

Affirmed in Part, Reversed and Remanded, and Opinion filed November 23, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00932-CV

**SUSAN E. APPELL, EXECUTRIX OF THE ESTATE OF RODNEY APPELL,
M.D., DECEASED, Appellant**

V.

SHARI MUGUERZA AND CYRENE MUGUERZA, Appellees

**On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2008-09147**

OPINION

A doctor's patient and her mother sued the doctor asserting claims for assault based on the doctor's alleged physical assault of the patient and her mother in an examination room at the doctor's office. The plaintiffs allege that the doctor punched his patient in the nose and mouth, violently threw her to the ground, and violently shoved her mother. Based on their assertion that the claims are not health care liability claims, the plaintiffs did not file an expert report under section 74.351 of the Texas Civil Practice and Remedies Code. After the doctor died, the executrix of his estate was substituted as the defendant, and she moved for dismissal, asserting that these claims are subject to

section 74.351. The trial court denied this motion, and the executrix appeals this ruling. We affirm in part and reverse and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellees/plaintiffs Shari Muguerza and Cyrene Muguerza (collectively “the Muguerzas”) filed suit against Dr. Rodney Appell, alleging that he assaulted them in an examination room in his medical office. In response, Dr. Appell asserted various defenses, including self-defense. He also moved to dismiss the Muguerzas’ claims based on their failure to file an expert report under section 74.351,¹ which Dr. Appell alleged applies to the Muguerzas’ claims. In addition, Dr. Appell asserted a counterclaim against Shari alleging the following:

- Dr. Appell is a licensed physician specializing in the practice of urology.
- On March 1, 2007, Shari presented herself to Dr. Appell’s medical office requesting that Dr. Appell examine her for urologically related complaints.
- Dr. Appell examined Shari in the presence of her mother and one of Dr. Appell’s medical assistants. Following the urological examination, Dr. Appell left the examination room while Shari got dressed.
- Dr. Appell returned to the examination room to discuss his medical findings and recommendations. Shortly after he started talking, Shari launched an unprovoked assault on Dr. Appell by trying to hit him with her fist, while cursing at him and telling him she was going to hurt him badly.
- Dr. Appell defended himself from Shari’s blows, and his nurses and assistants entered the room to assist and to control Shari.
- During the scuffle, Shari bit Dr. Appell’s left hand, causing a nasty skin tear. As a result of Shari’s assault, Dr. Appell experienced a significant physical injury to his left hand that necessitated emergency medical attention as well as inoculations against tetanus and other diseases.
- Nothing Dr. Appell did or failed to do caused or contributed to cause Shari’s unprovoked assault on him.

¹ Unless otherwise specified, all statutory references in this opinion are to the Texas Civil Practice and Remedies Code.

- Shari intentionally, knowingly, or recklessly caused bodily injury to Dr. Appell, for which Dr. Appell seeks to recover his medical expenses and damages for pain and suffering.

After Dr. Appell died, the Muguerzas amended their petition, making similar allegations and claims but naming appellant Susan E. Appell, Executrix of the Estate of Rodney Appell, M.D., Deceased (the “Executrix”) as the defendant instead of Dr. Appell. In their live petition against the Executrix, the Muguerzas allege the following:

- On or about March 1, 2007, Shari and Cyrene sought medical treatment at Dr. Appell’s medical office.
- Shari and Cyrene were escorted to an examination room.
- In the examination room, Dr. Appell assaulted Shari and Cyrene.
- Shari suffered physical and psychological injuries when Dr. Appell punched Shari in the nose and mouth, and when Dr. Appell and “his cohorts” threw her violently to the ground.
- Cyrene suffered trauma when Dr. Appell violently shoved her into a cabinet, cutting and injuring her arm, and then was forced to watch her daughter being beaten and abused by Dr. Appell.
- Nothing the Muguerzas did or failed to do was a proximate cause of the assault or resultant injuries or damages.
- Dr. Appell acted intentionally, knowingly, or recklessly.
- Dr. Appell made contact with Shari’s person and Cyrene’s person.
- Dr. Appell’s contact caused bodily injury to Shari and Cyrene.
- Shari and Cyrene suffered mental anguish, and Cyrene was traumatized by having to observe the assault of Shari.
- Shari and Cyrene seek relief for past and future medical expenses, past and future pain and suffering, past and future mental anguish, pre-judgment interest, post-judgment interest, and court costs.

