In the Court of Appeals Second Appellate District of Texas at Fort Worth

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No. 02-20-00005-CV

HEART CENTER OF NORTH TEXAS, Appellant

V.

S.W., S.J., J.W., K.P., P.W., AND JANE DOES 1–20, Appellees

On Appeal from the 17th District Court
Tarrant County, Texas
Trial Court No. 017-308590-19

Before Gabriel, Kerr, and Wallach, JJ.
Memorandum Opinion by Justice Wallach

MEMORANDUM OPINION ON REHEARING

On June 11, 2020, we issued a memorandum opinion in this interlocutory appeal. We reversed the trial court's order denying appellant Heart Center of North Texas's (HCNT's) motion to dismiss the claims of Jane Does 1–20 and remanded this case to the trial court for an assessment of HCNT's attorney's fees and taxable court costs. Appellees S.W., S.J., J.W., K.P., P.W., and Jane Does 1–20 (collectively, the Plaintiffs) timely filed a motion for rehearing. We deny the motion for rehearing, withdraw our June 11, 2020 opinion and judgment, and substitute the following.

This interlocutory appeal arises from the trial court's denial of HCNT's Chapter 74 motion to dismiss "Jane Doe plaintiffs 1–20's" claims due to the Jane Does' failure to provide expert reports as required by Texas Civil Practice and Remedies Code section 74.351(a). The Jane Does were alleged to be unknown patients and sexual misconduct victims of HCNT physician Dennis Doan, M.D. (Dr. Doan).[1] HCNT brought the motion to dismiss and requested sanctions under Texas Civil Practice and Remedies Code section 74.351(b) based on the Jane Does' failure to serve an expert report. We conclude that because the Jane Does' claims constituted health care liability claims and the Jane Does failed to serve one or more expert reports addressing their claims by the 120-day deadline prescribed by section

[1]We assume without deciding that it is proper for "Jane Doe" to be used to identify an unknown *plaintiff* as opposed to an unknown defendant or a plaintiff whose identity is being protected, if no party raises that issue on appeal.

74.351(a), the trial court erred in denying HCNT's motion to dismiss the Jane Does' claims and by not awarding sanctions against the Jane Does pursuant to section 74.351(b). The order of the trial court denying HCNT's motion to dismiss the Jane Does' claims is reversed, and, because the Jane Does dismissed their claims while this appeal was pending, this matter is remanded for an assessment of HCNT's attorney's fees and taxable court costs.

I. Jurisdiction

This is an interlocutory appeal from the denial of a motion to dismiss under Texas Civil Practice and Remedies Code section 74.351(b) for failure to serve an expert report. This court has jurisdiction to hear this appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9); *Lewis v. Funderburk*, 253 S.W.3d 204, 208 (Tex. 2008); *Collini v. Pustejovsky*, 253 S.W.3d 216, 216 (Tex. 2008); *Presbyterian Cmty. Hosp. of Denton v. Smith*, 314 S.W.3d 508, 511 (Tex. App.—Fort Worth 2010, no pet.).

II. Procedural Background

On June 14, 2019, a group of plaintiffs filed their Original Petition against Dr. Doan and HCNT, the medical group with which Dr. Doan practiced. The plaintiffs included five named plaintiffs (S.W., S.J., J.W., K.P., and P.W.) (the Named Plaintiffs) and, at the center of this appeal, twenty unknown "Jane Does" (collectively, the Plaintiffs). The Original Petition alleged that Dr. Doan intentionally or knowingly committed sexually inappropriate acts or, alternatively, that Dr. Doan was negligent in his performance of cardiologic examinations when he knew or should have known

that such contact would be offensive to Plaintiffs. The Original Petition leaves much to be desired regarding clarity, but the substance of the allegations indicates that the Plaintiffs asserted that Dr. Doan is directly liable for his alleged misconduct and that HCNT is directly liable for its own misconduct and vicariously liable for Dr. Doan's actions.

