COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GRISSEL A. VELASCO, Appellant,	§	No. 08-19-00287-CV
v.	§	Appeal from the
MICHIEL R. NOE, M.D., Individually and d/b/a SUN CITY WOMEN'S HEALTH CARE, Appellees.	§	County Court at Law No. 3 of El Paso County, Texas (TC# 2016DCV2658)

O P I N I O N

Appellant, Grissel Velasco, appeals five orders granting traditional and no-evidence motions for summary judgment the trial court entered in favor of Appellees, Michiel R. Noe, M.D., and Sun City Women's Health Care (Sun City), in a suit asserting that her pregnancy resulted from medical negligence. The petition also asserts alternative claims, including violations of the Deceptive Trade Practices Act (DTPA) and fraud, and seeks recovery for a variety of damages. Velasco first argues the trial court improvidently granted summary judgment on the medical negligence claim because (1) Appellees accepted her payment for a tubal ligation and never notified her Dr. Noe did not perform the procedure; and (2) it is unjust to restrict recovery for a failed sterilization procedure that resulted in the birth of a healthy child to the cost of the procedure.

She next argues the remaining claims are not health care liability claims artfully pled to avoid the Texas Medical Liability Act's requirements.[1]

We conclude Appellant's claims are all health care liability claims and affirm the trial court's judgments dismissing Appellant's claims for fraud, violations of the DTPA, breach of express warranty, and intentional infliction of emotional distress. However, we find Appellant produced some evidence of the existence of duty and breach of duty, as well as damages for mental anguish, which we hold are recoverable by Appellant upon a showing of medical negligence by Appellees. Accordingly, we reverse the trial court's order granting Appellees' motion for summary judgment on Appellant's medical negligence claim and remand it to the trial court for further actions consistent with our decision.

BACKGROUND

Appellant's second amended petition alleges Dr. Noe failed to perform a bilateral tubal ligation at the time of her third Cesarean delivery, on July 16, 2014, which she maintains resulted in the unplanned pregnancy and birth of her healthy fourth child, Andrea. She asserts a health care liability claim that Appellees were negligent for (a) accepting payment for the tubal ligation and failing to perform the procedure; (b) leading Appellant to believe Dr. Noe performed the procedure; and (c) taking no action to inform her she had not been surgically sterilized. Based upon the same core facts, Appellant alleges additional claims of fraud, medical battery, violation of the DTPA, promissory estoppel, breach of express warranty, and intentional infliction of emotional distress. She seeks damages for (a) medical expenses for the cost of a tubal ligation and

[1] In her opening brief, Velasco presents the singular issue the trial court erred in granting Appellees' motions for summary judgment, and sub-divides the issue into discussions concerning the five claims. Appellees' response brief first argues the trial court properly granted summary judgment towards the remaining claims because they are recast health care liability claims, and next argues summary judgment was proper towards the medical negligence claim because Velasco did not raise a fact issue and the element of damages was negated. For organizational purposes, this Court has addressed the issues in a different order.

(b) compensation for the invasion into her body for that procedure; (c) the risk of an unspecified additional medical procedure and recuperation; (d) the reasonable probability that she will incur future medical and/or counseling expenses for the rest of her life; (e) past and future physical pain and suffering and mental anguish; and (f) the financial obligations to maintain, support, and educate her fourth child.

Summary Judgment Proceedings

Appellees filed seven traditional and no-evidence motions for summary judgment that collectively challenged all of Appellant's claims. They argued the trial court should grant summary judgment on the medical negligence claim because (1) Texas law does not recognize Appellant's cause of action, including Appellant's claims for damages; and (2) even if the claim is cognizable, damages are limited to the cost of the tubal ligation for which Appellant has already been reimbursed.[2] Appellees argued that the remaining claims alleged in the second amended petition were impermissibly-recast health care liability claims. Appellant responded to five of the motions but did not respond to the motions for summary judgment towards the promissory estoppel and medical battery claims.[3] After a hearing, the trial court granted Appellees' motions for summary judgment.

[2] As a corollary to these arguments, Appellees asserted that the trial court should grant summary judgment because (1) Dr. Noe had no duty to perform the sterilization procedure based on the absence of any signed consent form; (b) Dr. Noe did not negligently perform any sterilization procedure; (c) Dr. Noe did not represent to Appellant that she was sterile because he performed a sterilization procedure on her; (d) Appellant was not injured by any alleged negligence because she still had not undergone a tubal ligation.

[3] Prior to addressing the motions for summary judgment, the trial court granted special exceptions to Appellant's medical battery and promissory estoppel claims, and Appellant did not respond to Appellees' motions for summary judgment towards these two claims. Appellant also did not raise any issues concerning these claims in her opening brief. As such, this Court does not address the trial court's grant of summary judgment towards Appellant's medical battery or promissory estoppel claims on appeal. *See* TEX.R.CIV.P. 166a(c) (providing that issues not presented to the trial court by answer or response shall not be considered as grounds for reversal on appeal); *see also D.R. Horton-Tex., Ltd. V. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) (indicating that a "nonmovant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived"); TEX.R.APP.P. 38.1(i) (delineating the requirements for adequate briefing on appeal).

Appellant's Patient-Physician Relationship with Appellees

Dr. Noe and the Sun City staff provided obstetric services to Appellant from April 2014 until the birth of her third child on July 16, 2014, and for an additional postpartum visit two weeks later.[4] All parties agree Dr. Noe did not perform a tubal ligation on Appellant at the time he delivered her third child.

Appellant did not meet or speak to Dr. Noe until she was admitted into the hospital for her scheduled C-section. She did not tell Dr. Noe she wanted him to perform a tubal ligation, and Dr. Noe did not personally inform her that he would perform the procedure during her Cesarean. Indeed, Dr. Noe did not communicate anything about a tubal ligation to Appellant, nor did he advise she undergo the procedure. Appellant testified an unidentified Sun City employee told her Dr. Noe recommended she undergo a tubal ligation because she was scheduled for a third Cesarean birth, and a fourth C-section could be dangerous. Appellant averred she did not tell Dr. Noe or anyone on his staff she did not want to have a tubal ligation. Dr. Noe testified he does not perform tubal ligations by default; a patient must request the procedure.[5]

While she was a Sun City patient, Appellant received federally-funded health insurance through the CHIP program, which pays for up to twenty prenatal and two postnatal obstetrician visits, prescription drug coverage, laboratory testing, and hospital charges relating to the delivery. CHIP does not cover the cost of surgical sterilization, and Appellant knew she had to pay Sun City $400 before Dr. Noe would perform a tubal ligation.