In response, the Executrix did not assert a counterclaim; however, in her answer, she alleged that the Muguerzas’ damages were the result of their voluntary actions. The Executrix also asserted as a defense the Muguerzas’ failure to file an expert report under section 74.351. Based on this failure, the Executrix filed a motion to dismiss the Muguerzas’ claims. In this motion, the Executrix asserted that the Muguerzas’ claims

were health care liability claims. The Executrix also relied upon Shari's discovery responses. In a response to a request for disclosure, when asked to identify the legal theories and general factual bases of her claims, Shari responded as follows:

Due to the negligence of this Defendant, Plaintiff suffered injuries and continues to suffer from the incident that makes [sic] the basis of this suit. It is expected that the testimony of Plaintiff as well as her treating physicians will clearly set forth the negligence of this Defendant.

In one of his interrogatories, Dr. Appell asked Shari the following: "To the extent not included in your Response to Rodney Appell, M.D.'s Request for Disclosure, with regard to the incident made the basis of this suit, identify the act(s) and/or action(s), if any, which you claim to have constituted assault." In her answer to this interrogatory, Shari stated as follows:

Dr. Appell aggressively jammed a catheter in my vagina causing significant pain. When I winced at the pain, he responded "Shut up! I have kids that are better patients than you!" He continued to physically attack both myself and my mother before summoning his nurse, Susan Peterson. Susan then entered the room and continued the assault by grabbing my hair. Because of the screaming, Mike, the janitor, entered the room and detained me by pinning me on the floor while wrenching my arm behind my back.

Dr. Appell and the Executrix both relied upon these discovery responses in their motions to dismiss. The trial court denied the motion in October 2009. In a single appellate issue, the Executrix challenges the trial court's ruling. She asserts that the trial court erred in denying her motion to dismiss under section 74.351(b).²

II. ANALYSIS

Generally, we review a trial court's order granting or denying a motion to dismiss under section 74.351(b) under an abuse-of-discretion standard. *See Wasserman v. Gugel*,

² Before his death, Dr. Appell filed a motion to dismiss under section 74.351(b). After the Executrix was substituted in as the defendant, the Executrix filed her own motion to dismiss under section 74.351(b). The trial court never ruled on Dr. Appell's motion; however, in the order from which the Executrix appeals, the trial court denied the Executrix's motion. Though in the express language of her appellate issue the Executrix complains of a denial of Dr. Appell's motion, it is clear from her notice of appeal and brief that the Executrix is challenging the denial of her motion.

No. 14-09-00450-CV, 2010 WL 1992622, at *2 (Tex. App.—Houston [14th Dist.] May 20, 2010, pet. filed) (mem. op.). However, when the issue presented requires statutory interpretation or a determination of whether Chapter 74 applies to a claim, that is a question of law to which we apply a de novo standard of review. *Id.*

To be subject to section 74.351, a claim must be a “health care liability claim.” TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West Supp. 2010). This term has the following statutory definition:

“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, 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.

Id. § 74.001(a)(13) (West 2005). Whether a claim falls within this definition requires an examination of the essence or underlying nature of the plaintiff’s claim, and we are not bound by the form of the pleading. *Diversicare Gen. Partners, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005). One alleges a departure from accepted standards of medical care³ or health care⁴ if the act or omission made the subject of the claim is an inseparable part of the rendition of medical services. *See Diversicare Gen. Partners*, 185 S.W.3d at 848; *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 544 (Tex. 2004). The necessity of expert testimony from a medical or health care professional to prove a claim may also be an

³ “Medical care” means “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.” TEX. CIV. PRAC. & REM. CODE ANN. § 74.001 (a)(19) (West 2005). Under section 151.002 of the Occupations Code, “practicing medicine” is defined as “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) (West Supp. 2010).