As to HCNT directly, the Plaintiffs alleged that HCNT had knowledge of Dr. Doan's propensity to engage in inappropriate sexual behavior toward patients but nevertheless retained Dr. Doan as an employee and/or partner physician when it knew or should have known that the Plaintiffs would be harmed by his conduct. The Plaintiffs further alleged that the collective acts and omissions of Dr. Doan and HCNT proximately caused their claimed damages. Dr. Doan and HCNT each timely filed an answer on July 10, 2019, and August 2, 2019, respectively.

Pursuant to Texas Civil Practice and Remedies Code section 74.351(a), the five Named Plaintiffs served written reports and curriculum vitae of the following three physicians on October 31, 2019: Catherin A. Roberts, M.D.; Mitul Kadakia, M.D.; and Jonathan Burroughs, M.D. (collectively, the Chapter 74 Reports). The Chapter 74 Reports limited their analysis to "all five plaintiffs"; none of the reports acknowledged or discussed the Jane Does. No expert reports addressing any of the Jane Does were served on behalf of the Janes Does by the 120-day deadline. HCNT moved to dismiss the Jane Does' claims with prejudice and sought recovery of its attorney's fees and court costs pursuant to section 74.351(b) of the Texas Civil

Practice and Remedies Code.[2] This motion was denied by written order on December 17, 2019.

On January 3, 2020, HCNT filed and served its Notice of Accelerated Interlocutory Appeal "from the Honorable Melody Wilkinson's Order . . . Determining Plaintiffs' Chapter 74 Expert Reports Are Sufficient and Order Denying Defendant Heart Center of North Texas'[s] Objections to Plaintiffs' Chapter 74 Expert Reports and Defendant Heart Center of North Texas'[s] Motions to Dismiss and for Statutory Sanctions . . . signed on December 17, 2019." On January 7, 2020, HCNT filed its docketing statement in this Court. Under "Type of Case," HCNT stated, "Professional Malpractice," and in response to the question asking for a brief description of the issues to be raised on appeal and relief sought, HCNT stated: "Plaintiffs include unidentified Jane Does 1–20. Plaintiffs' CPRC 74.351(a) expert reports do not reference Jane Does 1–20, and Plaintiffs' counsel represented in open court that Jane Does 1–20 are unknown, if they exist at all. The claims of Plaintiffs Jane Does 1–20 should be dismissed with prejudice." While the Notice of Appeal did not limit the focus of this appeal to just the Jane Does, the Docketing Statement did.

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[2]Dr. Doan did not file a motion to dismiss and is not seeking relief in this appeal. The trial court overruled objections that HCNT filed to the adequacy of the Named Plaintiffs' Chapter 74 expert reports. HCNT did not appeal that ruling.

On January 30, 2020, the Named Plaintiffs and the Jane Does filed in the trial court a Notice of Partial Nonsuit as to Jane Does 1–20. Specifically, the notice stated that "Plaintiffs withdraw and no longer wish to pursue claims belonging to as-yet-unknown Plaintiffs, Jane Does 1–20." This partial non-suit was signed by counsel representing the Named Plaintiffs and the Jane Does. It requested a dismissal without prejudice with each party bearing its own court costs. That same day, the trial court signed an Order of Partial Nonsuit as to Jane Does 1–20, dismissing the Jane Does' causes of action without prejudice with each party bearing its own court costs.

On February 19, 2020, the trial court signed an Order of Partial Dismissal With Prejudice as to Plaintiffs Jane Doe 1–20, reciting that "the court considered the Plaintiffs' Motion to Withdraw the Partial Nonsuit as to Jane Doe[s] 1–20 and the Plaintiffs' simultaneous Motion to Dismiss with Prejudice." This order dismissed the Jane Does' claims with prejudice and taxed court costs against the party incurring them. That same day, the trial court signed an Order of Severance as to Jane Does 1–20, reciting that the "Jane Does 1–20['s claims] were dismissed with prejudice" on February 19, 2020, and that "any claims held by any adverse party, such as a pending claim for affirmative relief (sanctions, attorney's fees, or other costs) pending at the time of the dismissal [were t]hereby SEVERED from Cause No. 017-308590-19 and [would] be heard at Cause No. 17-315352-20."

