COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00248-CV

T. C. APPELLANT

V.

AHMAD ABO KAYASS APPELLEE

FROM THE 348TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 348-282045-15

DISSENTING OPINION

In this appeal, we are faced with a sympathetic claimant who was sexually assaulted by a medical professional during her minor children's medical exams. When presented with these types of facts, it is difficult to ignore the practical effect of a particular decision. Even so, I must respectfully disagree with the majority's conclusion that appellant T.C.'s claims against appellee Ahmad Abo Kayass are not healthcare-liability claims (HCLCs) governed by the expert-report

requirement and with the majority's judgment reversing the trial court's contrary holding.

In the trial court and as explained by the majority, T.C. raised claims against not only Kayass but also against the medical facility and that facility's management companies (the entities). T.C. alleged that the entities departed from the applicable standards of care by credentialing Kayass, by negligently supervising him, and "by facilitating . . . Kayass's sexual preda[city]." She further alleged that the entities were vicariously liable for Kayass's actions and participated in a conspiracy with Kayass to "conceal . . . and keep secret" Kayass's actions. Finally, T.C. alleged that Kayass not only sexually assaulted her during her children's medical exam but "exploited her chart information to retrieve her telephone number" in order to send her a harassing text message.[1]

After 120 days had passed, Kayass and the entities separately moved to dismiss T.C.'s suit because she had failed to file an expert report supporting her claims, which they all argued were HCLCs subject to the expert-report requirement. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a)–(b) (West 2017). The trial court granted each motion to dismiss, dismissing T.C.'s claims with prejudice. Although T.C. filed a notice of appeal from each of the dismissal orders, she voluntarily dismissed her appeal as to the trial court's dismissal of her claims against the entities. T.C. filed her motion to dismiss the entities from her

[1]The record shows that the text read: "You[r] lips are sweet [T.C.]."

appeal contemporaneously with her appellate brief and stated that she sought to voluntarily dismiss her appeal as to the entities because she had nonsuited those claims in the trial court. *See* Tex. R. Civ. P. 162. But T.C. filed her notice of nonsuit almost five months after the trial court had dismissed all of her claims with prejudice based on her failure to file an expert report supporting her HCLCs. T.C.'s subsequent notice of nonsuit did not vitiate the trial court's earlier dismissal, which had adjudicated the merits of each of her claims. *See Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995) ("Once a judge announces a decision that adjudicates a claim, that claim is no longer subject to the plaintiff's right to nonsuit."); *Mossler v. Shield*, 818 S.W.2d 752, 754 (Tex. 1991) ("[I]t is well established that a dismissal with prejudice functions as a final determination on the merits."); *Curry v. Bank of Am., N.A.*, 232 S.W.3d 345, 354 (Tex. App.—Dallas 2007, pet. denied) ("[A] party who has had his claims adjudicated unsuccessfully cannot later non-suit his claims to avoid the judgment."). In any event, we granted T.C.'s motion to dismiss and dismissed the entities from T.C.'s appeal. *See* Tex. R. App. P. 42.1(a)(1).

T.C. now argues that her claims against only Kayass were not HCLCs subject to the expert-report requirement. But we cannot so parse T.C.'s claims. We must, as the majority recognizes, look at the entire record and the overall context of T.C.'s suit, not merely her claims against Kayass in isolation, to determine de novo whether T.C. has rebutted the presumption that her claims were HCLCs. *See Loaisiga v. Cerda*, 379 S.W.3d 248, 254–59 (Tex. 2012).

