

IN THE SUPREME COURT OF TEXAS

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No. 05-0386
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PROVIDENCE HEALTH CENTER A/K/A DAUGHTERS OF CHARITY HEALTH
SERVICES OF WACO AND DEPAUL CENTER A/K/A DAUGHTERS OF CHARITY
HEALTH SERVICES OF WACO, PETITIONERS,

v.

JIMMY AND CAROLYN DOWELL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE
OF JONATHAN LANCE DOWELL, DECEASED,
RESPONDENTS

-consolidated with-

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No. 05-0788
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JAMES C. PETTIT, D.O.,
PETITIONER,

v.

JIMMY AND CAROLYN DOWELL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE
OF JONATHAN LANCE DOWELL, DECEASED,
RESPONDENTS

=====
ON PETITIONS FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS
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JUSTICE WAINWRIGHT, concurring in part and dissenting in part.

The Court holds that there was legally insufficient evidence that the conduct of Providence Health Center, DePaul Center, and Dr. Pettit (collectively the defendants) caused Lance Dowell's suicide. I hesitate to join the Court's opinion as there seems to be some unchallenged evidence that the health care providers' breach of duty was a causative agent. I write separately because the trial court erred in failing to include Lance in the negligence and proportionate responsibility questions. I therefore concur in the Court's holding reversing the judgments of the court of appeals, but would remand to the trial court for a new trial.

After their son Lance's unfortunate suicide, Carolyn and Jimmy Dowell (the Dowells) sued the defendants for wrongful death damages and for survival damages on behalf of Lance's estate, alleging that Lance received negligent health-related services and that the defendants departed from accepted standards of medical care. The Dowells asserted that the defendants' failure to properly evaluate and retain Lance in the DePaul facility caused his death. The trial court submitted the negligence of Providence, DePaul, and Dr. Pettit to the jury but did not include Lance or his parents in the submission. The defendants objected to the omission of Lance and his parents from the negligence and proportionate responsibility questions. The jury found that all three defendants were negligent and that their negligence proximately caused Lance's suicide. In apportioning responsibility, the jury found Dr. Pettit twenty percent liable, Providence forty percent liable, and DePaul forty percent liable. The jury awarded \$400,000 in wrongful death damages and \$400,000 in survival damages. The court of appeals affirmed.

The defendants assert that it was erroneous for the trial court to exclude Lance and his parents from the questions in the jury charge. I conclude that although it was not error to exclude the

Dowells, it was error for the trial court to refuse to include Lance in the negligence and proportionate responsibility questions.

A reviewing court may reverse and remand for a new trial based on an alleged error in a jury charge only if such error “was reasonably calculated and probably did cause the rendition of an improper judgment.” *Island Recreational Dev. Corp. v. Republic of Tex. Sav. Ass’n*, 710 S.W.2d 551, 555 (Tex. 1986); *see also Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 843 (Tex. 2005); *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995). To make this determination, the reviewing court should consider “the pleadings of the parties, the evidence presented at trial, and the charge in its entirety.” *Island Recreational Dev. Corp.*, 710 S.W.2d at 555.

The defendants first argue that they submitted evidence of the Dowells’ negligence and that such evidence entitled them to a jury question regarding the Dowells’ negligence and proportionate responsibility. Specifically, the defendants point to the failure of the Dowells to remain with Lance in the thirty-six hours between his discharge and suicide, despite Nurse Fox’s instruction to do so. Generally, however, there is no duty to control the conduct of third persons. *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Although there is an exception to this rule when a special relationship exists, including between a parent and child, *see id.*, a child is understood to be a “a person under 18 years of age who is not and has not been married.” *See TEX. FAM. CODE* § 101.003. As an adult, Lance was not under the legal control or supervision of his parents. A lack of action on the part of the Dowells could not constitute contributory negligence in the absence of some legal duty. *See Thapar v. Zezulka*, 994 S.W.2d 635, 637–39 (Tex. 1999) (holding a mental-health professional owes no duty to warn third parties of a patient’s threats in the

absence of a doctor-patient relationship with the third parties). Therefore, the trial court did not err in refusing to submit a question on the Dowells' negligence and proportionate responsibility.

Next, the defendants argue that Lance was negligent in failing to follow his discharge instructions, and that his negligence should have been submitted to the jury. The Dowells respond that the Legislature has specifically prohibited juries from considering the negligence of people who commit suicide. Section 93.001 of the Texas Civil Practice and Remedies Code provides that in a civil action for personal injury or death, "if [a person's] suicide or attempted suicide was caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard, then such suicide or attempted suicide shall not be a defense." *See also Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994). Applying the statute to this case means that Lance's conduct in committing suicide could not be considered by the jury. *See Dallas County MHMR v. Bossley*, 968 S.W.2d 339, 346 (Tex. 1998) (Abbott, J., dissenting); *Kassen*, 887 S.W.2d at 12.