III. Standard of Review

We review a trial court's ruling on a section 74.351(b) motion to dismiss under an abuse of discretion standard. *Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 766 (Tex. 2011); *T.C. v. Kayass*, 535 S.W.3d 169, 171 (Tex. App.—Fort Worth 2017, no pet.); *Bueno v. Hernandez*, 454 S.W.3d 178, 182 (Tex. App.—San Antonio 2014, pet. denied) (op. on reh'g). Legal questions, such as whether the claims asserted fall within section 74.351(a)'s expert-report requirement, are reviewed de novo. *Loaisiga v. Cerda*, 379 S.W.3d 248, 254–55 (Tex. 2012); *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012); *Bueno*, 454 S.W.3d at 182; *T.C.*, 535 S.W.3d at 171–72. Regarding our interpretation of section 74.351(a), we stated the following in *T.C.*:

> We are mindful that in construing the [Texas Medical Liability] Act [(the Act)], this court must "'determine and give effect to the Legislature's intent.'" *Tex. W. Oaks Hosp.*, 371 S.W.3d at 177 (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003)). In making this determination, we must begin by looking at the "plain and common meaning of the statute's words." *Id.*; *cf. Ogden v. Sanders*, 25 U.S. (12 Wheat.) 213, 332 . . . (1827) (Marshall, C.J., dissenting) (stating "that the intention of the [statute] must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers").

535 S.W.3d at 172.

IV. Analysis

In a single issue, HCNT argues that the trial court erred by denying HCNT's Chapter 74 motion to dismiss. Resolving this issue requires us to address the following three questions:

a. Are the direct-liability claims asserted by the Jane Does against HCNT—claims that were essentially claims for negligent hiring, supervision, and retention—health care liability claims as that term is defined by Texas Civil Practice and Remedies Code section 74.001(a)(13)?

b. Are the vicarious-liability claims asserted by the Jane Does against HCNT health care liability claims as that term is defined by Texas Civil Practice and Remedies Code section 74.001(a)(13)?

c. If the answer to (a) or (b) is "yes," then did the Named Plaintiffs, on behalf of the Jane Does, serve expert reports as required by Texas Civil Practice and Remedies Code section 74.351(a)?

The procedures relating to the dismissal of health care liability claims based on the failure to comply with the expert-report requirements of Chapter 74 are set forth in subsections 74.351(a) and (b), which provide:

> (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that 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. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.
>
> (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.

Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a), (b). A "health care liability claim" is defined 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.

Id. § 74.001(a)(13) (emphasis added).

A. Were the direct-liability claims asserted by the Jane Does against HCNT health care liability claims?

Construing the allegations in the Original Petition as to the Jane Does is a challenge. "Jane Does 1–20" are identified as "Plaintiffs" in the case style. The Jane Does are identified in the "Parties" section of the Original Petition as follows: "Upon information and belief Jane Does 1–20 are unknown victims yet to be identified." In paragraph "V. Notice" of the Original Petition, it is alleged that "Defendants herein have been placed on notice of those portions of *Plaintiffs' claims that are governed by Tex. Civ. Prac. & Rem. Code Ch. 74, et seq.* prior to the filing of this lawsuit." [Emphasis added.] That paragraph goes on to allege, "*Plaintiffs* reserve the right to assert that

some of the Defendants and/or some of the claims asserted herein do not fall within the purview of Tex. Civ. Prac. & Rem. Code Ch. 74, et. seq." [Emphasis added.]

From these paragraphs, we can ascertain that the Jane Does, who were twice identified as "Plaintiffs" in the Original Petition, pleaded claims that they contended could be separated into two categories: claims subject to Chapter 74 (health care liability claims) and claims that are not subject to Chapter 74 (non-health care liability claims). Further, the "Plaintiffs" alleged in their Original Petition that they gave Defendants pre-suit notice of their health care liability claims.