[4] The summary judgment evidence consists of (a) excerpts of Velasco and Dr. Noe's sworn oral deposition testimony; (b) sworn affidavits from Velasco, her sister, and her mother; (c) Appellees' responses to requests for admissions; (d) Velasco's Sierra Providence East Hospital medical records pertaining to Dr. Noe's cesarean delivery of her third child; (e) Velasco's Sun City medical records; (f) Sun City medical forms and payment receipts; (g) information from Texas Health and Human Services concerning the CHIP perinatal coverage program; and (h) a medical expert report from Dr. Dallas Johnson.

[5] Dr. Noe also testified that medical assistants completed the precertification paperwork for his practice.

Appellant testified that the day before her scheduled Cesarean, a Sun City employee named "Jackie" or "Jennifer" gave her permission over the phone to come to the practice and pay for the tubal ligation with her mother's credit card. When Appellant arrived, the same employee asked Appellant if she intended "to make the $400 payment so we can do the . . . tubal ligation?" A Sun City receipt issued on July 15, 2014, for a $400 Master Card payment from Martha Enriquez does not indicate the reason for the charge.

According to her deposition testimony, when Appellant arrived at the hospital the next day for her delivery, she "told the staff that [she] was going to have [her] tubes tied," and any notation hospital staff made in the medical records to the contrary was incorrect. Dr. Noe did not counsel Appellant about having a tubal ligation following her Cesarean surgery, and the record does not contain an informed consent signed by Appellant granting Dr. Noe permission to perform the procedure. Dr. Noe also did not tell Appellant during the C-section that he was not going to perform a tubal ligation.

Sun City's surgical scheduling form indicated Appellant would report to the hospital at 6:30 a.m. on July 16, 2014 for her C-section. Underneath "BTL Yes/No," the form bears a handwritten notation of "Chip can't afford," and "Yes/No" are not circled. The maternity card Sun City issued to Appellant has "No" circled in response to "For BTL," with "CHIP" handwritten across the word "No".

Sun City requires women expressing a desire for a tubal ligation to sign a "Requirements for Sterilization" form. The form advises a tubal ligation is a surgery requiring the patient to be cut and carries a risk of death. The form also delineates a risk of failure with the procedure and explains that even if a portion of the tube is removed, a patient could have an unplanned and

undesired pregnancy in the future. The record does not contain a Requirements for Sterilization form signed by Appellant.

Sun City's records of Appellant's only postnatal visit, on August 4, 2014, indicate, "The patient is requesting the following contraception method(s): tubal ligation." The record later indicates: "Note for 'Post-partum visit': Pt delivered 7/16/2014, pspemc, dr noe, csection, boy, breast,Pt had Tubal."[6] Notes for the visit conclude, "Pt states that she had signed consent for BTL. OP report requested. . . . Pt instructed to abstain from sexual activity." Appellant averred Sun City staff never informed her there was any question concerning whether Dr. Noe performed a tubal ligation during her Cesarean.

During this postpartum visit, a Sun City staff member instructed Appellant not to have sexual intercourse. Sun City staff also requested Appellant return for another appointment, although Appellant did not return to the clinic.[7]

Appellant Becomes Pregnant and Appellees Refund $400

After Appellant's third child turned one year-old, Appellant discovered she was pregnant with her fourth child, Andrea. She went to Sun City in person, and the staff acknowledged Dr. Noe

[6] Dr. Noe did not personally attend to Velasco during this postnatal visit. He testified his staff member "Maggie" informed Velasco a tubal ligation was not performed and cautioned Velasco she should not have sexual intercourse. Dr. Noe instructed Maggie to obtain the "op note," to show Velasco she was not sterilized. Dr. Noe reviewed the op note, which did not reflect Velasco underwent a tubal ligation. Dr. Noe concluded he did not perform the procedure on Velasco because (1) neither Sun City's prenatal card or the hospital nurse's notes indicated Velasco requested a tubal ligation; (2) Velasco did not sign an informed consent to have a tubal ligation performed; and (3) her file contained no pathology report for the procedure.

[7] Velasco testified Sun City staff requested she return for a second postpartum visit, but her affidavit states Sun City did **not** request she return for another visit. The trial court was within its discretion to disregard any portion of Velasco's later-filed affidavit that conflicted with her sworn deposition testimony. *See Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 87 (Tex. 2018) (noting that the sham affidavit rule and TEX.R.CIV.P. 166a(c) provide that the trial court may conclude that a party does not raise a genuine fact issue by submitting sworn testimony that materially conflicts with the witness's prior testimony, unless a party sufficiently explains the conflict).

did not perform a tubal ligation. In November of 2015, Sun City issued Appellant a $400 check, which was the amount she paid for the tubal ligation.[8]

The physician that delivered Andrea in April 2016 recommended Appellant undergo a tubal ligation and would have charged Appellant $400 to perform the procedure at the time he performed her fourth Cesarean. Appellant, however, did not request a tubal ligation following Andrea's delivery.[9] Appellant became pregnant one or two months after she delivered her fourth child, but the child did not survive to term. She did not discuss undergoing a tubal ligation with the obstetrician who treated her during her most recent pregnancy. Appellant had not undergone a tubal ligation at the time she provided a deposition in the underlying suit.

Appellant's four live births resulted in healthy and normal children. Appellant loves and cherishes Andrea and is glad she had her fourth child. Andrea is an important part of Appellant's life, and Appellant enjoys having her daughter in her life.

DISCUSSION

In her first issue, Appellant argues the trial court improvidently granted the motion for summary judgment on the medical negligence health care liability claim because Sun City accepted her payment for a tubal ligation, but Dr. Noe did not perform the procedure and Appellees did not inform her of this fact. Appellant next contends the trial court should not have dismissed her claims against Appellees for violation of the DTPA, breach of express warranty, fraud, and intentional infliction of emotional distress because they are not impermissibly recast health care liability claims. We address each issue in turn.

[8] Dr. Noe testified the staff did not need to contact Velasco after her August 4, 2014 appointment to inform her she was not sterilized, because they informed Velasco of this fact during that August postpartum appointment.

[9] Velasco told the physician who delivered her fourth child she wanted a tubal ligation, but she did not have the $400 to pay for the procedure. Velasco was still receiving CHIP benefits that paid for the prenatal and delivery costs for her fourth child.