The Dowells argue that since the defendants do not contest the finding of their breach of the standard of care, a jury could not consider any of Lance's conduct. The statute, however, does not say that all acts of a deceased cannot be considered by a jury when determining proportionate responsibility for causing the injuries in a case. Rather, upon finding that the defendants breached an applicable legal standard, the statute precludes the "suicide or attempted suicide" from being an affirmative defense. TEX. CIV. PRAC. & REM. CODE § 93.001.

This raises the question: Under what circumstances and in what light may Lance's actions be considered by the jury? Chapter 33 of the Texas Civil Practice and Remedies Code requires proportioning of damages among responsible parties. Section 33.003 specifies that a jury "shall

determine the percentage of responsibility . . . with respect to each person’s causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.” TEX. CIV. PRAC. & REM. CODE § 33.003. The jury is to make this determination for all claimants, defendants, and responsible third parties, where evidence has been submitted to support such a question. *Id.*; *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 687 (Tex. 2007). If Lance’s actions apart from the act of committing suicide violated an applicable standard of care (such as negligence), a jury should have weighed such actions in assigning proportionate responsibility.

Before being discharged from the hospital, Lance was instructed by Nurse Fox to take a prescribed medication¹ and remain with family members until a follow-up examination at the MHMR center in three days. A jury could have determined from the evidence submitted that Lance failed to follow those instructions and that such failure was a contributing cause of his death. We have previously recognized that a patient has a duty to cooperate with treating physicians, which includes cooperation both in diagnosis and in treatment. *Jackson v. Axelrad*, 221 S.W.3d 650, 654 (Tex. 2007); *Elbaor v. Smith*, 845 S.W.2d 240, 245 (Tex. 1992). In *Elbaor*, we held that the failure of a patient to take prescribed antibiotics was evidence of negligence that should have been submitted as a question to the jury. *Elbaor*, 845 S.W.2d at 251. We later reaffirmed allowing a jury to consider the conduct of patients when determining proportionate responsibility as part of an

¹ Contrary to the dissent’s suggestion, prescribing medication was part of the physician’s treatment of Lance, and there is no evidence that prescribing medication to help Lance get much needed sleep was not part of his psychiatric treatment.

inclusive comparative negligence scheme rather than “compartmentaliz[ing] negligence in rigid categories.” *Jackson*, 221 S.W.3d at 654.

JUSTICE O’NEILL’s dissent argues that the jury could not have found Lance negligent, based on expert testimony that his mental condition impaired his ability to follow instructions. While the jury, if asked, may not have found Lance negligent, it was the jury’s role and not ours to determine whether Lance’s conduct contributed to his harm (and to what degree, if any) or whether Lance’s mental state absolved him of responsibility for a portion of the harm. It was not given that opportunity. Just as the Dowells were entitled to argue to the jury that Lance was not negligent based on his mental condition and circumstances, the defendants were entitled to attempt to convince the jury of Lance’s negligence and his proportionate responsibility for his death. Although this approach charges juries with the subtle task of separating generally negligent conduct of the deceased from the conduct involved in commission of the suicide, I believe juries, properly selected and guided, are capable of accomplishing this nuanced task. *See F.F.P. Operating Partners, L.P.*, 237 S.W.3d at 693 (citing cases in which juries considered subtle distinctions in apportioning damages between intoxicated patrons and dram shops). Contrary to JUSTICE O’NEILL’s assertion, my position is not that “parties that breached the standard of care [should] be absolved from liability,” but that, as the Legislature directed, where multiple parties caused or contributed to cause harm, each should be held responsible for their percentage of responsibility. ___ S.W.3d ___, ___.

Failure to include the requested questions was reasonably calculated and probably did cause the rendition of an improper verdict. *Reinhart*, 906 S.W.2d at 473. The trial court should have included Lance in the negligence question, with an instruction to the jury, if requested, not to

consider Lance's act of suicide in determining whether Lance's negligence, if any, proximately caused his death. Any subsequent finding of Lance's proportionate responsibility would be limited to Lance's negligence in the first question. As the language of the assumption of the risk statute governs all "civil action[s] for damages for personal injury or death," in this case the same limitations in the charge for use of the suicide as an affirmative defense apply to Carolyn and Jimmy Dowell. *See* TEX. CIV. PRAC. & REM. CODE § 93.001. Accordingly, I would reverse the court of appeals' judgments and remand these cases to the trial court for a new trial.

J. Dale Wainwright
Justice

OPINION DELIVERED: May 23, 2008