Here, the trial court concluded that T.C.'s claims against the entities were HCLCs, a conclusion that T.C. does not challenge on appeal. Whether or not those claims were HCLCs as the trial court concluded,[2] they were based on the same facts as the claims T.C. brought against Kayass. Accordingly, the claims against the entities have been established to be HCLCs for the purposes of this case; therefore, T.C.'s claims against Kayass are subject to the same characterization. *See PM Mgmt.-Trinity NC, LLC v. Kumets*, 404 S.W.3d 550, 552 (Tex. 2013); *Turtle Healthcare Grp., L.L.C. v. Linan*, 337 S.W.3d 865, 868–69 (Tex. 2011) (op. on reh'g); *Yamada v. Friend*, 335 S.W.3d 192, 195–98 (Tex. 2010). T.C. cannot avoid the effect of the expert-report requirement "by claim-splitting or by any form of artful pleading." *Kumets*, 404 S.W.3d at 552; *see also Yamada*, 335 S.W.3d at 197–98. All of T.C.'s claims were founded on the same operative facts; therefore, the classification of her claims against the entities as HCLCs—a classification that T.C. does not challenge—must govern the classification of her claims against Kayass. *See Kumets*, 404 S.W.3d at 552 (agreeing that "claims that are based on the same facts as HCLCs are

[2]T.C.'s claims against the entities were based on departures from accepted standards of professional or administrative services directly related to healthcare, which satisfies the statutory definition of an HCLC. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13) (West 2017); *see also Loaisiga*, 379 S.W.3d at 255 ("[C]laims premised on facts that *could* support claims against a physician or health care provider for departures from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care are HCLCs, regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards.").

themselves HCLCs and must be dismissed absent a sufficient expert report"); *Yamada*, 335 S.W.3d at 195–96 (holding that because plaintiffs did not challenge conclusion that some of their claims against doctor were HCLCs, all claims were HCLCs because they were based on the same facts); *Med. Ctr. of Lewisville v. Slayton*, 335 S.W.3d 382, 386 (Tex. App.—Fort Worth 2011, no pet.) ("[B]ecause Slayton conceded . . . that her original petition asserted [an HCLC], because she failed to file any expert report, and because her first amended petition asserting a common law premises liability . . . claim against the Medical Center is based on the same facts as the [HCLC] asserted in her original petition, the record before us reflects the type of claim splitting expressly prohibited by *Yamada* . . . .").

Additionally, one of T.C.'s claims—that Kayass and the entities violated medical-privacy laws when Kayass was allowed to "exploit[] her chart information" in order to send T.C. harassing text messages—was an act directly related to medical or healthcare services; thus, T.C. did not conclusively rebut the presumption that this claim is an HCLC. *See Loaisiga*, 379 S.W.3d at 257; *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 181 (Tex. 2012); *see also Monson v. Allen Family First Clinic, P.A.*, 390 S.W.3d 598, 601–02 (Tex. App.—Dallas 2012, no pet.) ("A claim for wrongful disclosure of health care information is [an HCLC] subject to the expert-report requirement."). Because this claim is presumed to be an HCLC, her other claims against Kayass based on the same nucleus of operative facts may not be exempted from the expansive application of the expert-report requirement. *See Kumets*, 404 S.W.3d at 552 ("When a

plaintiff asserts a claim that is based on the same underlying facts as an HCLC that the plaintiff also asserts, both claims are HCLCs and must be dismissed if the plaintiff fails to produce a sufficient expert report."); *E. El Paso Physicians Med. Ctr., L.L.C. v. Vargas*, 511 S.W.3d 172, 176 (Tex. App.—El Paso 2014, pet. denied) ("Where all claims arise from the same nucleus of operative fact, and some pleaded claims are HCLCs, then the [expert-report requirement] must be followed or else all claims arising from the same fact scenario must be dismissed."). In short, HCLCs "operate like the Three Musketeers—all for one and one for all." *Alajmi v. Methodist Hosp.*, 639 F. App'x 1028, 1030 (5th Cir. 2016).

As I stated at the outset, Kayass's sexual assault of T.C. while he was giving her small children a medical exam paints this result with an apparent patina of unjustness. But I believe that the applicable statutes and binding precedent require that T.C.'s claims against Kayass be classified as HCLCs, forcing the inevitable conclusion that her claims must be dismissed based on her failure to file an expert report. As such, I would affirm the trial court's dismissal order regarding T.C.'s claims against Kayass. Because the majority does not, I respectfully dissent.

/s/ Lee Gabriel
LEE GABRIEL
JUSTICE

DELIVERED: November 9, 2017