Standard of Review

An appellate court reviews an order granting summary judgment de novo. *See Houle v. Casillas*, 594 S.W.3d 524, 543 (Tex.App.—El Paso 2019, no pet.); *Border Demolition & Env't., Inc. v. Pineda*, 535 S.W.3d 140, 151 (Tex.App.—El Paso 2017, no pet.)(*citing Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)). When a party moves for summary judgment on both no-evidence and traditional grounds, and the trial court does not indicate under which theory the motion was granted, we first address the no-evidence grounds. *See Houle*, 594 S.W.3d at 543 (*citing Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 680 (Tex. 2017)). If we determine the trial court properly granted the no-evidence summary judgment motion, we need not address the traditional motion to the extent that it addresses the same claims. *See id.* (*citing Lightning Oil Co. v. Anadarko E & P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017)).

The rule governing no-evidence motions for summary judgment requires the movant to allege (1) an adequate time to conduct discovery has elapsed, and (2) the nonmovant has produced no evidence to support one or more essential elements of a claim for which the nonmovant would bear the burden of proof at trial. *See* TEX.R.CIV.P. 166a(i); *Houle*, 594 S.W.3d at 543 (noting the motion must specifically state the elements of the claim that the movant contends lack evidence)(*citing KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015)). Once the movant satisfies its burden, the burden shifts to the nonmovant to produce more than a scintilla of evidence to raise a genuine issue of material fact as to each challenged element. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). A nonmovant produces more than a scintilla of evidence when reasonable and fair-minded individuals could differ in their conclusions. *See Houle*, 594 S.W.3d at 543-44 (*citing King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)). While a nonmoving party is not required to present all his proof in response to a summary judgment motion,

he must present countervailing evidence that raises a genuine fact issue on the charged elements. *Id.* at 544 (*citing Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002)). A nonmovant fails to create a fact issue when the evidence is so weak that it creates a mere surmise or suspicion of material fact. *Id*.

The movant for traditional summary judgment bears the burden of proving that there is no genuine issue of material fact concerning at least one essential element of the challenged cause of action, entitling it to judgment as a matter of law. TEX.R.CIV.P. 166a(c); *see Houle*, 594 S.W.3d at 544 (*citing Lightning Oil Co.*, 520 S.W.3d at 45). If that burden is met, the burden shifts to the nonmovant to raise an issue of fact by producing more than a scintilla of evidence. *Id.* (*citing Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014)). If the initial burden is not satisfied, the nonmovant does not need to respond or present evidence. *Id.* (*citing Amedisys, Inc.*, 437 S.W.3d at 511).

In reviewing the trial court's grant of a traditional or no-evidence motion for summary judgment, an appellate court views the evidence in the light most favorable to the nonmovant, crediting evidence favorable to that party if reasonable jurors could do so and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). We indulge every reasonable inference in favor of the nonmovant and resolve any doubts against the motion. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005); *Houle*, 594 S.W.3d at 544. If the trial court's order does not specify the grounds on which summary judgment was granted, "we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious." *Houle*, 594 S.W.3d at 544 (*quoting Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003)).

Issue One: Medical Negligence and "Wrongful Pregnancy"

Appellant maintains the trial court erred by granting summary judgment towards her medical negligence health care liability claim because the evidence demonstrates she paid Sun City $400 for a tubal ligation that Dr. Noe did not perform, and Sun City did not inform her she was not surgically sterilized. She also argues that Texas law permits the recovery of the variety of damages she requested, because, if the benefits of childrearing were offset against recovery, then Appellees might pay no damages whatsoever.

Appellees respond that the trial court properly granted summary judgment because they negated the elements of duty and damages. Concerning duty, Appellees argue Dr. Noe had no information indicating Appellant requested a tubal ligation because she never told a Sun City nurse she wanted the procedure, her prenatal card had "no" circled for "BTL," and the hospital form stated, "CHIP can't afford." They also claim Dr. Noe was precluded from performing the procedure because Appellant did not sign an informed consent required by TEX.CIV.PRAC. & REM.CODE ANN. § 74.104 and wait the mandated 30 days required by 42 C.F.R. §§ 50.201-.210 (2022). Regarding damages, Appellees posit that damages in a wrongful pregnancy case are limited to the medical expenses of the negligently-performed sterilization procedure which resulted in the unplanned pregnancy. Because Appellees refunded $400 to Appellant and she did not present evidence of any medical bills incurred in relation to the procedure, Appellees maintain they negated the damages element of Appellant's medical negligence claim.

We find Appellant produced some evidence of duty and breach through the uncontroverted medical expert report she produced as summary judgment evidence. We further find Appellant offered some evidence supporting her request for mental anguish damages, which we find are appropriate and recoverable under the facts of this case, and under Texas law. Accordingly, we

find the trial court erred in granting Appellees' motion for summary judgment on Appellant's medical negligence claim and reverse and remand to the trial court for trial, as we further explain, below.

Legal Duty and Breach of Duty

Applicable Law

As with any negligence case, the threshold question in a medical malpractice case is whether the alleged tortfeasor owes a duty to the injured party. *See Ortiz v. Glusman*, 334 S.W.3d 812, 817 (Tex.App.—El Paso 2011, pet. denied)(*citing Praesel v. Johnson*, 967 S.W.2d 391, 394 (Tex. 1998)). To prevail in a medical malpractice claim, the plaintiff must prove the physician had a duty to conform to a particular standard of care, the physician breached that standard, the patient was injured, and the injury is causally connected to the breach. *Majzoub v. Appling*, 95 S.W.3d 432, 436 (Tex.App.—Houston [1st Dist.] 2002, pet. denied). Additionally, "[p]hysicians and surgeons have a duty to make a reasonable disclosure to a patient of risks that are incident to medical diagnosis and treatment." *Wilson v. Scott*, 412 S.W.2d 299, 301 (Tex. 1967), *superseded by statute on other grounds*, *Peterson v. Shields*, 652 S.W.2d 929, 930-31 (Tex. 1983)(replacing the "locality" with the "reasonable person" rule).