Additionally, throughout the Original Petition, at times the Named Plaintiffs are identified by their initials, but on several occasions the words "plaintiff" and "plaintiffs" are used without specific reference to specific plaintiffs and without making any distinction between the Named Plaintiffs and the Jane Does. Particularly, under "VII. Causes of Action," it is alleged:

a. "*Plaintiff* would show that during relevant times herein, Defendants provided medical treatment in Parker County, Texas and held itself out and represented to the *Plaintiff* and the public in general, that it was competent and qualified to provide inpatient medical treatment" [Emphases added.];

b. "*Plaintiff* will show this Court that the Defendants and its agents and employees owed *Plaintiff* a duty to exercise reasonable care when providing inpatient medical treatment within applicable standards of care" [Emphases added.];

c. "In the alternative, Defendant Dennis Doan, M.D. was negligent in the performance of his examinations when he knew or should have known that such contact would be offensive to *Plaintiffs*" [Emphasis added.];

d. “Defendant Heart Center, on information and belief, had notice of Doan’s propensity to treat *women*, and *woman* patients, in a sexually inappropriate and negligent way, but nevertheless negligently hired, supervised and retained Doan when they knew or should have known *Plaintiffs* would be damaged by his conduct.” [Emphases added.]

Then, in paragraph “VIII. Respondeat Superior,” it is alleged:

> At the time of the incident made the basis of this lawsuit, the persons responsible for *Plaintiffs’* care and safety were the agents, servants and/or employees of Defendants and were acting within the scope of their actual and apparent authority as such agents, servants and/or employees. Accordingly, Defendant is responsible for the damages which resulted from the negligent acts of its agents, servants and/or employees under the doctrine of respondeat superior. [Emphasis added.]

In construing pleadings in the context of a section 74.351 motion to dismiss, the Austin Court of Appeals succinctly summarized the proper rules when it stated,

> The rules of civil procedure require that the pleadings “consist of a statement in plain and concise language of the plaintiff’s cause of action,” Tex. R. Civ. P. 45(b), and “contain a short statement of the cause of action sufficient to give fair notice of the claim involved[.]” Tex. R. Civ. Proc. 47(a). “‘A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.’” *DeRoeck v. DHM Ventures, LLC*, 556 S.W.3d 831, 835 (Tex. 2018) (quoting *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000)). “The key inquiry is whether the opposing party ‘can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant.’” *Id.* “When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader.” *Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 897.

Seton Family of Hosps. v. White, 593 S.W.3d 787, 793 (Tex. App.—Austin 2019, pet. filed). In this case, the Jane Does are listed as plaintiffs in the case style, as plaintiffs in the identification of “Parties,” and as victims of the sexual misconduct by Dr. Doan. The “Plaintiff” or “Plaintiffs” allege that they are asserting claims—some of

which the "Plaintiffs" admit are subject to Chapter 74 of the Texas Civil Practice and Remedies Code—that Dr. Doan is liable to "Plaintiffs" for his own misconduct, that HCNT is vicariously liable to "Plaintiffs" for Dr. Doan's conduct, and that HCNT is liable for its own conduct in that it knew or should have known of Dr. Doan's propensity for misconduct and failed to do something to prevent harm to the Plaintiffs. Construing the Original Petition liberally, such allegations are sufficient to demonstrate that the Original Petition asserted claims for affirmative relief on behalf of the Jane Does. *Id.* at 793–95.