⁴ “Health care” is defined 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 ANN. § 74.001(a)(10).

important factor in determining whether a claim is an inseparable part of the rendition of medical or health care services. *See Diversicare Gen. Partners*, 185 S.W.3d at 848; *Garland Cmty. Hosp.*, 156 S.W.3d at 544. When the essence of a suit is a health care liability claim, a claimant cannot avoid the requirements of the legislature’s statutory scheme through artful pleading. *See Diversicare Gen. Partners*, 185 S.W.3d at 851; *Garland Cmty. Hosp.*, 156 S.W.3d at 543.

A. What claims did the Muguerzas plead?

Before determining whether their claims are health care liability claims, we first must determine what claims the Muguerzas have asserted. Because no special exceptions have been sustained against the Muguerzas’ petition, this court construes that pleading liberally in the Muguerzas’ favor to include all claims that reasonably may be inferred from the language used in the petition, even if the petition does not state all the elements of the claim in question. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000); *London v. London*, 192 S.W.3d 6, 13 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).

To prevail on a claim for civil assault, the plaintiff must establish the same elements required for criminal assault. *See Kastner v. Gutter Mgmt., Inc.*, No. 14-09-00055-CV, 2010 WL 4457461, at *7 (Tex. App.—Houston [14th Dist.] Nov. 4, 2010, no pet. h.) (mem. op.). Therefore, a person commits civil assault if he “intentionally, knowingly, or recklessly causes bodily injury to another.” (hereinafter, “Bodily Injury Assault”). TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2009); *Kastner*, 2010 WL 3010941, at *7. A person also commits civil assault if he “intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.” (hereinafter, “Offensive Contact Assault”). TEX. PENAL CODE ANN. § 22.01(a)(1) (West Supp. 2009); *Kastner*, 2010 WL 3010941, at *7.

In their petition, the Muguerzas' make no reference to any vaginal-catheterization procedure. They do not specify what was transpiring in the examination room when Dr. Appell allegedly assaulted the Muguerzas. They do not allege in their petition that Dr. Appell "aggressively jammed a catheter in [Shari's] vagina causing significant pain," or that this act was an assault, as stated in Shari's discovery responses. The Muguerzas' petition contains a general allegation that Dr. Appell assaulted the Muguerzas in the examination room, and the Executrix has not lodged any special exceptions. Under the required liberal construction of the Muguerzas' petition, we conclude that Shari has pleaded claims for both Bodily Injury Assault and Offensive Contact Assault based on the manner in which Dr. Appell conducted the vaginal-catheterization procedure as well as the manner in which he conducted his medical examination of Shari on the day in question (hereinafter, "Medical Procedure Claims").

The focus of the factual allegations in the Muguerzas' live petition is an alleged unprovoked physical assault on the Muguerzas by Dr. Appell while the Muguerzas were seeking medical treatment in an examination room in Dr. Appell's office. The Muguerzas state that, during this alleged assault, Dr. Appell punched Shari in the nose and mouth, violently threw her to the ground, and violently shoved Cyrene into a cabinet. Applying the liberal construction rule, we conclude that the Muguerzas have pleaded claims for both Bodily Injury Assault and Offensive Contact Assault based on an alleged unprovoked physical attack on them by Dr. Appell at some point when they were in the examination room, whether during the vaginal-catheterization procedure or at some other time while the Muguerzas were in this room (hereinafter, "Attack Claims").