There are countless cases in the Texas intermediate courts of appeals and the Texas Supreme Court addressing physicians' duties to disclose information to their patients, most often involving risks of performing a certain treatment, surgery or other course of care. *See, e.g.*, *Binur v. Jacobo*, 135 S.W.3d 646, 655 (Tex. 2004)(claim for failure to obtain informed consent to mastectomy); *Schaub v. Sanchez*, 229 S.W.3d 322, 323-24 (Tex. 2007)(prior refusal of ganglion block could not form basis for lack of informed consent in subsequent surgery); *Vaughan v. Nielson*, 274 S.W.3d 732, 738 (Tex.App.—San Antonio, 2008, no pet.)(alleged failure to advise

regarding the necessity of a procedure). However, despite the many cases regarding the duty to disclose, we were unable to find a single case with facts akin to those presented by Appellant, where there is evidence that a patient (1) requested a particular treatment, (2) paid for the treatment, (3) believed she received the requested treatment, (4) discussed the treatment she purportedly received with someone in the physician's practice, (5) was never informed she did not receive the treatment, and (6) was injured as a result. Thus, although this case involves an alleged failure to disclose, it is not a lack-of-informed-consent case. Rather, it sounds in general medical negligence. *See Binur*, 135 S.W.3d at 655 (where physician erroneously recommended a surgery based on an incorrect diagnosis, the claim sounded in general medical negligence rather than lack of informed consent).

Analysis

In support of her medical negligence claim and in response to Appellees' motions for summary judgment, Appellant offered the expert report of Dallas Johnson, M.D., a board-certified obstetrician-gynecologist, as summary judgment evidence.[10] Dr. Johnson opined that Dr. Noe "deviat[ed] from the acceptable standards of care in the treatment of Grissel Velasco…during [her] office visits, her surgery on July 15, 2014, and every day of the fifteen (15) months following her

[10] The report by Dr. Johnson which Appellant used as summary judgment evidence appears to be the same report she used to comply with Section 74.351(a) of the Civil Practices and Remedies Code. Section 74.351, subsection (k), prohibits using an expert report under that section as evidence by any party. *See* TEX.CIV.PRAC. & REM.CODE § 74.351(k); *see also Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 254 (Tex. 2010)("Such [expert] reports . . . are not [generally] admissible and cannot be used in trial or any other proceeding."). This includes using threshold expert reports as summary judgment evidence. *See Coleman v. Woolf*, 129 S.W.3d 744, 746 n.1, 747-48 (Tex.App.—Fort Worth 2004, no pet.)(referring to previous statute regarding medical expert requirements, but noting the same principles apply to Chapter 74 expert reports). However, use of a threshold expert report as summary judgment evidence is a formal defect which must be objected to by the party opposing it or it is waived. *See id.* at 748-49. Because Appellees made no objection to Appellant's use of Dr. Johnson's report as summary judgment evidence, we find no reason why it should not have been considered as admissible evidence opposing Appellees' motions for summary judgment. *See Trusty v. Strayhorn*, 87 S.W.3d 756, 764 (Tex.App.—Texarkana 2002, no pet.)(failure to preserve objections to formal defects in summary judgment evidence prohibits a party from relying on those defects as a basis for affirming summary judgment).

Cesarean section . . . that Dr. Noe failed to inform Ms. Velasco that he failed to perform the surgical contraceptive procedure she requested." He further opined this deviation from the standard of care proximately caused the damages alleged by Appellant. Dr. Johnson notes the combination of (1) Appellant being charged for the BTL the day prior to her scheduled Cesarean section; (2) notes in her medical record when asked about her contraceptive plans, she indicated she signed consents for a BTL prior to her scheduled Cesarean section; (3) the request for the surgical report regarding whether a BTL was performed; and (4) the surgical report not mentioning any BTL procedure or other procedure other than the Cesarean section indicate Dr. Noe was on notice that Appellant believed she had received a BTL at the time of her Cesarean section, she had not actually been surgically sterilized, she was unaware she was not sterilized, and she did not have other plans in place for a contraceptive. Dr. Johnson opined the standard of care would require a surgeon to "make every reasonable effort to inform the patient she is at significant risk for [the consequences of not receiving sterilization surgery] unless additional steps are taken." He believed Dr. Noe also should have immediately counseled Appellant to use another effective form of contraception to avoid additional pregnancies. Dr. Johnson stated Dr. Noe's failure to so advise Appellant proximately caused conception of her fourth child and enduring a fourth high-risk pregnancy and fourth Cesarean, all of which she hoped to avoid by obtaining the BTL.

Based on Dr. Johnson's expert report, we find the record contains some evidence Dr. Noe owed Appellant a duty of care to inform her she had not received the BTL she paid for, which the Sun City medical records indicate Appellees knew or should have known Appellant requested but did not receive. We likewise find, based on Dr. Johnson's report, Appellant produced some evidence Appellees failed to conform to the applicable standard of care when they failed to inform Appellant she did not receive a BTL despite possessing medical records showing she thought she

received the surgery.[11] We find this evidence to be more than a mere scintilla for purposes of overcoming a no-evidence motion for summary judgment as to duty and breach, and likewise creates an issue of material fact under the traditional summary judgment standard. *See* TEX.R.CIV.P. 166a(c), (i). Accordingly, we move on to Appellant's second sub-issue regarding the sufficiency of evidence on damages.

Damages

Applicable Law

The Texas Supreme Court has not directly addressed what types of damages a prevailing plaintiff may recover in a so-called "wrongful pregnancy" case. For guidance, we look to cases from our sister courts where they considered whether damages are available to patients who received negligent care in sterilization procedures and subsequently parented a child.

In *Terrell v. Garcia*, the San Antonio Court of Appeals denied recovery of damages for the expenses of raising a healthy son to a mother who underwent an unsuccessful tubal ligation. *See* 496 S.W.2d 124, 126-28 (Tex.App.—San Antonio 1973, writ ref'd n.r.e.). There, the only damages sought by the mother were the costs for raising her child. *See id*. at 127. The *Terrell* court stated the familiar chorus oft sung in jurisdictions which limit recovery in wrongful pregnancy cases: the "satisfaction, joy, and companionship" parents experience in raising a healthy child outweigh the economic costs of rearing the child. *Id.* at 128. Other courts followed *Terrell* and denied recovery for the expense of raising a healthy child born after a negligently performed sterilization procedure. *See Hickman v. Myers*, 632 S.W.2d 869, 872 (Tex.App.—Fort Worth 1982, writ ref'd n.r.e); *Sutkin*

[11] We would also note that Appellees' argument that they could not be liable for not having done the procedure because Appellant did not sign the requisite consent forms seems dubious. Appellant could only have obtained the consent forms from Sun City. The fact Sun City staff did not tell her she had to sign the forms even though she had requested and paid for a BTL indicates the communication breakdown was not merely between Sun City staff and Dr. Noe. It was *among* the staff, as well. In our view, this weighs against the Appellees, not the Appellant.

v. Beck, 629 S.W.2d 131, 132 (Tex.App.—Dallas 1982, writ ref'd n.r.e.); *Silva v. Howe*, 608 S.W.2d 840, 842 (Tex.App.—Corpus Christi 1980, writ ref'd n.r.e.).

