COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00424-CV

DRS. CALABRIA-ELLIS, P.C. D/B/A GATEWAY DENTAL AND DR. ANDRE ELLIS, INDIVIDUALLY — APPELLANTS

V.

AMANDA HO AND RACHEL HO — APPELLEES

FROM THE 67TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 067-284752-16

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellants Drs. Calabria-Ellis, P.C. d/b/a Gateway Dental and Dr. Andre Ellis, individually, appeal the trial court's interlocutory order denying their motion to dismiss under the Texas Medical Liability Act (TMLA). *See* Tex. Civ. Prac. &

[1]See Tex. R. App. P. 47.4.

Rem. Code Ann. § 51.014(a)(9) (West Supp. 2016), § 74.351(a), (b) (West 2017). The lone issue is a familiar one: the often hazy question of whether a claim, though labeled otherwise, is a healthcare-liability claim subject to the TMLA's mandatory expert-report and dismissal provisions. Because we agree with Appellants that the promissory-estoppel claim alleged by Appellees Amanda and Rachel Ho is a healthcare-liability claim, we will reverse and remand.

II. BACKGROUND

Appellees filed their original petition on April 6, 2016. They complained of experiencing pain, infection, and other mental and physical maladies after Appellants performed dental services for them. According to a different filing, Amanda's problems began after she visited Appellants in April 2014 to correct a food trap between two molars. Appellants filled a cavity and performed temporary and permanent crown procedures to address the persistent tooth pain that Amanda subsequently experienced, but she ultimately visited other dentists who, among other things, corrected the food-trap and crown procedures that Appellants had previously performed. After Appellants filled multiple cavities for Rachel in late 2013, she too experienced persistent tooth pain and had the cavities re-treated by other dentists.

In addition to the allegations involving dental treatment, Appellees averred in paragraph twelve of their original petition that when they confronted Appellants with the problems they were experiencing, Dr. Ellis promised to reimburse them for the costs they had incurred to have the issues corrected by other dentists.

Appellees presented Appellants with invoices documenting the dental work performed by other dentists, but Appellants failed to reimburse them.[2]

Appellees alleged healthcare-liability claims against Appellants, averring that Appellants' negligence in performing the dental procedures proximately caused them damages. Appellees also alleged a claim for promissory estoppel. Premised upon the facts contained in paragraph twelve, Appellees alleged that Dr. Ellis promised to reimburse them for the costs they incurred to correct the procedures that Appellants had performed; that Appellants should have foreseen, and did foresee, that Appellees would rely on the promise; that Appellees did in fact substantially rely upon Dr. Ellis's promise; and that Appellees were injured because Appellants reneged on the promise to reimburse them.

Appellees later nonsuited their "Malpractice and Negligence claims." In the notice of nonsuit, Appellees confirmed that their "claim for Promissory Estoppel against [Appellants] shall proceed without regard to this Notice."

Soon after the nonsuit, Appellants filed a combined traditional and no-evidence motion for summary judgment and a motion to dismiss under the TMLA, arguing in part that Appellees' "claims" should be dismissed because Appellees failed to comply with the TMLA's applicable expert-report requirement. Appellees responded that they were not attempting to avoid the TMLA's expert-

[2]Appellees attached evidence to their response showing that on one occasion, Appellants did reimburse them for the costs they incurred from a different dentist, as evidenced by Dr. Ellis's payment of $1,150 for dental work that Jeffrey L. Saunders D.D.S. performed for Amanda.

report requirement by improperly recasting their nonsuited medical-negligence claim as a promissory-estoppel claim—primarily because the claims' elements differed—and that evidence supported their contract-based promissory-estoppel claim. This is one exchange that took place at the hearing on Appellants' motion to dismiss:

> The Court: You're saying that the agreement had nothing to do with the medical care other than he was just willing to pay? Is that . . . what you're basically saying? He made a promise to pay or help pay?
>
> [Appellees' counsel]: Exactly. He made a promise to pay for my clients' expenses in connection with them seeking out the other dentist. . . .

The trial court denied Appellants' motions.