B. Are the Medical Procedure Claims health care liability claims?

In the Medical Procedure Claims, the Muguerzas do not complain of Dr. Appell's alleged punching of Shari and throwing her to the ground or the alleged throwing of Cyrene into a cabinet. Rather, in these claims, the Muguerzas complain of Dr. Appell's alleged acts or omissions regarding the manner in which Dr. Appell conducted the

vaginal-catheterization procedure as well as the manner in which he conducted his medical examination of Shari.⁵ We conclude that the acts or omissions the Muguerzas allege in the Medical Procedure Claims are an inseparable part of the rendition of medical services. *See Wasserman*, 2010 WL 1992622, at *3 (noting that complaint regarding doctor's acts or omissions that could be part of medical care would be health care liability claims); *Ramchandani v. Jiminez*, 314 S.W.3d 148, 152–53 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding that claims in which plaintiff complained of doctor's acts or omissions in conducting medical procedure were health care liability claims). Therefore, the trial court erred in denying the Executrix's motion to dismiss as to the Medical Procedure Claims.

C. Are the Attack Claims health care liability claims?

1. Are the alleged acts or omissions made the subject of the Attack Claims an inseparable part of the rendition of medical services?

In the Attack Claims, the Muguerzas allege that, while they were in the examination room seeking medical treatment, Dr. Appell, without provocation, physically attacked them by (1) punching Shari, (2) violently throwing Shari to the ground, and (3) violently throwing Cyrene into a cabinet. Punching and violently throwing patients to the ground or into a cabinet without provocation cannot reasonably be characterized as being part of the medical services provided by a doctor. We conclude that these alleged acts or omissions are not an inseparable part of the rendition of medical services, even though they allegedly took place in an examination room immediately after the rendition of medical care.⁶ *See Wasserman*, 2010 WL 1992622, at *3 (holding

⁵ It is undisputed that Dr. Appell was a physician and that the Muguerzas allege the claimed assault by Dr. Appell proximately resulted in injury to them.

⁶ The Executrix asserts that Dr. Appell's decision to allow Cyrene to be present in the examination room involved a medical decision by Dr. Appell that implicates his professional judgment. Presuming that this is correct, any such medical decision or professional judgment is not relevant to the Muguerzas' claims for assault and the Executrix's defenses to these claims. If this case were tried, there might be testimony as to whether Dr. Appell physically assaulted the Muguerzas, whether any such physical assault was provoked or consented to by the Muguerzas, and whether Dr. Appell acted in self-defense. But any

that alleged sexual assault by surgeon of one of his patients during a physical examination in the doctor's office was not an inseparable part of the rendition of medical services); *Loaisiga v. Cerda*, No. 13-09-00666-CV, 2010 WL 3049086, at *4–5 (Tex. App.—Corpus Christi Aug. 5, 2010, pet. filed) (mem. op.) (holding that alleged sexual assault by doctor of two patients during medical examinations were not an inseparable part of the rendition of medical services); *Holguin v. Laredo Reg'l Med. Ctr.*, 256 S.W.3d 349, 353–54 (Tex. App.—San Antonio 2008, no pet.) (holding that alleged sexual assault by nurse of hospital patient was not an inseparable part of the rendition of health care services); *Jones v. Khorsandi*, 148 S.W.3d 201, 205–6 (Tex. App.—Eastland 2004, pet. denied) (holding that alleged sexual assault by emergency-room doctor of patient was not an inseparable part of the rendition of medical services); *see also Buck v. Blum*, 130 S.W.3d 285, 290–91 & n.6 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (concluding that alleged sexual assault by doctor of patient during medical examination did not arise out of the course and scope of the doctor's employment and was not an inseparable part of the rendition of medical services by the doctor).

The Executrix cites a line of cases holding that negligence claims against health care facilities for not protecting patients in these facilities from assault are health care liability claims. *See, e.g., Diversicare Gen. Partners*, 185 S.W.3d at 851. These cases are not on point because the Muguerzas are not suing any facility or alleging negligent failure to protect them against assault. *See id.* (emphasizing that the plaintiff's claim was not that the nursing home, through its employees and agents, committed the sexual assault). The Muguerzas have sued only the doctor whom they allege assaulted them.