The recovery of medical expenses for a subsequent pregnancy and associated health issues was placed at issue in *Garwood v. Locke*, 552 S.W.2d 892, 895 (Tex.App.—San Antonio 1977, writ ref'd n.r.e.). In *Garwood*, the plaintiff sought damages for medical expenses, loss of earnings, and physical pain and anguish, after she gave birth to a healthy child following an unsuccessful tubal ligation. *See id.* at 893-94 (distinguishing *Terrell*, where the plaintiff waived all damages except the cost of raising a healthy child). The San Antonio court reversed and remanded a summary judgment granted in favor of the defendants, noting the plaintiff presented evidence of medical expenses she incurred after the failed procedure. *Id.* at 895. *Garwood* did not make any determination on whether the other damages alleged, including mental anguish and pain and suffering, were recoverable. *See id.* at 895.

The Waco Court of Appeals relied upon *Garwood* to permit recovery of medical expenses, physical and mental pain and suffering, and physical impairments after an unsuccessful sterilization in *Flax v. McNew*, 896 S.W.2d 839, 845 (Tex.App.—Waco 1995, no writ). There, the mother obtained a BTL, yet found herself pregnant less than six months later. *Id.* at 840-41. Her son was delivered healthy and without complications. *Id.* at 841. However, during her pregnancy with him and following his delivery, she suffered from a myriad of health issues, including swelling of her limbs, face and abdomen; incontinence; and severe personality changes, among other ailments. *Id.* She sought damages for the medical expenses of her unwanted pregnancy, in addition to pain and suffering and mental anguish she experienced during pregnancy and following the birth of her child. *See id.*

In a thorough and well-reasoned opinion, the Waco court determined Texas law provided for a limited recovery of damages in wrongful pregnancy cases, relying on several courts from other jurisdictions as well as *Garwood. See Flax*, 896 S.W.2d at 843-845. Citing a case from the Missouri Supreme Court, the *Flax* court held that in wrongful pregnancy cases in Texas, the limited damages allowable should include:

> (1) medical expenses associated with the unsuccessful sterilization procedure; (2) medical and hospital expenses for the birth of the unplanned child; (3) the woman's lost wages because of the pregnancy or from a procedure to terminate the pregnancy; (4) pain and suffering connected to the pregnancy; and (5) for those who elect to have an abortion, the cost of that procedure and any pain and suffering associated with it.

Flax, 896 S.W.2d at 845. Finding all of Flax's alleged damages fell within the various limited damages categories, the Waco court reversed the trial court's order granting summary judgment for the doctor and remanded the case for trial. *Id.*

In contrast, the Texarkana Court of Appeals concluded the parents of a healthy child born after a failed sterilization procedure may only recover damages for the actual medical expenses incurred as a result of the failed procedure. *See Crawford v. Kirk*, 929 S.W.2d 633, 637 (Tex.App.—Texarkana 1996, writ denied). Crawford alleged physician Kirk negligently performed a sterilization procedure, which was proximately caused her pregnancy and associated medical complications.[12] *See Crawford*, 929 S.W.2d at 634-35. She sought damages for the medical expenses associated with her pregnancy, physical and mental pain and suffering, and the costs of raising her twins. *See id.* at 636. The trial court granted Kirk's motion for summary judgment, determining Texas does not permit recovery of damages for wrongful pregnancy. *See id.*

[12] Crawford was repeatedly hospitalized for vaginal bleeding, placed on bed rest during her pregnancy, and underwent a hysterectomy after birth. *See Crawford*, 929 S.W.2d at 636.

The *Crawford* court relied on *Terrell* in denying Crawford's request for the cost of raising the child. *See Crawford*, 929 S.W.2d at 636. It relied upon *Garwood* in finding medical expense damages were appropriate following a negligent sterilization procedure. *See Crawford*, 929 S.W.2d at 636 (*citing Garwood*, 552 S.W.2d at 895). However, it disavowed *Flax's* adoption of a "limited recovery rule" in a wrongful pregnancy action. *See Crawford*, 929 S.W.2d at 637 (*discussing Flax*, 896 S.W.2d at 845). Because *Garwood* did not address the availability of other damages and approved only the recovery of medical expenses, the Texarkana Court of Appeals flagged *Flax* as the only Texas case to expressly approve the recovery of damages other than medical expenses when a healthy child is born following a failed sterilization procedure.[13] *See Crawford*, 929 S.W.2d at 637 (*discussing Flax*, 896 S.W.2d at 845).

The *Crawford* decision also noted *Flax* did not mention *Jacobs v. Theimer*, where the Supreme Court of Texas limited recovery in a wrongful birth case to the expenses to care for a physically-deformed child's treatment, and rejected the parents' claim for emotional suffering in raising the child. *See Crawford*, 929 S.W.2d at 637 (*citing Jacobs*, 519 S.W.2d at 849). The *Crawford* court felt *Flax* did not explain why the parents of a healthy child could recover for emotional suffering while, according to *Jacobs*, the parents of a deformed child cannot. *See Crawford*, 929 S.W.2d at 637; *Jacobs*, 519 S.W.2d at 849-850; *Flax*, 896 S.W.2d at 845. It thus determined *Flax* to be erroneous and contradictory to other Texas authority. *See Crawford*, 929 S.W.2d at 637 (*discussing Flax*, 896 S.W.2d at 845). The *Crawford* court remanded the case, concluding the physician had not demonstrated in his summary judgment motion the parents were barred from recovery of medical expenses as a matter of law or fact. *See id.* at 638.

[13] This Court cited to *Flax* in a string cite regarding the availability of a cause of action for medical negligence for wrongful pregnancy due to a tubal ligation that was performed negligently. *See Naugle v. Theard*, 917 S.W.2d 287, 291 (Tex.App.—El Paso 1995, writ denied)(*citing Flax*, 896 S.W.2d at 844-45). However, we did not expressly decide whether mental anguish damages are available to a plaintiff for wrongful pregnancy.

