

Opinion issued January 8, 2009



In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00484-CV

BELINDA K. SKLOSS, Appellant

V.

**SANDRA J. PEREZ AND GUSTAVO PEREZ, SR., INDIVIDUALLY AND
AS NEXT FRIENDS OF G.P. AND A.P., MINORS, Appellees**

**On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 07CV0409**

MEMORANDUM OPINION

Appellant, Belinda K. Skloss, a Licensed Professional Counselor, appeals from the trial court's order denying her motion to dismiss the suit brought against her by appellees, Sandra J. Perez and Gustavo Perez, Sr., Individually and as Next Friends of G.P. and A.P., minors. In her sole issue, appellant contends that appellees' suit constitutes a health care liability claim and that they failed to serve appellant with an expert report, as required by Texas Civil Practice and Remedies Code section 74.351.¹

We reverse and remand for entry of judgment dismissing appellees' claims with prejudice and assessing attorney's fees.

Background

Appellant is licensed by the State of Texas as a Licensed Professional Counselor ("LPC"). *See* TEX. OCC. CODE ANN. § 503.001–.511 (Vernon 2004 & Supp. 2008). Appellees, Sandra J. Perez and Gustavo Perez, Sr., are the grandparents and conservators of G.P. and A.P.

¹ The current version of Section 74.351(a) applies to a cause of action that accrued after September 1, 2005, the effective date of the amendments. Act of May 18, 2005, 79th Leg., R.S., ch. 635, §§ 2–3, 2005 Tex. Gen. Laws 1590, 1590. Here, appellants' cause of action accrued prior to September 1, 2005. Accordingly, we apply the former version of section 74.351(a) in this case. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590; *Clark v. TIRR Rehabilitation Ctr.*, 227 S.W.3d 256, 264 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Beginning in October 2003, appellant provided counseling services to G.P., who was then seven years of age. In March 2004, appellant began providing counseling services to A.P., who was then four years of age. In May 2004, appellant began counseling Mr. and Mrs. Perez. Appellant's counseling services ended in April 2005. According to appellees, appellant saw Mr. and Mrs. Perez over 300 times and saw the children 80 to 90 times each.

According to the record, appellees allege that, during the course of the period from October 2003 to April 2005, appellant required an "exorbitant number of visits," sometimes requiring twice daily visits; threatened to discontinue seeing the children if appellees refused; "threatened to withdraw her support of the family's custody battle" if appellees refused; required Mr. Perez to drive appellant around town for errands and deliveries and then charged his health insurance carrier for therapy sessions; would call four-year-old G.P. on the telephone and bill the insurance company for therapy sessions; and that appellant "entered into dual relationships" with appellees and improperly terminated their relationship. Appellees allege that they have expended approximately \$194,000 in "therapy expenses" over the course of the total 18-month period.

On April 5, 2007, appellees, individually and as next friends of the children, sued appellant, alleging negligence, breach of fiduciary duty, “outrage,” “breach of privacy rights,” fraud, and breach of contract. Generally, appellees² alleged that appellant negligently failed to treat, or improperly treated, appellees, who were suffering from “psychological problems”; that appellees’ psychological problems were beyond appellant’s competency to treat; that appellant “negligently undertook to treat [appellees]” and “negligently failed to refer [appellees] to another more competent professional person for proper treatment”; and that appellant “negligently maintained or negligently failed to maintain appropriate professional boundaries.” In addition, appellees alleged that appellant breached her duty of trust; that her conduct was extreme and outrageous, and caused appellees extreme emotional distress; that she fraudulently represented that she was competent to treat appellees; and that she failed to perform the contract for professional services and charged substantially excessive fees.

It is undisputed that appellees did not serve appellant with an expert report. On January 22, 2008, appellant moved to dismiss appellees’ suit on the basis that appellees’ claim constituted a health care liability claim and that appellees had failed to file an expert report within 120 days of filing their initial claim, as required by

² References to “appellees” includes the children.

Civil Practice and Remedies Code section 74.351. Appellees responded that their claims did not constitute health care liability claims. On May 20, 2008, after a hearing, the trial court denied appellant's motion to dismiss. This appeal ensued.