The Executrix relies upon *Vanderwerfer v. Beathard*, a case in which the Fifth Court of Appeals held that the plaintiff's claim that the defendant doctor “rubbed her

professional judgment by Dr. Appell in deciding to allow Cyrene to be present in the examination room is not related to any potential liability for the alleged assault of the Muguerzas in the examination room.

genitals” during the course of a chiropractic examination was “inseparable from the rendition of health care services” and was a health care liability claim. *See* 239 S.W.3d 406, 408–9 (Tex. App.—Dallas 2007, no pet.). Though the plaintiff in *Vanderwerfer* asserted an assault claim against the chiropractor who allegedly committed the assault, the *Vanderwerfer* court concluded that the act or omission of which the plaintiff complained might have been within the scope of the chiropractic examination that the plaintiff asked the chiropractor to perform because the plaintiff sought treatment for pain that went up to her upper thigh. *See id.* at 408–9. This case is not on point as to the Attack Claims, in which the Muguerzas allege an unprovoked physical attack that could not have been within the scope of the medical services rendered by Dr. Appell. Under no reasonable view of the Muguerzas’ allegations could it be argued that an unprovoked physical assault on the Muguerzas would be required as part of Dr. Appell’s medical services as a urologist. The *Vanderwerfer* case is not on point. *See Wasserman*, 2010 WL 1992622, at *3 (distinguishing *Vanderwerfer*).

The Executrix also cites *Mata v. Calixto-Lopez*. *See* No. 04-06-00540-CV, 2007 WL 3003139, at*2 (Tex. App.—San Antonio Oct. 17, 2007, no pet.) (mem. op.). In that case a man arrested for driving while intoxicated alleged that a medical provider at the county jail assaulted him by taking urine and blood samples without his consent. *See id.* at *1–2. The *Mata* court concluded that the case involved the issue of when a doctor can properly force an intoxicated patient to give urine and blood samples needed for medical clearance to enter a jail. *See id.* In the case under review, there is no issue of whether it could be proper for Dr. Appell to engage in an unprovoked physical assault of the Muguerzas. The *Mata* case is not on point.⁷

The Executrix also points to *Oak Park, Inc. v. Harrison*, a case in which a patient at a drug treatment center was allegedly slammed against a wall when nurses physically

⁷ In addition, the plaintiff in *Mata* pleaded medical negligence until the day before the hearing on the doctor’s motion to dismiss, when the plaintiff dropped the negligence claim and added claims for assault and battery, sexual assault, and violation of his civil rights. *See Mata*, 2007 WL 3003139, at*1.

restrained a psychological patient. *See* 206 S.W.3d 133, 135 (Tex. App.—Eastland 2006, no pet.). The injured patient sued the center alleging it had been negligent in handling the psychological patient and in not protecting the plaintiff from the patient. *See id.* at 135–36. The *Oak Park* case is not on point because the Muguerzas are neither suing a facility nor alleging negligent failure to protect them against assault.

Finally, the Executrix asserts that Dr. Appell’s alleged conduct was “necessary, even required, under the circumstances of a patient being in ‘significant pain’ during a medical procedure and a commotion erupting in the examination room.” But the conduct alleged by the Muguerzas is Dr. Appell’s unprovoked physical attack of the Muguerzas by (1) punching Shari, (2) violently throwing Shari to the ground, and (3) violently throwing Cyrene into a cabinet. This conduct is clearly not part of any medical examination, vaginal-catheterization procedure, or any response to a commotion in the examination room.

Because the alleged unprovoked physical assault of the Muguerzas is not an inseparable part of the rendition of medical services, the Attack Claims cannot be health care liability claims on this basis.

2. Are the Attack Claims health care liability claims based on the part of the statutory definition dealing with an alleged departure from accepted standards of safety?

The Executrix also asserts that the Muguerzas’ claims are health care liability claims because they involve an alleged departure from “accepted standards of . . . safety.” TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13). Both Chapter 74 and former article 4590i of the Texas Revised Civil Statutes contain definitions of “health care liability claim” that refer to safety standards. *See id.*; Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4), 1977 Tex. Gen. Laws 2039, 2041, *repealed and codified as amended by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 10.01, 10.09, 2003 Tex. Gen. Laws 847, 864, 884. However, these definitions are materially different with respect to the part of the definition dealing with safety standards. *Compare* TEX. CIV.