In the legal malpractice petition of *Pressil v. Gibson*, Pressil alleged that, but for the Gibson attorneys' negligence, he would have succeeded on a medical negligence claim he asserted in a lawsuit against a fertility clinic.[14] 477 S.W.3d 402, 407-08 (Tex.App.—Houston [14th Dist.] 2015, pet. denied). The Gibson parties moved for summary judgment, arguing that, even if Pressil had been represented by competent attorneys, Texas law does not recognize damages for the costs and emotional suffering associated with raising an unwanted but healthy child. *See id.* at 405, 408. As such, they were entitled to judgment because Pressil could not establish the damages element of his claim against the fertility clinic. *See id.* at 408. The Fourteenth Court of Appeals ultimately limited Pressil's damages to the actual medical expenses incurred as a result of the failed medical procedure. *See id.* at 409. The court agreed with the reasoning in *Crawford,* that "existing Texas authority" disallowed the expansion of the types of damages permitted in a "so-called wrongful pregnancy action." *See Pressil*, 477 S.W.3d at 409-410 (*citing Crawford,* 929 S.W.2d at 637)(rejecting *Flax's* "limited-damages rule"). Because Pressil did not request damages for the medical expenses relating to the wrongful procedure that produced the healthy but unwanted child, the Fourteenth Court of Appeals concluded none of the damages he sought in the fertility lawsuit were recoverable under Texas law.[15] *See id.* at 410.

Analysis

We start our analysis by agreeing with the consensus among our sister courts, left undisturbed by the Supreme Court of Texas, and conclude the expenses of raising a healthy child born after a negligent sterilization procedure are not recoverable. *See, e.g.*, *Terrell*, 496 S.W.2d

[14] In the underlying fertility lawsuit, Pressil sought damages for mental anguish, loss of opportunity, loss of enjoyment of life, child support, the cost of raising two children, lost earnings, lost earning capacity and exemplary damages. *See Pressil*, 477 S.W.3d at 405. He alleged the fertility clinic successfully inseminated his sexual partner with his sperm and she gave birth to healthy twin boys, without his consent. *See id.*

[15] Although the court analogized "Pressil's claim in the Fertility Lawsuit to a wrongful pregnancy action," it limited the holding to the unique facts of the case. *Id.* at 410 n.3

126-27; *Crawford*, 929 S.W.2d at 637; *Hickman*, 632 S.W.2d at 872; *Sutkin*, 629 S.W.2d at 132. As such, Appellant's request for damages for the care, education, maintenance, and support of her healthy fourth child are not recoverable.

We also conclude the parents of a healthy child born after an unsuccessful sterilization procedure may recover damages for the actual medical expenses incurred as a result of the procedure. *See Crawford*, 929 S.W.2d at 637. Viewing the evidence in the light most favorable to Appellant as the nonmovant, if we assume all elements of a negligently-performed procedure were met, the damages recoverable for actual medical expenses incurred in this case would be the $400 Appellant paid for the BTL. However, Appellees issued Appellant a check in November 2015 refunding this amount in full. In addition, CHIP paid the prenatal and delivery expenses for Appellant's fourth child, and Appellant did not allege or present any evidence demonstrating she incurred any medical complications or expenses as a result of the pregnancy or birth. Accordingly, we do not find the record warrants recovery of medical expenses related to the unexpected pregnancy or birth of Appellant's fourth child since there is no evidence in the record Appellant incurred a loss of this type.

However, we disagree with Appellees and the trial court on its determination regarding mental anguish and pain and suffering damages resulting from the pregnancy and/or the birth. We agree with *Flax* and its limited recovery analysis, and do not find any binding precedent at odds with this analysis, despite Appellees' position that the Supreme Court's refusal to allow mental anguish damages in *Jacobs* precludes recovery here. *See* 519 S.W.2d at 848-49. We find it important to note the emotional suffering damages sought by the parents in *Jacobs* were for the mental anguish suffered by the parents in raising a deformed child, compared with not having a child to raise at all. *Id.* at 849. *Jacobs* was not a "wrongful pregnancy" case; it did not involve a

couple who sought sterilization and nevertheless became pregnant thereafter. Instead, Mrs. Jacobs became pregnant around the same time she fell ill to rubella but was assured by her physician the disease would cause no harm to her unborn child. *Id.* at 847. When the child was born severely deformed, the couple sought mental anguish damages for their suffering in having to raise a child with severe medical issues, where the evidence indicated they would have terminated the pregnancy had their doctor informed them of the risk to the developing fetus posed by Mrs. Jacobs' illness. *Id.* at 847-849. The Supreme Court's difficulty in *Jacobs* was in valuing mental anguish sustained by the parents for having to raise a deformed child but offset by the joy the parents experienced in having a child, whatever their condition. *See id.* at 849 ("The objection is to an award based upon speculation as to the quality of life and as to the pluses and minuses of parental mind and emotion."). Much of the same analysis was employed in *Pressil*, where the plaintiff was the recipient of a negligently-performed vasectomy and later sought mental anguish damages for having to raise a healthy child as a result. *See Pressil*, 477 S.W.3d at 409-10.

In contrast, the plaintiff in *Flax* sought mental anguish and pain and suffering damages she sustained *from the pregnancy and the birth*, distinct from mental anguish for having to raise another child. *See Flax*, 896 S.W.2d at 841, 845. We do not find it difficult to distinguish between the public policy arguments against awarding damages for mental anguish allegedly sustained by a plaintiff for raising a child they did not want (whatever their condition), and damages for mental anguish attributable to the pregnancy and birth. In other words, the mental anguish for which a plaintiff may obtain recompense is not the result of the child coming into their life; rather, it is the result of physical pain and psychological stressors sustained by parents, most especially the birthing parent, who actively sought through medical sterilization to avoid incurring the financial, physical, and emotional toll of pregnancy and childbirth *despite* the joy that welcoming a child

brings. Pregnancy and childbirth can be beautiful, enriching and enjoyable endeavors for some. For others, even when a child is hoped for, pregnancy and birth can be extremely painful, arduous, and difficult. We expect this may certainly be the case when the pregnancy is not wanted and parents take affirmative steps to avoid it, however they may ultimately feel if and when the child joins them.