Health Care Liability Claim

Appellant contends that the trial court erred by denying her motion to dismiss appellees' claim for failure to timely file an expert report. Appellant contends that she is a "health care provider" and that appellees' claim constitutes a "health care liability claim," as defined under Chapter 74 of the Texas Civil Practice and Remedies Code. Appellant contends that, because it is undisputed that appellees did not serve an expert report on appellant, the suit must be dismissed.

A. Standard of Review

We review a trial court's decision on a motion to dismiss a case for failure to comply with section 74.351 for an abuse of discretion. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001) (applying abuse of discretion standard in review of trial court's decision to dismiss under predecessor statute, section 13(e) of article 4590i); *Torres v. Mem'l Hermann Hosp. Sys.*, 186 S.W.3d 43, 45 (Tex. App.—Houston [1st Dist.] 2005, no pet.). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to guiding rules or principles when it dismisses a claim. *Torres*, 186 S.W.3d at 45. However, if

resolution of the issue requires us to construe statutory language, we review under a de novo standard. *Id.*

B. Applicable Law and Guiding Principles

At the time appellant's cause of action accrued, Civil Practice and Remedies Code section 74.351 provided, in relevant part, as follows:

- (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. . . .³
- (b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that: (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.⁴

³ See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, amended by Act of May 18, 2005, 79th Leg., R.S., ch. 635, §§ 1–3, 2005 Tex. Gen. Laws 1590, 1590.

⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b) (Vernon Supp. 2008). Subsection (b) was not amended in 2005 when subsection (a) was amended. Therefore, we refer to the current version of that subsection.

Stated generally, section 74.351(a) requires a claimant to serve an expert report on a defendant health care provider, or its attorney, within 120 days after the date the claim is filed. If the claimant fails to timely comply, the trial court is required, on the motion of the affected health care provider, to dismiss the suit.

Statutes must be construed as written and the legislative intent determined, when possible, from the express terms. TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005); *Univ. of Tex. Health Sci. Ctr. at Houston v. Gutierrez*, 237 S.W.3d 869, 873 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Words and phrases shall be read in context and construed according to rules of grammar and common usage. TEX. GOV'T CODE ANN. § 311.011(a) (Vernon 2005). Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. *Id.* § 311.011(b). Unless a word is used with reference to a particular trade or subject matter or is a word of art, the word shall be given its ordinary meaning. *Id.* § 312.002.

B. Appellants' Claim

Pursuant to Chapter 74, a “health care liability claim” is

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 ANN. § 74.001(a)(13) (Vernon 2005).

Here, applying Chapter 74, we determine whether appellants' claim is a "health care liability claim" by determining whether their cause of action (1) is against a "health care provider" and (2) "for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety." *See id.*

1. *Health care provider*

The parties dispute whether appellant, as an LPC, is a "health care provider" under Chapter 74. *See id.* § 74.001(a)(12). A "health care provider" is "*any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including: a registered nurse, a dentist, a podiatrist, a pharmacist, a chiropractor, an optometrist, or a health care institution.*" *Id.* § 74.001(a)(12) (emphasis added).

It is undisputed that appellant is a person licensed by the State of Texas as an LPC. *See* TEX. OCC. CODE ANN. ch. 503 (Vernon 2004 & Supp. 2008). The list of health care providers in section 74.001(a)(12) does not specifically include an LPC; however, the list is non-exhaustive.⁵ *See* TEX. CIV. PRAC. & REM. CODE ANN.

⁵ Cases construing 4590i, the predecessor to Chapter 74, concluded that certain mental health professionals, including licensed counselors, were not health care providers. *See Grace v. Colorito*, 4 S.W.3d 765, 769 (Tex. App.—Austin 1999, pet. denied); *Lenhard v. Butler*, 745 S.W.2d 101, 106 (Tex. App.—Fort Worth 1988, writ denied) (concluding that psychologist was not "health care provider" because the profession was not one of those enumerated in Medical Liability Act section 1.03(a)(3)). Unlike

§ 74.001(a)(12) (Vernon 2005); TEX. GOV'T CODE ANN. § 311.005(13) (Vernon 2005) (“Includes’ and ‘including’ are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.”); *Christus Health v. Beal*, 240 S.W.3d 282, 286 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (noting that provider list at section 74.001(a)(12) is non-exhaustive).

