Affirmed and Memorandum Opinion filed July 9, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00703-CV

LAKE JACKSON MEDICAL SPA, LTD., ROBERT YARISH AND JAMIE GUTZMAN, Appellants

V.

ERICA GAYTAN, Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2018-12153

MEMORANDUM OPINION

This appeal requires us to decide whether certain tort claims of negligence, negligent undertaking, and negligent hiring, retention, and supervision constitute health care liability claims. Appellee Erica Gaytan sued appellants Lake Jackson Medical Spa, Dr. Robert Yarish, and Jamie Gutzman for injuries Gaytan experienced after several procedures performed by Gutzman at Lake Jackson Medical Spa. Contending Gaytan's claims are health care liability claims governed by Texas Civil

Practice and Remedies Code Chapter 74, appellants filed a motion to dismiss and for attorney's fees because Gaytan did not serve an expert report as the code requires. The trial court denied the motion and appellants appeal.

We conclude that Gaytan's claims are not subject to Chapter 74's expert report requirement and affirm the trial court's order.

BACKGROUND

When Gaytan filed her original petition, she gave notice of a health care liability claim under sections 74.051 and 74.052 of the Texas Civil Practice and Remedies Code and alleged that her claims arose from an "improper and negligent course of medical treatment." Gaytan alleged she underwent a course of medical treatment that included "L.J. acne treatment, L.J. skin pen, L.J. phototherapy acne treatment, skin pen spot treatment, microdermabrasion, and L.J. VI peel treatment for areas on her face and back." Gaytan alleged that the treatments did not improve the condition of her skin but left her with scarring and darkening on her back and face as a result of the negligent medical treatment conducted by Gutzman. Gaytan alleged that Lake Jackson and Yarish were liable for Gutzman's acts through the doctrine of respondeat superior. Gaytan also alleged that she was owed a duty of care as a patient of Lake Jackson.

Appellants answered asserting a general denial and plea in abatement. Appellants asserted a plea in abatement on the grounds that Gaytan pleaded a health care liability claim and was required to serve an expert report pursuant to section 74.351(a) of the Texas Civil Practice and Remedies Code. After the expiration of 120 days appellants filed a motion to dismiss Gaytan's actions because she failed to serve a Chapter 74 expert report within the required time. Attached to appellants' motion to dismiss were Gaytan's original petition, appellants' answer and plea in abatement, Gaytan's first amended petition, and appellants' first amended plea in

abatement.

In response, Gaytan amended her petition to delete all references to medical procedures and health care liability. In Gaytan's second amended petition she alleged that Yarish and Lake Jackson are liable for the negligence of Gutzman because she was an employee, agent, or representative acting in the course and scope of her employment with Yarish or Lake Jackson. In her live pleading, Gaytan alleges that Yarish, Lake Jackson, and Gutzman are in the business of providing cosmetic services and that Gaytan's damages were proximately caused by the defendants' negligent acts or omissions, including the following:

> a. Failing to properly evaluate Plaintiff's skin condition and tailor cosmetic treatments pursuant to established standards of dermatological care;
>
> b. Failing to properly assess, document, and/or request Plaintiff's medical history, including medications Plaintiff was using at the time of the cosmetic treatments;
>
> c. Performing abrasive dermatological treatment such as VI peel on Plaintiff while Plaintiff was actively using a tretinoin cream;
>
> d. Failing to properly instruct Plaintiff to suspend use of tretinoin cream in anticipation of abrasive dermatological treatment such as VI peel;
>
> e. Recommending and/or prescribing laser treatment without determining its effect on Plaintiff's ethnic skin;
>
> f. Failing to properly prepare Plaintiff's ethnic skin to safely accept laser treatment;
>
> g. Failing to properly adjust laser treatment to be safely applied to Plaintiff's ethnic skin; [and]
>
> h. Failing to properly supervise and evaluate Ms. Gutzman's cosmetic treatments of Plaintiff's skin conditions[.]

Gaytan further asserted:

> Defendants Lake Jackson Med Spa and Dr. Yarish are liable for the

> negligence of [their] employees, agents, and/or representatives because [they] did not use ordinary care in hiring, training and retaining them and their supervisors, including but not limited to Ms. Gutzman, and the breach of the applicable standard of care by these employees, agents, and/or representatives and their supervisors, as described above, proximately caused injuries to Plaintiff.