PRAC. & REM. CODE ANN. § 74.001(a)(13) (stating “‘Health care liability claim’ means a cause of action . . . for . . . other claimed departure from accepted standards of medical care, or health care, *or safety or professional or administrative services directly related to health care*”) (emphasis added) (hereinafter, “Current Definition”), *with* Act of May 30, 1977, 1977 Tex. Gen. Laws at 2041 (stating “‘Health care liability claim’ means a cause of action . . . for . . . other claimed departure from accepted standards of *medical care or health care or safety*”) (emphasis added) (hereinafter, “Former Definition”). Therefore, cases regarding the construction of the Former Definition are not on point and do not govern the construction of the part of the Current Definition dealing with safety standards. *See Christus Health v. Beal*, 240 S.W.3d 282, 288–89 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Valley Baptist Med. Ctr. v. Stradley*, 210 S.W.3d 770, 774–75 (Tex. App.—Corpus Christi 2006, pet. denied).

Research reveals no cases from the Supreme Court of Texas or from this court addressing the proper legal standard for determining whether a claim is a health care liability claim under the Current Definition because the claimant alleges a “departure from accepted standards of . . . safety or professional or administrative services directly related to health care.”⁸ TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13). Therefore, this is an issue of first impression in this court.

We review the trial court’s interpretation of applicable statutes de novo. *See Johnson v. City of Fort Worth*, 774 S.W.2d 653, 655–56 (Tex. 1989). In construing a statute, our objective is to determine and give effect to the legislature’s intent. *See Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). If possible, we must

⁸ Regarding the safety portion of the Former Definition, some justices on the Supreme Court of Texas have concluded that the alleged departure from accepted safety standards must be “an inseparable or integral part of the patient’s care or treatment,” for the claim to fall under this part of the Former Definition. *See Marks v. St. Luke’s Episcopal Hosp.*, 319 S.W.3d 658, 662–64 (Tex. 2010) (plurality op.) (Medina, J., joined by Hecht, J.). On this issue, other justices have concluded that the alleged departure from accepted safety standards need not be related to health care for the claim to fall under this part of the Former Definition. *See id.* at 672–74 (Johnson, J., concurring, joined by Willett, J.).

ascertain that intent from the language the legislature used in the statute and not look to extraneous matters for an intent the statute does not state. *Id.* If the meaning of the statutory language is unambiguous, we adopt the interpretation supported by the plain meaning of the provision’s words. *St. Luke’s Episcopal Hosp. v. Agbor*, 952 S.W.2d 503, 505 (Tex. 1997). We must not engage in forced or strained construction; instead, we must yield to the plain sense of the words the legislature chose. *See id.*

The main issue in construing the Current Definition regarding safety standards is whether the phrase “directly related to health care” modifies “standards of . . . safety.” TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13). One possible construction is that, under the rules of grammar, the legislature’s failure to place a comma after “safety” means that “directly related to health care” modifies “safety or professional or administrative services.” *See Christus Health*, 240 S.W.3d at 287–89. Under this construction, accepted standards of safety do not fall within the Current Definition unless they are directly related to health care. *See id.* Under another possible construction, the phrase “directly related to health care” modifies only “professional or administrative services,” and accepted standards of safety need not be directly related to health care to fall within the Current Definition. *See Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 327–28 (Tex. App.—San Antonio 2006, pet. denied) (holding that claims were health care liability claims because they involved alleged departure from accepted standards of safety without any requirement that the safety standards be related to health care). Examining the words chosen by the legislature in the context of the Current Definition and of Chapter 74 as a whole and in accordance with rules of grammar, we conclude that, under the unambiguous statutory language, the phrase “directly related to health care” modifies “safety or professional or administrative services.” This construction accords with six of the seven other courts of appeals that have addressed this issue.⁹ *Compare St.*

⁹ The Supreme Court of Texas may resolve this issue when it issues its opinion in *Yamada v. Friend*, which has been submitted in cause number 08-0262 in that court.

