Concurring Opinion Filed June 30, 2020

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00827-CV

CHRISTINE FABER, INDIVIDUALLY AND AS HEIR AT LAW OF CARMELINA "MILLIE" SMITH, DECEASED, Appellant
V.
COLLIN CREEK ASSISTED LIVING CENTER, INC. D/B/A/ DAYSPRING ASSISTED LIVING COMMUNITY, Appellee

On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-02547-2015

CONCURRING OPINION

Opinion by Justice Carlyle

I concur in the opinion of the Court because, under the facts and circumstances of this case, controlling authority requires the conclusion that Faber's claims are all health care liability claims (HCLCs) subject to mandatory dismissal under section 74.351 of the Texas Civil Practices and Remedies Code for want of an expert report. I write separately to highlight the strange injustice created by an expansive judicial reading of the statute's mandatory-dismissal provision such that it appears to encompass all claims based on facts that could be characterized as having

"implicate[d] a defendant's duties as a health care provider, including its duties to provide for patient safety."[1]

I am not the first.[2]

The practical consequences of this jurisprudence ought to spur the Legislature to revise the statute. Chapter 74 was enacted in 2003, purportedly to address a "medical malpractice insurance crisis" adversely affecting healthcare in the state. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(5), 2003 Tex. Gen. Laws 847, 884–85. To address this "crisis," the Legislature set out to reform the law governing medical malpractice claims "in a manner that [would] not unduly restrict a claimant's rights any more than necessary to deal with the crisis." *Id.* As part of its

[1] *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 505 (Tex. 2015); *see Coming Attractions Bridal & Formal, Inc. v. Tex. Health Res.*, 595 S.W.3d 659, 664–65(Tex. 2020) (upholding dismissal where an Ohio clothing store failed to serve an expert report for its claims against a Dallas hospital that employed a potentially contagious nurse who visited the clothier); *Loaisiga v. Cerda*, 379 S.W.3d 248, 255 (Tex. 2012) ("[C]laims premised on facts that *could* support claims against a physician or health care provider for departures from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care are HCLCs, regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards."); *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 185–86 (Tex. 2012) (holding that safety-based claims need not be directly related to healthcare to qualify as HCLCs).

[2] *See Williams*, 371 at S.W.3d at 193 (Lehrmann, J., dissenting) ("The Court's strained reading of the statute runs counter to express statutory language, the Legislature's stated purposes in enacting the current version of chapter 74, and common sense."); *Ross*, 462 S.W.3d at 506 (Lehrmann, J., concurring) ("I write separately . . . to emphasize my concern that a statute intended to address the insurance crisis stemming from the volume of frivolous medical-malpractice lawsuits has become a nebulous barrier to what were once ordinary negligence suits brought by plaintiffs alleging no breach of any professional duty of care."); *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 861–67 (Tex. 2005) (O'Neill, J., dissenting) ("The Legislature did not provide that the statute governs all claims against a health care provider or physician; instead, it limited the statute's scope to claims 'for treatment, lack of treatment, or other claimed departure[s] from accepted standards of medical care or health care or safety. Chief Justice Jefferson suggests that the term 'safety' is broad enough to encompass a premises liability claim unrelated to the provision of health care. I disagree that the term can be read so broadly . . . ."); *Univ. of Tex. Med. Branch at Galveston v. Jackson*, 598 S.W.3d 475, 482–85 (Tex. App.—Houston [14th Dist.] 2020, no pet. h.) (Poissant, J., dissenting).

overhaul, the Legislature introduced the expert-report requirement of section 74.351.

Section 74.351 requires a plaintiff asserting "a health care liability claim" to serve a report from a qualified medical expert, explaining (among other things) how the healthcare provider contributed to the plaintiff's injuries by failing to satisfy the standard of care applicable to that provider. TEX. CIV. PRAC. & REM. CODE § 74.351(a), (r)(6). The purpose of this requirement is to "weed out frivolous malpractice claims in the early stages of litigation, not to dispose of potentially meritorious claims." *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 223 (Tex. 2018). It accomplishes this by requiring the trial court to dismiss with prejudice any HCLC for which the plaintiff has failed to timely serve a report that "represent[s] an objective good faith effort to comply" with statutory requirements. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b), (*l*). The statute provides no escape valve for an untimely report, though a trial court may grant a thirty-day extension to allow a plaintiff to cure deficiencies in a timely report. *Id.* § 74.351(c).