Gaytan responded to appellants' motion to dismiss and argued that she sought cosmetic skin treatments that were not sought to "combat, address or prevent any disease, disorder or injury." In Gaytan's response she attached her affidavit in which she averred:

- I went to Lake Jackson Med Spa ("the Spa") to seek cosmetic skin treatments to address acne on my back and face. I found the Spa by an online search. I was not referred to the Spa by a medical doctor.
- I was not seeking cosmetic treatments to combat, address or prevent any disease, disorder or injury. They were sought purely for aesthetic reasons in order to prepare for my upcoming wedding.
- When I arrived at the Spa on my first visit, the Spa's aesthetician, Jamie Gutzman ("Gutzman"), spoke with me about my treatment goals and recommended a course of action to address them.
- I signed up for the course of skin treatments Gutzman recommended. I do not recall filling out any Patient Medical History Questionnaires or Patient Informed Consent Forms before starting work with Gutzman.
- I did not at any time have a consultation with Dr. Robert Yarish ("Dr. Yarish"). He did not examine me, or apply any of the skin treatments.
- He did not operate any medical device on me during the treatments.
- To my knowledge, the skin cream Gutzman applied to my face was not a prescription medicine. Gutzman got it from a storage closet at the Spa and gave it to me to use. I did not have to go to pharmacy to get a prescription filled or refilled.

- I did not see Dr. Yarish at any time during my visits with Gutzman. Dr. Yarish was not present during any of the activities between me and Gutzman. He was not in the room supervising Gutzman at any time during my visits.

After conducting a hearing on appellants' motion to dismiss, the trial court denied the motion and appellants appealed. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9).

ANALYSIS

In two issues appellants contend the trial court erred in denying their motion to dismiss. Appellants first argue that the trial court abused its discretion in denying their motion to dismiss for failure to timely serve an expert report. Under this issue appellants argue that Gaytan filed suit under the Texas Medical Liability Act ("TMLA") in her original and first amended petitions and failed to serve an expert report within 120 days of those filings. For that reason, appellants argued the trial court should have granted their motion to dismiss. In issue two, appellants argue in the alternative that Gaytan's second amended petition also asserts a health care liability claim despite the removal of specific reference to the TMLA in the pleadings.

I. Chapter 74 Health Care Liability Claims

The main issue in this appeal—whether Gaytan's claims are health care liability claims—turns on the reach of the TMLA, a comprehensive medical malpractice reform measure. *See Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 287 (Tex. 2010). The TMLA is codified at Chapter 74 of the Texas Civil Practice and Remedies Code. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 864–82 (codified at Tex. Civ. Prac. & Rem. Code ch. 74). Because this case requires us to interpret the statute to

determine whether it extends to Gaytan's claims, our review is de novo. *Loaisiga v. Cerda*, 379 S.W.3d 248, 254–55 (Tex. 2012); *Mem'l Hermann Hosp. Sys. v. Kerrigan*, 383 S.W.3d 611, 612, 613 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

When construing a statute, we give it the effect the Legislature intended. *See Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 494 (Tex. 2013). The best expression of the Legislature's intent is the plain meaning of the statute's text. *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). The broad language of the TMLA evinces legislative intent for the statute to have expansive application. *Loaisiga*, 379 S.W.3d at 256.

In determining whether Gaytan's claim is a health care liability claim, we focus on the underlying nature of the cause of action and are not bound by the pleadings. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005). We therefore address appellants' issues together and focus on Gaytan's second amended petition, the live pleading at the time the trial court denied the motion to dismiss. In doing so, we consider the underlying nature of Gaytan's claim rather than its label. *Baylor Scott & White, Hillcrest Med. Ctr. v. Weems*, 575 S.W.3d 357, 363 (Tex. 2019).