Section 74.001 also requires that the person be duly licensed “to provide health care.” *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12). “Health care” is “*any act or treatment performed or furnished, or which 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.*” *Id.* § 74.001(a)(10) (emphasis added). Appellees contend that appellant is not a health care provider because she did not provide “medical care.”⁶

the current statute, which is non-exclusive, the prior statute specifically excluded all but the specified list of medical professionals. *See Christus Health v. Beal*, 240 S.W.3d 282, 286 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (concluding that previous judicial interpretations of former article 4590i § 1.03(a)(3) that determined list was exclusive are obsolete and have no application to amended definition).

⁶ Appellees also contend that appellant, as an LPC, cannot be a health care provider because psychologists, which have more formal education and training, are specifically excluded by statute, namely Texas Occupations Code section 151.052. *See* TEX. OCC. CODE ANN. 151.052 (Vernon 2004). Chapter 151 provides that a “licensed or certified psychologist” is not a physician. *See id.* We agree that an LPC, like a psychologist, would not be considered a “physician.” However, Chapter 74 of

“Medical care” is defined as “practicing medicine.” *Id.* § 74.001(a)(19).

“Practicing medicine” is

the diagnosis, treatment, or offer to treat a mental or physical disease or disorder or a physical deformity or injury by any system or method, or the attempt to effect cures of those conditions, by a person who: (A) publicly professes to be a physician or surgeon; or (B) directly or indirectly charges money or other compensation for those services.

TEX. OCC. CODE ANN. § 151.002(a)(13) (Vernon Supp. 2008) (governing physicians).

Occupations Code chapter 503, which governs LPCs, specifically states that “[t]his Chapter does not authorize the practice of medicine as defined under the laws of this State.” TEX. OCC. CODE ANN. § 503.004 (Vernon 2004). Hence, here, appellant did not provide “medical care” to appellees.

It is undisputed that appellees were not in “confinement” at a health care institution. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10) (Vernon 2005). The remaining question is whether appellant, as an LPC, was performing an act “for, to, or on behalf of a patient during the patient’s . . . *treatment.*” *Id.* (emphasis added).

The term “treatment” is not defined in section 74.001. Section 74.001 provides that, “[a]ny legal term or word of art used in this chapter, not otherwise defined in this

the Civil Practice and Remedies Code distinguishes between “health care providers” and “physicians.” *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(13) (Vernon 2005). Chapter 151 is not instructive concerning the question before us, which is the scope of who is a “health care provider.”

chapter, shall have such meaning as is consistent with the common law.” *See id.* § 74.001(b). Appellant does not direct us to any, and we do not find any, case law that specifically defines “treatment” within Chapter 74 or considers whether an LPC provides “treatment” in this context.⁷

As appellant points out, “treatment” is defined in common usage as “the act or manner or an instance of treating someone or something” and as “the techniques or actions customarily applied in a specific situation.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1333 (11th ed. 2003). More specifically, within the medical context, “treatment” is defined as “the care and management of a patient to combat, ameliorate, or prevent a disease, disorder, or injury.” MOSBY’S MEDICAL DICTIONARY 1744 (6th ed. 2002). A “patient” is “a recipient of a health care service.” *Id.* at 1294. Appellant contends that she was engaging in the “treatment” of appellees because she was engaging in “the techniques and actions customarily applied” by LPCs. Appellant directs us to Texas Occupations Code section

⁷ Appellees rely on *Macpete v. Bolomey*, 185 S.W.3d 580 (Tex. App.—Dallas 2006, no pet.), to support their contention that appellant, as an LPC, cannot be a “health care provider” because in *Macpete* the court determined that a psychologist, who has more formal training, was not a “health care provider.” A close reading of *Macpete* reveals, however, that the court did not determine whether the psychologist there independently qualified as a health care provider. Rather, applying a different provision of chapter 74, the court determined that the psychologist was a health care provider by virtue of her status as a contractor with “Medical City,” who was a health care provider. *See id.* at 584–85 (applying section 74.001(a)(12)(B)(ii)).

503.003(a), which defines the practice of professional counseling. Appellant contends that, “[b]y definition, professional counseling includes treating mental health.”

Section 503.003(a) provides as follows, in pertinent part:

- (a) In this chapter, “practice of professional counseling” means the application of mental health, psychotherapeutic, and human development principles to:
 - (1) facilitate human development and adjustment throughout life;
 - (2) prevent, assess, evaluate, *and treat* mental, emotional, or behavioral *disorders* and associated distresses that interfere with mental health;
 - (3) conduct assessments and evaluations to *establish treatment goals and objectives*; and
 - (4) plan, implement, and *evaluate treatment plans using counseling treatment* interventions that include:
 - (A) counseling;
 - (B) assessment;
 - (C) consulting; and
 - (D) referral.