Having established that the Jane Does asserted actual claims for affirmative relief for negligent hiring, supervision, and retention of a physician, we must answer the three questions raised above, the first being whether the direct claims asserted by Dr. Doan's patients against HCNT for damages caused by sexual assaults occurring in the health-care setting are health care liability claims. The answer is clearly "yes" because the claims are based on an alleged "departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care." Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13); *see Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 849 (Tex. 2005) (holding that claim against owner of nursing home for negligent supervision resulting in injuries to nursing-home resident from sexual abuse and sexual assault by another resident stated a cause of action for departure from accepted standards of professional care within the scope of the Medical Liability Insurance Improvement Act (MLIIA)); *Heriberto*

Sedeno, P.C. v. Mijares, 333 S.W.3d 815, 818–22 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (holding that patient asserted a health care liability claim for purposes of Chapter 74 by alleging that a clinic was negligent in allowing a physician to be unsupervised with female patients despite knowledge of the physician's sexual proclivities and by failing to properly monitor patients); *Christus Spohn Health Sys. Corp. v. Sanchez*, 299 S.W.3d 868, 874–75 (Tex. App.—Corpus Christi–Edinburg 2009, pet. denied) (holding that patient's claims against hospital for negligent hiring, training, and supervision and retaining employees who allegedly assaulted plaintiff were essentially claims that the hospital did not care for her within accepted standards of care and safety and thus were health care liability claims); *Holguin v. Laredo Reg'l Med. Ctr., L.P.*, 256 S.W.3d 349, 354–56 (Tex. App.—San Antonio 2008, no pet.) (holding that patient's claim against nurse that nurse sexually assaulted him was not a health care liability claim but that patient's claim against the center that the center was negligent in hiring, training, and supervising the nurse amounted to a cause of action for departures from accepted standards of safety or health care and thus fell within the definition of "health care liability claim" under Chapter 74); *Holleman v. Vadas*, No. 04-05-00875-CV, 2007 WL 1059035, at *4 (Tex. App.—San Antonio Apr. 11, 2007, pet. denied) (mem. op.) (holding that health-care unit administrator's supervision of staff at the Connally Unit of the Texas Department of Criminal Justice is an integral component of the Unit's health-care services); *Espinosa v. Baptist Health Sys.*, No. 04-05-00131-CV, 2006 WL 2871262, at *2 (Tex. App.—San Antonio Oct. 11, 2006, pet.

denied) (mem. op.) (discussing the MLIIA and stating that a "cause of action against a health care provider is a health care liability claim if it is based on a claimed departure from an accepted standard of medical care, health care, or safety of the patient" and that 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") (citing *Diversicare*, 185 S.W.3d at 848)); *Sw. Mental Health Ctr. v. Olivo*, No. 04-06-00256-CV, 2006 WL 2682245, at *1 (Tex. App.—San Antonio Sept. 20, 2006, no pet.) (mem. op.) (holding that father's claims against mental health center for negligence and assault arising from an employee's allegedly inappropriate contact with the father's child who had been admitted to and was staying at the center were health care liability claims within the scope of the MLIIA); *Oak Park, Inc. v. Harrison*, 206 S.W.3d 133, 135–41 (Tex. App.—Eastland 2006, no pet.) (holding that claims brought by drug-addiction patient against treatment center after allegedly being injured when nurses physically restrained a psychological patient left in the same room with the plaintiff alleged negligence in failing to segregate the psychological patient and thus asserted "health care liability claims" within the scope of Chapter 74); *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 327 (Tex. App.—San Antonio 2006, pet. denied) (holding that claims on behalf of assisted-living-facility resident against facility and its owner arising out of resident-on-resident altercations alleged claims based on the departure from accepted standards of care and thus asserted "health care liability claims").

Accordingly, the Jane Does were required to comply with Chapter 74's expert-report requirements as to their direct claims against HCNT.

B. Were the vicarious-liability claims asserted by the Jane Does against HCNT health care liability claims?

Question two—whether the vicarious-liability claims asserted by the Jane Does against HCNT are health care liability claims within the scope of Chapter 74—is more complex than question one, but the ultimate answer is also "yes." We begin by examining the test for determining whether the gravamen of a plaintiff's claims constitutes a health care liability claim. A health care liability claim has three criteria:

> (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.