Section 74.351 requires a plaintiff, in cases involving a health care liability claim, to serve on the defendant one or more expert reports, on or before the 120th day after the defendant's original answer is filed. Tex. Civ. Prac. & Rem. Code § 74.351(a). An expert report means "a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *Id*. § 74.351(r)(6). If the plaintiff

fails to serve an expert report within the 120-day period, the statute requires a trial court, upon motion, to dismiss the plaintiff's claim with prejudice. *Id.* § 74.351(b)(2).

The TMLA defines a health care liability claim as:

> 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, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

The TMLA defines "health care" as "any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement." Tex. Civ. Prac. & Rem. Code § 74.001(a)(10). The TMLA defines "medical care" as "any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement." *Id.* § 74.002(a)(19).

The Supreme Court of Texas observed that this statutory definition contains three elements:

> (1) a physician or health care provider must be a defendant; (2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must proximately cause the injury to the claimant.

Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 179–80 (Tex. 2012).

No one element, occurring independent of the other two, will recast a claim as a health care liability claim. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753, 758 (Tex. 2014). As relevant here, the parties, at this preliminary stage, do not contest the third element, causation. Their dispute centers around two primary questions: whether Gutzman is a health care provider and whether Gaytan's claim is for medical or health care. In answering those questions we note that the Supreme Court of Texas has held, "Because a claim under the health care prong of section 74.001(a)(13) incorporates the definition of 'health care,' such a claim must involve a patient-physician relationship." *Tex. W. Oaks Hosp.*, 371 S.W.3d at 181. We therefore turn first to the issue of whether Gaytan's claim is for medical or health care.

II. Because no physician-patient relationship was established Gaytan's claim does not fall under the TMLA.

Treatment and a physician-patient relationship are elements of a claimed departure from accepted standards of health care. Tex. Civ. Prac. & Rem. Code § 74.001(a)(10); *Tex. W. Oaks*, 371 S.W.3d at 180. The requirement that a claim arising under the health care prong of section 74.001(a)(13) involve a patient-physician relationship could be viewed as in tension with the term "claimant," defined in terms of a person. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(2). However, the specific wording of the "health care" definition, that health care mean an act involving treatment rendered for, to, or on behalf of a patient, acts as a limitation on the general provision that a health care liability claim need only be pursued by a "claimant." *Id.* § 74.001(a)(10). While other categories of health care liability claims need only be pursued by claimants, by specific statutory directive health care claims must involve a patient-physician relationship. *Tex. W. Oaks Hosp.*, 371 S.W.3d at 181; Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(10).

In this case, Gaytan's claims derive from her allegation that Gutzman improperly treated her back and face and that such actions proximately resulted in her injuries. In her affidavit, Gaytan showed that she had no physician-patient relationship with Yarish or Lake Jackson. Appellants presented no evidence to the contrary.

We agree that the supreme court's analysis in *Bioderm* guides our analysis in this case. We hold, however, that the facts in *Bioderm* and other decisions relied on by appellants are distinguishable from the facts in this case. In *Bioderm*, the plaintiff was a patient of a physician and a dermatological care center who alleged that she was burned through the use of a laser hair removal device. 426 S.W.3d at 756–57. The plaintiff alleged the laser device operator was negligent and the supervising physician and dermatological care center were vicariously liable for the operator's negligence. *Id.* The court held that Bioderm, which was owned by a physician, was a health care provider, and that the plaintiff's claim was a health care liability claim because expert testimony was required to prove or refute the merits of her claim. *Id.* at 760. Relying on *Texas West Oaks* and *Haddock v. Arnspiger*, 793 S.W.2d 948, 951 (Tex. 1990), the court held that expert health care testimony was needed to prove or refute the plaintiff's claims because federal regulations provided that the laser used in that case could only be acquired by a licensed medical professional for supervised use in a medical practice and the proper operation and use of the laser required extensive training and experience, which indicated that such matters were not within the common knowledge of laypersons. *Bioderm,* 426 S.W.3d at 760–62.

Unlike the plaintiff in *Bioderm*, Gaytan has not alleged damages from the use of a medical device. Gaytan stated in her affidavit that she never saw or consulted with Dr. Yarish and does not recall filling out patient medical history questionnaires or patient informed consent forms. Appellants have not asserted that resolution of

Gaytan's claims requires expert testimony or are matters not within the common knowledge of laypersons.