TEX. OCC. CODE ANN. § 503.003(a) (Vernon 2004) (emphasis added).

Contained in the record is appellant’s affidavit, in which she attested as follows, in relevant part: “I am a licensed professional counselor, licensed by the State of Texas to practice professional counseling. In that capacity, I assessed, evaluated and treated the mental and emotional conditions of Sandra J. Perez,

Gustavo Perez, Sr., [G.P. and A.P.]”

Hence, an LPC is licensed by the State of Texas to provide health care, that is, “treatment,” and, here, appellant attested that she was providing “treatment” for the mental and emotional conditions of appellees.

By analogy, the Supreme Court of Texas has considered the scope of the definition of a “health care provider” in section 74.001 in a case involving a physical therapist. *Rehabilitative Care Sys. of Am. v. Davis*, 73 S.W.3d 233, 234 (Tex. 2002). In *Davis*, Davis was attending physical therapy after having surgery on his shoulder. *Rehabilitative Care Sys. of Am. v. Davis*, 43 S.W.3d 649, 652 (Tex. App.—Texarkana 2001, pet. denied). During a session in which Davis was working on a weight machine at the direction of his physical therapist, the therapist left the room. *Id.* at 653. While Davis was unsupervised, he tore his rotator cuff. *Id.* At trial, Davis prevailed on his medical malpractice claim against the rehabilitation center. *Id.* at 652. On appeal, the rehabilitation center contended that the trial court erred in denying its motion for an instructed verdict because Davis failed to produce expert testimony. *Id.* at 656. The intermediate court held that Davis was not required to produce expert testimony regarding the standard of care required of a physical therapist when the claim was that of negligent supervision. *Id.* at 657. The court concluded that the standard of care was within the comprehension of lay persons. *Id.*

The Supreme Court of Texas denied the petition for review; however, it wrote to express its disapproval of the lower court's conclusion that expert testimony was not required to establish the appropriate standard of care. *Davis*, 73 S.W.3d at 234. The high court concluded that a malpractice suit against a physical therapist is “no different from any other medical-malpractice suit in that the applicable standard of care must generally be established by expert testimony.” *Id.*

Nothing in section 74.001 draws a distinction between mental and physical health care. Here, like *Davis*, the standard of care of a therapist in providing health care to a patient, in the form of “treatment,” requires expert testimony.

Moreover, other Texas statutes characterize an LPC as a “health services provider.” For example, Texas Civil Practice and Remedies Code section 81.001, defines a “mental health services provider” as “an individual, licensed or unlicensed, who performs or purports to perform mental health services, including a: . . . licensed professional counselor as defined by Section 503.002, Occupations Code.” TEX. CIV. PRAC. & REM. CODE ANN. § 81.001(2) (Vernon 2005) (defining in context of sexual exploitation by mental health services provider).

We conclude that appellant is a health care provider within section 74.001 of the Civil Practice and Remedies Code.

2. *Healthcare Claim*

We next consider whether appellees' claim is a health care liability claim.

Again, a "health care liability claim" is

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) (Vernon 2005) (emphasis added).

_____ To determine whether a cause of action is a "health care liability claim," we consider the underlying nature of the claim. *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543–44 (Tex. 2004). If the act or omission alleged is an inseparable part of the rendition of health care services, then the claim is a health care liability claim. *Id.* at 544. One consideration is whether the specialized knowledge of an expert is required to prove the claim. *Id.* A plaintiff cannot artfully plead around the requirements of Chapter 74. *See id.* at 543. If the cause of action is based on a breach of the standard of care by a healthcare provider, then the claim is a health care liability claim, without regard to how it is labeled. *Torres*, 186 S.W.3d at 47.