David's Healthcare P'ship v. Esparza, 315 S.W.3d 601, 605 (Tex. App.—Austin 2010, pet. filed); *Dual D Healthcare Operations v. Kenyon*, 291 S.W.3d 486, 489–90 (Tex. App.—Dallas 2009, no pet.); *Yamada v. Friend*, No. 2-07-177-CV, 2008 WL 553690, at *3–4 (Tex. App.—Fort Worth Feb. 28, 2008, pet. granted) (mem. op.); *Omaha Healthcare Ctr. v. Johnson*, 246 S.W.3d 278, 281–84 (Tex. App.—Texarkana 2008, pet. filed); *Christus Health*, 240 S.W.3d at 287–89; *Stradley*, 210 S.W.3d at 774–75, with *Emeritus Corp.*, 211 S.W.3d at 327–28.¹⁰

Applying this construction, we now must determine whether, in the Attack Claims, the Muguerzas allege a departure from accepted standards of safety directly related to health care. “Health care” is defined 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 ANN. § 74.001(a)(10). Presuming that the alleged unprovoked physical assault by Dr. Appell asserted in the Attack Claims is a departure from accepted standards of safety, this alleged assault does not directly relate to any act or treatment performed or furnished, or that should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient’s medical care or treatment. Therefore, we conclude that the Attack Claims are not health care liability claims based on the part of the Current Definition that includes alleged departures from accepted standards of safety directly related to health care.¹¹ *See Wasserman*, 2010 WL 1992622,

¹⁰This disagreement among courts of appeals has been mirrored by a disagreement among justices on the Supreme Court of Texas opining as to the construction of the Current Definition in separate opinions in a case involving the Former Definition. *Compare Diversicare Gen. Partners*, 185 S.W.3d at 867 (O’Neill, J., dissenting, joined by Brister, J. and Green, J.) (stating that “[w]hen it recently amended the definition of ‘health care liability claim,’ the Legislature clarified that claims falling under the statute must relate to the actual provision of health care”), *with id.* at 861 n. 4 (Jefferson, C.J., concurring in part, dissenting in part, and concurring in judgment) (stating that “[i]t is clear under the revised statute that claims for ‘professional or administrative services’ must be ‘directly related to health care’; however, there is no indication that claims involving ‘safety’ must also relate to health care”).

¹¹ The Executrix has not argued that the Muguerzas have alleged a departure from accepted standards of professional or administrative services directly related to health care; however, if she had made this argument, the alleged departure likewise would not be directly related to health care.

at *3 (concluding that alleged sexual assault by surgeon of one of his patients during a physical examination in the doctor's office did not relate to the patient's treatment or care); *Loaisiga*, 2010 WL 3049086, at *4–5 (holding that alleged sexual assault by doctor of two patients during medical examinations did not relate to the doctor's treatment of these patients); *Holguin*, 256 S.W.3d at 353–54 (concluding that alleged sexual assault by nurse of hospital patient was not related to patient's course of care or treatment); *Jones*, 148 S.W.3d at 205–6 (holding that alleged sexual assault by emergency-room doctor of patient was not related to patient's medical care).

3. Do Shari's discovery responses mandate a conclusion that the Attack Claims are health care liability claims?

The Executrix argues that two of Shari's discovery responses show that the true nature of the Muguerzas' claims is medical negligence and that the Muguerzas are simply engaging in artful pleading in an attempt to recast their claims as claims for physical assault. The interrogatory response was quoted in its entirety in section I., above. When asked to describe, under oath, the conduct she claims constituted an assault, Shari stated generally that Dr. Appell physically attacked Shari and Cyrene, but Shari did not specify that Dr. Appell punched her in the nose and mouth, violently threw her to the ground, or violently shoved Cyrene. Nonetheless, Shari stated in her interrogatory answer that Dr. Appell physically attacked Shari and Cyrene in the examination room, which is consistent with the Muguerzas' allegations. Though in her interrogatory answer Shari did not recite the specific assault allegations from the live pleading, she stated generally that Dr. Appell physically assaulted her and her mother, and her answer is consistent with the allegations of the live pleading.