Our sister court in Texarkana applied the reasoning in *Jacobs* to deny recovery for mental anguish and pain and suffering alleged by a plaintiff who was improperly sterilized and later gave birth to healthy twin girls following a very difficult pregnancy, birth, and postpartum period. *See Crawford*, 929 S.W.2d at 636-37. We decline to do so here. The *Crawford* court does not recognize the clear distinction between the feelings one experiences in raising a child and the feelings one experiences in carrying and birthing a child; it is quite possible to feel extreme elation from one and extreme distress, or worse, from the other. *Crawford*'s holding likewise does not contemplate situations where a person who, following negligent medical sterilization, becomes pregnant and does not go home with a child (whether through abortion, miscarriage, stillbirth or adoption). These people do not have the redemptive experience of raising the child to "compensate" them for having to carry and deliver a child against their wishes and are equally or more likely to experience symptoms qualifying as mental anguish as a direct result of the pregnancy and/or birth.[16] Denying recovery of mental anguish damages particularly where, as here, there are no out-of-pocket medical expenses would effectively allow physicians performing medical sterilization to be immune from liability for their negligence. Worse, it would leave plaintiffs harmed by overt medical negligence no avenue by which to seek reimbursement for the physical and emotional

[16] Further illustrating that the emotions from pregnancy and birth are wholly separate from the emotions of raising children, parents of adopted or foster children, or parents of children who were carried by surrogates, can experience the emotional peaks and valleys of raising a child without experiencing the physical and emotional toll of pregnancy and childbirth.

suffering they endured as a result. We do not believe the Supreme Court intended this outcome based on its holding in *Jacobs.*

We also recognize the unique circumstances of this case. Although the parties treat it as a "wrongful pregnancy" claim—that is, a claim against a physician for the negligent performance of a sterilization procedure which subsequently results in a pregnancy—the crux of Appellant's claim is not a negligent sterilization procedure. It is the physician's alleged negligence in failing to perform a procedure Appellant requested and paid for, and subsequently failing to inform Appellant she did not receive the requested procedure, despite her belief to the contrary. The result of that alleged departure from the standard of care was an unwanted pregnancy and birth, and damages associated therewith. Thus, whether the claim is treated as "simple" medical negligence or wrongful pregnancy, we find it appropriate for mental anguish damages tied to an unwanted pregnancy and birth to be recoverable upon a showing of Appellees' negligence. *See Sax v. Votteler,* 648 S.W.2d 661, 667 (Tex. 1983)(recognizing right of plaintiff in medical malpractice claim to seek damages for physical pain and mental anguish); *see also* TEX.CIV.PRAC. & REM.CODE § 41.001(12).

Here, Appellant produced some evidence of mental anguish damages directly related to her fourth pregnancy which followed the third Cesarean procedure where she believed she obtained a BTL. Specifically, her affidavit attached as summary judgment evidence states,

> When I found out that I was pregnant again even though I thought that I had had [sic] a tubal ligation done by Dr. Noe, I was surprised, distraught, worried and confused. … I have been sad, depressed, anxious, angry, suicidal, have had fits of crying, and continually experience loss of sleep. … Once I found out that Dr. Noe had not done a tubal ligation… I was angry and distraught. … I felt guilty for feeling angry and distraught. When I found out that I was pregnant because Dr. Noe had not done the tubal ligation and had not told me that he had not done the tubal ligation, I began to cry, had fits of crying, had difficulty sleeping, felt sick, felt weight on my chest, and felt that a lot of new responsibility, financial and personal, had been placed on my shoulders.

We find this testimony to be more than a scintilla of evidence tending to show Appellant suffered mental anguish damages as a result of Appellees' failure to perform the BTL and/or their failure to inform her the BTL was not performed. We likewise find this evidence creates a genuine issue of material fact which must preclude granting summary judgment. The trial court erred, therefore, in granting Appellees' summary judgment on her medical negligence claim. *See* TEX.R.CIV.P. 166a(c), (i). As such, we sustain Appellant's first issue.

Issue No. 2: Summary Judgment Proper Towards Remaining Claims

Appellant next argues the trial court improperly granted summary judgment on her DTPA, breach of express warranty, fraud, and intentional infliction of emotional distress claims because the record demonstrates evidence supporting each of these claims. Appellees respond the claims are impermissibly recast health care liability claims because they all derive from the core allegations that Appellant's unwanted fourth pregnancy resulted from Appellees' failure to inform her she did not receive the tubal ligation she had paid for. We agree, and conclude the trial court properly granted summary judgment.

Applicable Law

Whether Appellant's remaining causes of action are health care liability claims is a question of law this Court reviews de novo. *See Baylor Scott and White, Hillcrest Med. Ctr. v. Weems*, 575 S.W.3d 357, 363 (Tex. 2019)(*citing CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 534 (Tex. 2016)). The Texas Medical Liability Act defines a health care liability claim 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 or death or a claimant, whether the claimant's claim or cause of actin sounds in tort or contract.

TEX.CIV.PRAC. & REM.CODE ANN. § 74.001(a)(13). "Health care" is considered "any act or treatment performed or furnished, or which 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. *Id.* § 74.001(a)(10). A health care liability claim contains three elements:

> (1) a physician or health care provider must be a defendant; (2) the claim(s) 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.

Texas W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 179-80 (Tex. 2012)(*citing* TEX.CIV.PRAC. & REM.CODE ANN. § 74.001(a)(13). The broad language of the Texas Medical Liability Act creates a presumption a 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 or treatment. *See Loaisiga v. Cerda*, 379 S.W.3d 248, 256 (Tex. 2012). A claimant may rebut the presumption a claim is a health care liability claim by proving the claim does not constitute an alleged departure from accepted standards of medical or health care. *See Rio Grande Valley Vein Clinic, P.A. v. Guerrero*, 431 S.W.3d 64, 66 (Tex. 2014)(per curiam).

The Supreme Court of Texas determined claims based on the same facts as a plaintiff's health care liability claim cannot alternatively be brought as other types of claims. *See Yamada v. Friend*, 335 S.W.3d 192, 194, 96-97 (Tex. 2010) (indicating a plaintiff cannot avoid the application of the Texas Medical Liability Act by artful pleading). The respondents in *Yamada* asserted health care liability claims and ordinary negligence claims concerning a physician's advice to a water park regarding the placement of defibrillator devices. *See id.* at 195. The Court rejected the respondents' argument that the ordinary negligence claim could be raised outside the parameters of the Texas Medical Liability Act because they did not require specific expertise in health care,

recognizing most health care liability claims could also potentially support a breach of an ordinary standard of care. *See id.* at 197. The Court concluded splicing health care liability claims into a multitude of causes of action with standards of care and damages would permit a claimant to escape the statutory scheme and contradict the Legislature's explicit requirements. *See id.* (*citing Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005)).