_____ In their petition, as amended, appellees sued appellant for negligence, breach of fiduciary duty, outrage, breach of privacy rights, fraud, and breach of contract. Specifically, as to their negligence claim, appellees alleged that appellant "negligently

. . . manipulated the emotions of [appellees] in order to gain control over [appellees] and abused and mishandled the transference phenomenon that arose out of their professional relationship”; that appellant “negligently and carelessly failed *to treat*, or *improperly treated*[,] [appellees], individuals suffering from psychological problems”; that appellant “negligently and carelessly entered into improper and unprofessional dual relationships with [Mr. and Mrs. Perez] during the period of therapy”; that “[d]uring the course of [appellees’] therapy, [appellant] negligently conducted or handled the termination of the professional therapeutic relationship with [appellees], ultimately terminated that relationship improperly, and/or failed to assist in obtaining *other professional treatment in accordance with accepted therapeutic procedure or practice*”; that appellant “negligently undertook *to treat* [appellees], patients or clients who, under these circumstances, had psychological problems which were beyond [appellant’s] competency *to treat*”; that appellant “negligently failed to refer [appellees] to another more competent professional person *for proper treatment*”; that appellant “negligently maintained or negligently failed to maintain appropriate professional boundaries in the parties’ professional relationship.” (Emphasis added.)

As to their remaining claims, stated generally, appellees alleged that appellant breached her duty of trust; that her conduct was extreme and outrageous, and caused

appellees extreme emotional distress; that she fraudulently represented that she was competent to treat appellees; and that she failed to perform the contract for professional services and charged excessive fees.

The underlying nature of these claims is that appellant “improperly treated,” or “failed to treat,” appellees’ psychological disorders; that she was not competent “to treat” appellees’; and that she failed to refer appellees to “other professional treatment in accordance with accepted therapeutic procedure or practice.” Hence, appellees’ claims concern “treatment, lack of treatment, or other claimed departure from accepted standards of . . . health care.” *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) (Vernon 2005).

In addition, at the heart of the services that an LPC provides is the assessment, evaluation, and treatment of mental health disorders. *See* TEX. OCC. CODE ANN. § 503.003(a) (Vernon 2004); *see also Diversicare Gen. Partners, Inc. v. Rubio*, 185 S.W.3d 842, 849–50 (Tex. 2005) (considering essence of services at issue). LPCs make judgments about the care and treatment of an individual patient based on the care that a patient requires. *See Rubio*, 185 S.W.3d at 850. The essence of appellees’ claims are that they were injured by appellant’s lapses in professional judgment. *Id.* at 851. Hence, the treatment of appellees’ mental health was inseparable from the health care and services provided to them by appellant. *Id.* at 849.

Further, an important factor in determining whether a claim is a health care liability claim is whether expert testimony from a health care provider would be necessary to establish the claim. *Rubio*, 185 S.W.3d at 848. Expert testimony is necessary to establish the standard of care when the act of negligence alleged is of such nature as to not be within the experience of laymen. *See Rose*, 156 S.W.3d at 544.

Here, whether appellant acted within the standard of care of an LPC in treating the specific mental health disorders presented by appellees is not within the experience of laypersons; including, whether appellant “mishandled the transference phenomenon that arose out of [her] professional relationship” with appellees. Similarly, whether the emotional injuries of which appellees complain in their suit were proximately caused by appellant’s breach of the standard of care, if any, is not within the experience of laypersons. Further, as to appellees’ breach of contract claim,⁸ the scope and duration of care required to treat appellees’ respective conditions and the reasonableness and necessity of the fees for that treatment is not going to be within the experience of laypersons.

⁸ Section 74.001 encompasses causes of action that sound in contract. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (Vernon 2005).

We conclude that appellees' claims are health care liability claims because the acts or omissions complained of amount to a claimed departure from accepted standards of health care. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) (Vernon 2005). As such, appellees' suit is subject to the requirements of Chapter 74. Appellants filed suit on April 5, 2007. Pursuant to section 74.351, appellants were required to file an expert report by August 3, 2007.⁹ Appellants do not dispute that they did not file an expert report. When the claimant fails to timely comply, the trial court is required, on the motion of the affected health care provider, to dismiss the suit. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b) (Vernon Supp. 2008). We hold that the trial court erred by denying appellant's motion to dismiss appellees' suit.

Conclusion

We reverse the judgment of the trial court and remand for rendition of judgment dismissing appellees' claims with prejudice and assessing attorney's fees.

Laura Carter Higley
Justice

Panel consists of Chief Justice Radack and Justices Nuchia and Higley.

⁹ *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 1, 2005 Tex. Gen. Laws 1590, 1590;