In a response to a request for disclosure, when asked to identify the legal theories and general factual bases of her claims, Shari responded that, because of Dr. Appell's negligence, she suffered injuries and continues to suffer from the incident made the basis of this suit. Shari also stated that she expected that her testimony and that of her treating physicians will "clearly set forth the negligence of [Dr. Appell]." Other than this single

response, Shari does not otherwise refer to negligence in her discovery responses. In her disclosures, Shari designated various treating physicians as expert witnesses and describes the expected subject matter of their testimony. In these descriptions, Shari does not state that she expects these doctors to testify as to any standard of care allegedly owed by Dr. Appell or as to Dr. Appell's alleged negligence. Instead, Shari states that she expects these doctors to testify regarding her medical history, past treatment for the injuries she sustained as a result of the incident made the basis of this suit, and her treatment, prognosis, and medical bills. Given that the Muguerras have never pleaded any negligence claims in this suit, Shari's response in her disclosures that Dr. Appell's negligence caused her injuries is puzzling. Even more puzzling is the absence of any indication in the record that Shari amended this response after the Executrix relied on it in her motion to dismiss.

Discovery responses cannot amend a party's pleadings. *See Price v. Short*, 931 S.W.2d 677, 685–87 (Tex. App.—Dallas 1996, no writ) (noting that raising a defense in discovery responses does not amend the pleadings or put opposing parties on notice that the defense will be raised at trial). Nonetheless, inaccurate or misleading discovery responses do not further the legitimate goals and purposes of discovery and can frustrate a litigant's efforts to narrow issues for trial. Though the two discovery responses on which the Executrix relied may raise other issues, these responses do not alter the claims the Muguerras have pleaded in their petition. Research has revealed no case in which a court concludes that a party's discovery responses supplant the facts alleged in the party's pleading in determining whether the party has asserted a health care liability claim.

The Executrix also asserts that Shari's discovery responses are clear, deliberate, and unequivocal statements of fact that are judicial admissions binding on Shari. As discussed above, the interrogatory response is consistent with the allegations of the live petition. Shari's response in her disclosures that Dr. Appell's negligence caused her injuries is not consistent with Shari's pleaded claims. But this response is a conclusion of

law not a statement of fact, and, given Shari's pleadings and other discovery responses, this response is not so clear and unequivocal as to rise to the level of a judicial admission. *See Regency Advantage Ltd. P'ship v. Bingo Idea-Watauga, Inc.*, 936 S.W.2d 275, 278 (Tex. 1996); *In re S.A.M.*, 321 S.W.3d 785, 790, n.1 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Shari's discovery responses do not mandate a conclusion that the Attack Claims are health care liability claims.

For the foregoing reasons, we conclude that the Attack Claims are not health care liability claims.

III. CONCLUSION

Based on the Current Definition, the Medical Procedure Claims are health care liability claims, and the Attack Claims are not. Accordingly, in denying the Executrix's motion to dismiss relative to the Medical Procedure Claims, the trial court erred, and we sustain the Executrix's appellate issue to this extent. We overrule the remainder of this issue. Accordingly, we affirm the trial court's denial of the Executrix's motion relative to the Attack Claims, reverse the trial court's order relative to the Medical Procedure Claims, and remand for further proceedings regarding the Attack Claims. We instruct the trial court to (1) dismiss the Medical Procedure Claims under section 74.351(b) and (2) determine the amount of reasonable attorney's fees and costs to be awarded under section 74.351(b) for the dismissal of the Medical Procedure Claims.

/s/ Kem Thompson Frost
 Justice

Panel consists of Justices Anderson, Frost, and Seymore.