III. APPLICABILITY OF TMLA

In their only issue, Appellants argue that the trial court erred by denying their motion to dismiss Appellees' promissory-estoppel claim. They contend that because the claim is inseparable from, and "completely intertwined with," the rendition of health care services, it is a healthcare-liability claim subject to the TMLA's expert-report requirement, and Appellees' failure to serve an expert report mandates dismissal. According to Appellants, "Put another way, without the allegations of the breach of the standard of care and injuries therefrom, the Appellees would not be seeking any sort of recovery from the Appellants."

Appellees disagree with Appellants' characterization of the promissory-estoppel claim, responding that it is not a healthcare-liability claim because they

do not complain, nor are they required to prove, that Appellants departed from any accepted standard of medical care or that they suffered injury as a result of any such departure. Appellees maintain that their promissory-estoppel claim—which requires them to prove that Appellants made a promise, that it was foreseeable to Appellants that Appellees would rely on the promise, and that Appellees substantially relied on the promise to their detriment—is "not based on a breach of the standard of medical care, but relate[s] to a broken promise to repay fees." *See Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 n.25 (Tex. 2002).

A. Standard of Review

Generally, we review a trial court's denial of a motion to dismiss under civil practice and remedies code section 74.351 for an abuse of discretion. *Polone v. Shearer*, 287 S.W.3d 229, 232 (Tex. App.—Fort Worth 2009, no pet.). However, when the matter involves construing a statute, such as determining whether the TMLA applies to a particular claim, as in this case, we apply a de novo review. *See Loaisiga v. Cerda*, 379 S.W.3d 248, 254–55 (Tex. 2012).

B. Expert-Report Requirement

A plaintiff must serve an expert report for each physician or health care provider against whom a healthcare-liability claim is asserted. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). A party's obligation to serve an expert report thus depends on whether its claim falls within the statutory definition of "health care liability claim." *See id.* If the expert-report requirement applies, and a report is

not served, the trial court is required, upon motion by the affected health care provider, to dismiss the claim with prejudice and to award reasonable attorney's fees and costs. *Id.* § 74.351(b).

C. Scope of Healthcare-Liability Claim

A healthcare-liability claim contains three elements: (1) a physician or healthcare provider must be the defendant; (2) the claim at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety; and (3) the defendant's act, omission, or other departure must proximately cause the patient's injury or death. *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 662 (Tex. 2010); *see* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13) (West 2017) (defining "health care liability claim"). A dentist is a healthcare provider. Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(12)(A)(ii). For the second element, Appellants argue that Appellees allege a departure from accepted standards of health care. *See id.* § 74.001(a)(10) ("'Health care' means any act or treatment 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."). Appellees disagree, additionally arguing that they do not claim that they were injured as a result of Appellants' departure from accepted standards of care.

"A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of medical services." *Diversicare Gen. Partner, Inc. v. Rubio*, 185

S.W.3d 842, 848 (Tex. 2005). In making that determination, we consider the alleged wrongful conduct and the duties allegedly breached. *Id.* at 851. We also consider whether expert testimony is necessary to show breach of an applicable standard of care, whether the alleged act involves medical judgment related to the patient's care or treatment, and whether a specialized standard in the healthcare community applies. *Id.* at 848–51. "[I]f expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider, the claim is a health care liability claim." *Tex. W. Oaks Hosp., L.P. v. Williams*, 371 S.W.3d 171, 182 (Tex. 2012). "And only if expert testimony is not needed should a court proceed to consider the totality of the circumstances, as a claim may still be a health care liability claim despite that 'in the final analysis, expert testimony may not be necessary to support a verdict.'" *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753, 760 (Tex. 2014).

A plaintiff cannot avoid the TMLA's requirements by artfully phrased language or recasting of claims. *Loaisiga*, 379 S.W.3d at 255. Rather than focus on the way a claim was pleaded, we concentrate on the nature and essence of the claim, or its gravamen. *Diversicare*, 185 S.W.3d at 851. If a claim is premised on facts that *could* support liability for breach of an applicable standard of care, then the claim is properly characterized as a healthcare-liability claim, and the TMLA applies. *Loaisiga*, 379 S.W.3d at 255.