Psychiatric Sols., Inc. v. Palit, 414 S.W.3d 724, 725–26 (Tex. 2013) (describing the elements of a health care liability claim under Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13)); *see also Hopebridge Hosp. Houston, L.L.C. v. Lerma*, 521 S.W.3d 830, 835 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Here, Doan is a physician and HCNT is a health care provider, so the first criterion is met. *See Hopebridge*, 521 S.W.3d at 835.

Criterion two addresses whether the claims 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.

Psychiatric Sols., 414 S.W.3d at 725. We look to the "entire court record" and the overall context of the plaintiff's suit, including the nature of the factual allegations in the pleadings, the motion to dismiss, the response, and any relevant evidence properly admitted. *See Loaisiga*, 379 S.W.3d at 258–59; *Hopebridge*, 521 S.W.3d at 836. This analysis focuses on the facts underlying the claims. *Loaisiga*, 379 S.W.3d at 255. We are not limited to plaintiffs' characterizations of their claims as plaintiffs cannot avoid the requirements of Chapter 74 through artful pleading or recasting of claims. *Id.*; *Hopebridge*, 521 S.W.3d at 835.

A health care liability claim may include intentional torts as well as negligent torts. *Loaisiga*, 379 S.W.3d at 256, 259–60; *Hopebridge*, 521 S.W.3d at 836. The breadth of Chapter 74's definition of a health care liability claim creates a rebuttable presumption that a patient's claim is a health care liability claim if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during a patient's care, treatment, or confinement. *Loaisiga*, 379 S.W.3d at 256; *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 662 (Tex. 2010) (op. on reh'g); *Hopebridge*, 521 S.W.3d at 836; *Bueno*, 454 S.W.3d at 184. This presumption may be rebutted by a plaintiff if the record, including the pleadings, motions, responses, and properly admitted evidence conclusively shows the following:

> (1) there is no complaint about any act of the provider related to medical or health care services other than the alleged offensive contact, (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and (3) the only possible relationship between the alleged

> offensive contact and the rendition of medical services or healthcare was the setting in which the act took place.

Loaisiga, 379 S.W.3d at 257.

In this case, the Original Petition alleged that the Jane Does were unknown victims of Dr. Doan's sexual misconduct. The Jane Does admitted in their petition that they were asserting health care liability claims, at least in part, as explained above. Construing the petition liberally, the claims were based on (1) allegedly sexually offensive conduct perpetrated against them while receiving care from Dr. Doan at HCNT *or* (2) conduct toward them as patients during the course of their care by Dr. Doan that he should have known was sexually offensive to them. The former sounds in intentional conduct and the latter in professionally negligent conduct. We only have the allegations of the Original Petition for evaluation. The identities of the Jane Does are unknown and the facts, if any, of their encounters with Dr. Doan are unknown. Based upon this record, and construing the petition liberally, we conclude that the allegations of misconduct create a rebuttable presumption that the claims are health care liability claims. *See id.* at 256; *Hopebridge*, 521 S.W. 3d at 836; *Bueno*, 454 S.W.3d at 184.

Did the Jane Does conclusively rebut the health care liability claim presumption? No. Although there is no complaint about any act of the providers related to medical or health care services other than the alleged offensive contact, the last two requirements to rebut the presumption were not met. *See Loaisiga*,

379 S.W.3d at 257. There are no pleadings and there is no evidence about whether the alleged offensive contact with the Jane Does was pursuant to their actual or implied consent. The Jane Does are unknown, and no facts about their encounters, if any, with Dr. Doan are known or alleged. Likewise, there are no pleadings and there is no evidence regarding whether the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place. Again, because there is no pleading or evidence concerning actual people with actual encounters as it pertains to the Jane Does, the Jane Does failed to conclusively rebut the presumption that their alleged claims are health care liability claims. *See Hopebridge*, 521 S.W. 3d at 837–38; *Bueno*, 454 S.W.3d at 183–86.