Moreover, the record does not reflect that the dermatological treatment Gaytan received was not an inseparable part of the rendition of medical care. An act or omission by a healthcare provider falls within the scope of the TMLA if it is a departure from the standards of medical care or healthcare or if it is an inseparable part of the rendition of medical services. Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

Appellants cite authority in support of their position that Gaytan's claims should be considered health care liability claims. Appellants first cite this court's opinion in *Sarwal v. Hill*, No. 14-01-01112-CV, 2002 WL 31769295, at *3 (Tex. App.—Houston [14th Dist.] Dec. 12, 2002, no pet.) (not designated for publication) in which this court held that a claim for injuries received as the result of laser hair removal was a health care liability claim. This court's opinion in *Sarwal* was not designated for publication and therefore has no precedential value. *See* Tex. R. App. P. 47.7(b). Even if *Sarwal* were published, it would be distinguishable from today's case for the same reasons *Bioderm* is distinguishable. In *Bioderm*, the court held that, "Because Bioderm's laser is a regulated surgical device, which may only be acquired by a licensed medical practitioner for supervised use in her medical practice, we conclude the testimony of a licensed medical practitioner is required to prove or refute Sok's claim that use of the device departed from accepted standards of health care." *Bioderm*, 426 S.W.3d at 761–62. Gaytan alleged injuries from the use of an "L.J. skin pen, L.J. phototherapy acne treatment, skin pen spot treatment." The record in this case does not reflect that the devices used were regulated surgical devices that could only be acquired by a medical professional in a medical practice.

Appellants also cite the Thirteenth Court of Appeals' opinion in *Garza v.*

Saenz, No. 13-09-00111-CV, 2010 WL 746712, at *1 (Tex. App.—Corpus Christi Mar. 4, 2010, no pet.) (mem. op.). In *Garza*, the plaintiff alleged injuries after a dermabrasion procedure at a physician's office. *Id.* Unlike Gaytan, the plaintiff in *Garza* was treated by a physician and had a physician-patient relationship. *Id.* Moreover, the court's decision in *Garza* did not turn on whether the plaintiff's claim was a health care liability claim. Rather, the *Garza* court addressed whether the physician could seek dismissal for failure to timely file an expert report because the physician did not provide the plaintiff her medical records, and whether a motion to dismiss was the appropriate procedural vehicle. *Id.* at *2. Therefore, *Garza* is distinguishable from the case before us.

Gaytan did not meet with, see, or agree to be treated by a physician or other health care provider. She did not fill out any patient history questionnaire forms or patient informed consent forms, or undergo a medical history and physical examination. In short, Gaytan never had a physician-patient relationship with Yarish. As explained above, because no physician-patient relationship was established, this case does not involve medical care or health care, and Gaytan has not pled a health care liability claim. *See Tex. W. Oaks Hosp.*, 371 S.W.3d at 179–80.

Because Gaytan's claims are based on the alleged acts or omissions of an esthetician[1] not related to a physician-patient relationship, Gaytan's claims were not

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[1] *See* Tex. Occ. Code Ann. § 1602.257, Eligibility for Esthetician Specialty License
(a) A person holding an esthetician specialty license may perform only the practice of cosmetology defined in Sections 1602.002(a)(4), (5), (6), (7), and (10).
(b) To be eligible for an esthetician specialty license, an applicant must:
    (1) be at least 17 years of age;
    (2) have obtained a high school diploma or the equivalent of a high school diploma or have passed a valid examination administered by a certified testing agency that measures the person's ability to benefit from training; and
    (3) have completed 750 hours of instruction in esthetics specialty through a commission-approved training program.

subject to section 74.351(a)'s expert report requirements. *Id*. The trial court did not abuse its discretion in denying appellants' motion to dismiss Gaytan's health care liability claims for failure to timely serve an expert report.

CONCLUSION

Gaytan's claims were not health care liability claims; therefore, Gaytan was not required to comply with section 74.351(a)'s expert report requirements. Accordingly, we overrule appellants' two issues and affirm the trial court's order denying the motion to dismiss.

/s/ Jerry Zimmerer
Justice

Panel consists of Chief Justice Frost and Justices Zimmerer and Poissant.