And of course, we cannot ignore that the "broad language of the TMLA evidences legislative intent for the statute to have expansive application." *Id.* at

256. In fact, the TMLA essentially creates a presumption that a claim is a healthcare-liability claim when it involves a physician or health care provider and is based on facts evolved during the course of the patient's care. *Id.*

D. Appellees Allege a Healthcare-Liability Claim

Appellants contend in part that Appellees' promissory-estoppel claim is inseparable from the rendition of health care because "but for the Appellants' alleged departure from the standard of care in the provision of health care services, Appellees would have no basis to make their claim under promissory estoppel." That is not the standard, and we are unaware of any authority likening the determination of whether a claim is a healthcare-liability claim to some sort of proximate-cause inquiry. The appropriate question is whether Appellees' claim is premised on facts that could support a healthcare-liability claim. *See Loaisiga*, 379 S.W.3d at 255; *see also Hillman v. Diagnostic Clinic of Houston, P.A.*, No. 01-04-00580-CV, 2005 WL 995453, at *5 (Tex. App.—Houston [1st Dist.] Apr. 28, 2005, no pet.) (mem. op.) (considering "the underlying nature of" plaintiff's contract claim, not whether it would have existed but for defendant's alleged negligence). We initially consider the gravamen of Appellees' promissory-estoppel claim and whether expert testimony will be necessary to show breach of an applicable standard of care. *See Diversicare*, 185 S.W.3d at 848–51.

Appellees argue that they merely complain of a broken assurance to repay fees, but the true gravamen of their promissory-estoppel claim—in their own

words—is that they seek reimbursement for the costs they incurred "correcting the issues arising from the dental surgeries negligently performed by [Appellants]." To prove damages under the theory of promissory estoppel, Appellees must rely on testimony that only a medical expert can provide because they must prove the amount of subsequent dental work they incurred to "correct the issues arising from the dental surgeries negligently performed." *See generally Tex. W. Oaks Hosp.*, 371 S.W.3d at 182 (holding that "if expert medical or health care testimony is necessary *to prove or refute* the merits of the claim against a physician or health care provider, the claim is a health care liability claim") (emphasis added). Similarly, insofar as Appellants dispute that they are responsible for reimbursing Appellees because they did not negligently perform one or more of the initial dental procedures, medical expert testimony will likewise be necessary.[3] *See id.*

Appellees must also prove justifiable reliance upon the alleged promise. As in *Jones v. Landry's Seafood Inn & Oyster Bar-Galveston, Inc.*, where a customer relied on a restaurant's promise to pay her dental bill when her injuries were caused by biting into food that the restaurant served, Appellees' proof of justifiable reliance will be based, at least in part, on the fact that Appellants

[3]A claimant in a medical negligence cause may recover damages for past medical expenses. *See Gunn v. McCoy*, 489 S.W.3d 75, 101 (Tex. App.—Houston [14th Dist.] 2016, pets. filed). The essence of Appellees' promissory-estoppel claim is an action for damages limited to medical expenses incurred in the past caused by Appellants' alleged medical negligence. *See Yamada v. Friend*, 335 S.W.3d 192, 197 (Tex. 2010).

allegedly caused their injuries to begin with. *Compare* 328 S.W.3d 909, 914–15 (Tex. App.—Houston [14th Dist.] 2010, no pet.), *and Corpus Christi Day Cruise, LLC v. Christus Spohn Health Sys. Corp.*, 398 S.W.3d 303, 311–14 (Tex. App.—Corpus Christi 2012, pet. denied) (holding evidence sufficient to support jury finding of promissory estoppel when shipowner-promissor was liable for medical services as a matter of law), *with Coastal Bank ssb v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.) ("Generally, reliance on representations made in a business or commercial transaction is not justified when the representation takes place in an adversarial context.").

Appellees' promissory-estoppel claim thus concerns an alleged departure from accepted standards of health care, and expert testimony will be necessary to support the claim. *See Tex. W. Oaks Hosp., L.P.*, 371 S.W.3d at 182. Because Appellees were required to serve an expert report but failed to do so, the trial court had no option but to dismiss Appellees' promissory-estoppel claim, and it abused its discretion by not doing so. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a), (b). Accordingly, we sustain Appellants' only issue.

IV. CONCLUSION

Having sustained Appellants' issue, we reverse the trial court's order denying their motion to dismiss and remand this cause to the trial court for rendition of judgment dismissing Appellees' promissory-estoppel claim and for a determination of reasonable attorney's fees and costs. *See id.* § 74.351(b)(1), (2).

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: MEIER, SUDDERTH, and KERR, JJ.

DELIVERED: August 31, 2017