We now turn to the third and final criterion of what constitutes a health care liability claim: Did the alleged conduct cause the Jane Doe plaintiffs' alleged injuries? Again, the Jane Does fall short. There are no pleadings and there is no evidence as to the identities of the Jane Does, the details of their interactions, or the injurious effects, if any, from the interactions.

Accordingly, the Jane Does' allegations asserting vicarious-liability claims also constitute health care liability claims, which means that the Jane Does were obligated to provide expert reports pursuant to Texas Civil Practice and Remedies Code section 74.351 within the required 120-day deadline. As noted by the Supreme Court of Texas in *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671–72 (Tex. 2008), "When a

party's alleged health care liability is purely vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient."

C. Did the Jane Does serve expert reports as required by Texas Civil Practice and Remedies Code section 74.351(a)?

Did the Jane Doe plaintiffs provide one or more expert reports to meet the deadline? We conclude that they did not.

The Named Plaintiffs, on behalf of the Jane Does, contend that the expert reports served by the Named Plaintiffs on the defendants specifically addressed the allegations against Dr. Doan by the Named Plaintiffs and constituted a good-faith effort to comply with section 74.351(a) for the Jane Does, and they contend that the trial court should have given a thirty-day extension to cure any deficiencies in these reports. They cite *Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 513 (Tex. 2017), and *American Transitional Care Centers of Texas v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001), to support their argument for the Jane Does. These cases, however, hold that a good-faith effort must provide "enough information to fulfill two purposes: (1) it must inform the defendant of the specific conduct the plaintiff has called into question, and (2) it must provide a basis for the trial court to conclude that the claims have merit." *Miller*, 536 S.W.3d at 513 (quoting *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002)); *see also Am. Transitional Care Ctrs. of Tex.*, 46 S.W.3d at 879. Both cases were dealing with the *adequacy* of *served* expert reports.

The test for determining whether a "report" constitutes a good-faith effort at compliance with section 74.351(a) is set out in *Scoresby v. Santillan*, where the Court stated:

> While the Act thus contemplates that a document can be considered an expert report despite its deficiencies, the Act does not suggest that a document utterly devoid of substantive content will qualify as an expert report. Based on the Act's text and stated purposes, we hold that a document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit.

346 S.W.3d 546, 549 (Tex. 2011). And Chapter 74 defines an "expert report" as

> 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.

Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). The expert-report requirements may be satisfied through one or more reports. *Miller*, 536 S.W.3d at 514.

In this case, there is no dispute that the expert reports were served by the statutory deadline and that they were authored by individuals with expertise. The dispute centers around whether the reports have opinions that the Jane Does' claims have merit and if a defendant's conduct is implicated. The parties cite no authority regarding the application of section 74.351(a)'s report requirements to totally unknown "Jane Doe" plaintiffs, nor has the court identified any such authority. On appeal, the Jane Does rely upon one portion of the report by Dr. Kadakia, a cardiologist, as to liability and upon one part of the report by Dr. Roberts, a

psychiatrist, as to damages to argue that expert reports were served on behalf of the Jane Does. As for Dr. Kadakia, he opined that no doctor should molest patients. Dr. Roberts opined that any woman who had suffered molestation at the hands of a physician would feel the same types of damages and that "Plaintiffs, all and singular" suffered from the damages.

The question we must answer is whether an "expert report" addressing the Jane Does' claims, as required by Chapter 74, was served. From the context of both reports, and looking at the four corners of the reports as required, the merits of *the Jane Does' claims* are not the subject of the opinions in Dr. Kadakia's or Dr. Roberts's report, and because the Jane Does are not mentioned in the reports, neither Dr. Doan's nor HCNT's conduct is implicated with respect to the Jane Does' claims. In fact, it is difficult to fathom a circumstance where claims asserted on behalf of unknown plaintiffs regarding unknown events in unknown circumstances resulting in unknown claimed injuries could form the basis of an expert report required by section 74.351(a). This would require the law to accept completely unsubstantiated rank speculation about all aspects of a purely hypothetical health care liability claim as constituting a "good faith basis" for an expert report, which this court is not willing to do.

