractice insurance policies, the Court risks broadening the class of claims that medical malpractice insurance companies must cover." *Marks*, 319 S.W.3d at 686 (Guzman, J., concurring and dissenting). Health care providers will incur higher medical malpractice insurance premiums as insurers adjust their rates to account for more claims attributed to medical malpractice. *See Diversicare*, 185 S.W.3d at 862 (O'Neill, J., dissenting) (noting that providers carry both general and malpractice liability policies, and health care liability claim litigation expenses fall under the malpractice policy). This defeats the very purpose of the statute as expressed by the Legislature, "which is to reduce the cost of medical malpractice insurance in Texas so that patients can have increased access to health care." *Marks*, 319 S.W.3d at 686 (Guzman, J., concurring and dissenting) (citing a previous version of the statute). The uncertain line between premises liability and medical malpractice claims also means that premises liability insurance premiums could be adversely affected. Above all, continuing uncertainty will lead to increased litigation costs, forcing plaintiffs to procure multiple expert reports in cases involving no medical expertise or true health care related claims.

Because the Court's decision will spawn uncertainty and extend health care liability claim treatment to claims that are not "inseparabl[y] and integral[ly]" related to the rendition of medical services, *Marks*, 319 S.W.3d at 664, without regard to legislative intent, I am compelled to respectfully express my dissent.

Debra H. Lehrmann
Justice

OPINION DELIVERED: July 1, 2011