The expert-report requirement and mandatory-dismissal provision make some sense in the context of what I would call "true" malpractice claims; if a patient asserts she was harmed by a healthcare provider's failure to satisfy the standard of care applicable when providing the care, she should be able to find a qualified medical expert who can explain why her claims have merit. But neither of these hurdles makes much sense in the context of claims that are not, in fact, malpractice claims,

but which are, by court interpretation, HCLCs. I find it unnecessary to obtain a report from a qualified medical expert discussing standards of care that have little to do with providing healthcare.[3]

In this vein, a creditable reading of the statutory definition of "health care liability claim" might lead one to conclude it captures only those claims that are directly related to the provision of healthcare: "'Health care liability claim' means a cause of action 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." *Id.* § 74.001(13); *see malpractice,* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "medical malpractice" as a "doctor's failure to exercise the degree of care and skill that a physician or surgeon of the same medical specialty would use under similar circumstances"). But under the current state of the law, reading "directly related to health care" to apply to the entire definition is incorrect; we are told the phrase "directly related to health care" modifies only the phrase "professional or administrative services." *Williams*, 371 S.W.3d at 185–86.

To address the interpretive reality created by concluding that "directly related to health care" does not modify "safety," we are told a claim implicating safety standards may fall under the statutory definition, even if it is not directly related to

[3] Thus, I would view this case as an example of a non-HCLC. A medical doctor's expert report discussing the premises liability standards of care for the sidewalk outside a facility has little utility. But because of the current statutory interpretation, we are bound to require such a report.

providing healthcare, if there is some "substantive nexus between the safety standards allegedly violated and the provision of healthcare." *See Ross*, 462 S.W.3d at 502. Acknowledging that "the line between a safety standards-based claim that is not an HCLC and one that is an HCLC may not always be clear," the supreme court has provided a list of non-exclusive considerations that "lend themselves to analyzing" the issue. *See id.* at 505. There is no sure way to know in advance whether a court will consider claims to be HCLCs despite there being only a tenuous connection between healthcare and the standards on which the claims could be based. *See Loaisiga*, 379 S.W.3d at 255.

This leaves plaintiffs in a precarious situation: file an expert report or fly blind. The practical effect of our supreme court's expansive interpretation of the statute is that all plaintiffs asserting claims against a "health care provider" are well-counseled to proceed as if they are asserting HCLCs, even if they arguably are not. To do otherwise would be to risk dismissal with prejudice for guessing incorrectly about how the courts will eventually apply *Ross*'s amorphous "substantive nexus" standard to the facts of their cases.

Although we have described the expert-report requirement as a "low threshold a person claiming against a health care provider must cross merely to show that [her] claim is not frivolous," *Whitfield v. Henson*, 385 S.W.3d 708, 711 (Tex. App.—Dallas 2012, no pet.), we must follow an overly burdensome interpretation of state law forcing plaintiffs to hire medical experts to opine on subjects that may have little

application to their cases. If predictability is a virtue, we may have approximated it under current HCLC jurisprudence, but at the literal cost of an expert report in any case where a provider defendant might colorably argue its necessity. At a minimum, a plaintiff asserting claims against a healthcare provider ought to be entitled to know whether she is, in fact, asserting HCLCs before her claims are forever barred for failing to serve an expert report.

We must re-tether the law to the laudable legislative goal of weeding out frivolous medical malpractice claims but not meritorious ones. Perhaps we provide a mechanism for the trial court to preliminarily determine whether a plaintiff's claims are HCLCs subject to the expert-report requirement. This initial determination would not be subject to interlocutory appeal or mandamus, and would not be binding on the ultimate determination whether the plaintiff's claims are HCLCs subject to Chapter 74's other provisions, such as damages limitations. This would significantly reduce dismissals of otherwise-non-frivolous claims like the ones in this case. Aside from characterizing the current dismissals as systemic costs of a gatekeeping requirement, I cannot locate a positive jurisprudential value in dismissing non-frivolous claims the way we now do.

The Legislature said it intended to provide a mechanism for efficiently weeding out frivolous medical malpractice claims without unduly restricting claimants. Neither the expert-report provisions nor the statutory definition of "health

care liability claim" have achieved that goal. It is high time to rethink this portion of Chapter 74.

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

Pedersen, III and Reichek, JJ., join in this concurring opinion.

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