Accordingly, under these circumstances, we conclude that Dr. Kadakia's and Dr. Roberts's reports are devoid of substantive content regarding the Jane Doe plaintiffs and as to the Jane Doe plaintiffs, constituted no report for purposes of

section 74.351(a). *See Post Acute Med., LLC v. Montgomery*, 514 S.W.3d 889, 892 (Tex. App.—Austin 2017, no pet.) ("[T]he Act does not suggest that a document utterly devoid of substantive content will qualify as an expert report." (quoting *Scoresby*, 346 S.W.3d at 549)); *Velandia v. Contreras*, 359 S.W.3d 674, 678–79 (Tex. App.—Houston [14th Dist.] 2011, no pet.).[3] Thus, the Jane Does were not entitled to a thirty-day extension.

V. Conclusion

Having determined that the Jane Does' claims are health care liability claims and that the Jane Does did not serve any expert reports as required by section 74.351(a), we conclude that the trial court abused its discretion by denying HCNT's

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[3]The Jane Does contend that this court's holding and judgment conflict with the Texas Supreme Court's holding in *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013). This argument is incorrect. In *Potts*, the plaintiff (Potts) sued a nursing staffing agency (EMS) for injuries arising from a sexual assault by a nurse against Potts, a patient in a hospital. EMS had placed the nurse for work in the hospital. Potts asserted that EMS was both directly and vicariously liable to Potts for the nurse's misconduct. The expert reports served by Potts were adequate as to Potts's vicarious-liability claims against EMS but were arguably inadequate regarding her direct-liability claims against EMS. As a result, EMS contended that the direct-liability claims should have been dismissed. *Id.* at 629. The Supreme Court held "In sum, an expert report that adequately addresses at least one pleaded liability theory satisfies the statutory requirements, and the trial court must not dismiss in such a case." *Id.* at 632. Since Potts had provided a report which was adequate as to one pleaded theory of liability against EMS, dismissal of the other claims was not proper. *Potts* did not hold that reports that are adequate regarding one plaintiff's claims are adequate to prevent dismissal of other plaintiffs' claims which are not addressed in those reports, which is the case here.

motion to dismiss and request for sanctions as to the Jane Does' claims. We sustain HCNT's sole issue.

We reverse that portion of the district court's order denying HCNT's motion to dismiss and motion for sanctions regarding the Jane Does' claims and remand the case to the district court for assessment of attorney's fees and costs. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b); *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009); *Hopebridge*, 521 S.W.3d at 839; *CHCA Bayshore, L.P. v. Salazar*, No.14-12-00928-CV, 2013 WL 1907888, at *3 (Tex. App.—Houston [14th Dist.] May 7, 2013, pet. denied) (mem. op.).[4]

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[4]As discussed above, HCNT's Chapter 74 motion to dismiss the Jane Does' claims with prejudice and for attorney's fees and court costs was denied by order dated December 17, 2019. On the Plaintiffs' own motion after HCNT filed this appeal, the trial court dismissed the Jane Does' claims with prejudice on February 19, 2020, and severed any remaining claims for affirmative relief by an adverse party, including sanctions, attorneys fees, and costs of court into cause number 17-315352-20. Because HCNT's appeal of the denial of its motion to dismiss and motion for sanctions was pending in this interlocutory appeal at the time of the dismissal of the Jane Does' claims, the dismissal did not affect HCNT's rights to pursue its request for affirmative relief. *Villafani v. Trejo*, 251 S.W.3d 466, 470 (Tex. 2008). Additionally, because the trial court severed HCNT's request for adverse affirmative relief into a new cause number, this court will treat this interlocutory appeal as an appeal from the severed action and remand the case accordingly for further proceedings in that action. *See* Tex. R. App. P. 27.3; *Roccaforte v. Jefferson Cty.*, 341 S.W.3d 919, 924–25 (Tex. 2011).

/s/ Mike Wallach
Mike Wallach
Justice

Delivered: August 13, 2020