Because the remaining claims in Appellant's petition meet the first and third elements of a health care liability claim, this Court must focus on the second element, and determine the nature of the claims. To analyze the second element—the cause of the action—a reviewing court focuses on the facts underlying the claim, and not the artfully-phrased language of the pleading or the legal theories asserted. *See Loaisiga*, 379 S.W.3d at 255 (*citing Yamada*, 335 S.W.3d at 196-97). Claims based upon facts that could support claims against a physician for departures from accepted standards of medical or health care, or safety or professional or administrative services directly related to health care, are health care liability claims, regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards. *See id.* (*citing* TEX.CIV.PRAC. & REM.CODE ANN. § 74.001(a)(13)). "The broad language of the Texas Medical Liability Act evidences the legislative intent for the statute to have expansive application."[17] *Id.* at 256.

Analysis

Focusing on the facts underlying the claims, Appellant's DTPA claim is based upon allegations that Appellees verbally represented to Appellant that Dr. Noe would perform a tubal ligation, and they did not inform Appellant Dr. Noe did not perform the procedure. The breach of express warranty claim contends Appellant paid for a tubal ligation which Dr. Noe did not perform,

[17] The Supreme Court of Texas recognized that the Legislature intended the Texas Medical Liability Act's predecessor, the Texas Medical Liability Insurance Improvement Act, to be broad, and further broadened that scope with its 2003 repeal and subsequent amendments resulting in the current act. *See Texas W. Oaks Hosp. LP*, 371 S.W.3d at 176.

and Appellees failed to inform her she was not sterilized although the medical records indicated Appellant questioned if the procedure occurred. The fraud claim asserts Appellees led Appellant to believe Dr. Noe would perform a tubal ligation if she paid for it and failed to inform her that he did not perform the procedure. Finally, the intentional infliction of emotional distress claim alleges Appellees did not notify Appellant the tubal ligation was not performed after they reviewed the operative report. In the second amended petition, Appellant incorporates the same background facts into the health care liability claim and the remaining claims.

Appellant acknowledges her medical negligence claim is a health care liability claim. She served written notice on Appellees she was filing such a claim, and she filed the expert report that Chapter 74 requires of all plaintiffs alleging a health care liability claim. *See* TEX.CIV.PRAC. & REM.CODE ANN. §§ 74.051, 74.351 (setting forth the timing for a plaintiff asserting a health care liability claim to file an expert report). To analyze Appellant's remaining claims, we do not consider the specific cause of action listed in the petition, such as fraud or breach of express warranty. *See Weems*, 575 S.W.3d at 363 (noting "a party cannot avoid Chapter 74's requirements through artful pleading"). If the claims are based upon facts concerning a lack of treatment or an alleged departure from the applicable standard of medical care, health care, or professional service, the pleading invokes the presumption the claims are health care liability claims. *See Loaisiga*, 379 S.W.3d at 256; TEX.CIV.PRAC. & REM.CODE ANN. § 74.001(a)(13). Appellant's remaining claims do just that. The claims allege breaches of the standard of care for a health care provider because they concern: (a) all pre-surgical communications, consents, and authorizations between Appellees and Appellant; (b) the medical information Appellees relayed to Appellant concerning the results of the procedure Dr. Noe performed on July 16, 2014; (c) the interpretation and accuracy of the

medical records Appellees kept; and (d) the parties' knowledge of the contents of those medical records.

Appellant's allegations that Appellees breached a duty by collecting payment for a sterilization procedure that they did not perform concern departs from the applicable medical standard of care. At their core, these are health care liability claims. *See Murphy v. Russell*, 167 S.W.3d 835, 839 (Tex. 2005)(holding claims for breach of contract, battery, and deceptive trade practice based upon an anesthesiologist's alleged breach of agreement not to administer general anesthesia to patient were recast health care liability claims). Likewise, Appellant's assertion that Dr. Noe's failure to perform the BTL or inform her the BTL was not performed caused her unwanted pregnancy concerns the rendition of medical care and invokes the presumption her claims are health care liability claims. *See Loaisiga*, 379 S.W.3d at 256 (allegations of a breach by the health care provider during the patient's medical care invoke the presumption that the claims are health care liability claims).

In addition, the Supreme Court of Texas recognized the maintenance of accurate medical records falls within the Texas Medical Liability Act's definition of "professional or administrative services." *See Weems*, 575 S.W.3d at 365 (noting that the Texas Medical Board requires physicians to maintain adequate medical records for each patient and the duty to maintain accurate records is directly related to health care); TEX.CIV.PRAC. & REM.CODE ANN. § 74.001(a)(13). The Texas Medical Liability Act does not require a person asserting a claim based on professional or administrative services to have been a patient during the relevant period. *See Carswell*, 505 S.W.3d at 535. Nor does it require the injury to have occurred contemporaneously with health care or be caused by health care. *See id.* Thus, to the extent the remaining claims concern issues with the contents or maintenance of medical records, the claims are directly related to Appellees' acts which

Appellant argues were improperly performed. *See id.* at 536. Appellant bears the burden of rebutting the presumption that the claims are not health care liability claims, and she has not done so. *See Weems*, 575 S.W.3d at 363.

"If expert medical or health care testimony is necessary to prove or refute accepted standards of medical or health care and their breach, the claim is a health care liability claim." *Guerrero*, 431 S.W.3d at 66 (*citing Texas W. Oaks Hosp., LP*, 371 S.W.3d at 183). Here, Appellant relies on her expert's report to prove her claims. Specifically, the report opines that

> [T]here were deviations in the applicable standards of care in the treatment of Grissel Velasco by Michael Noe, MD during Ms. Velasco's office visits, her surgery on 15 July 2014, and every day of the fifteen (15) months following her cesarean section on 15 July 2014 that Dr. Noe failed to inform Ms. Velasco that he failed to perform the surgical contraceptive procedure she requested.

The expert report recites Sun City billing records reflect Appellant paid $400 for a tubal ligation, and Dr. Noe's operative report indicates he did not perform the procedure. The expert report then proposes Appellees' failure to inform Appellant she was not sterilized after reviewing the operative report fell "below the standard of care for a competent and caring obstetrician." As such, the testimony of a licensed medical practitioner is also required to refute the remaining claims. *See id*. As such, Appellant has not rebutted the presumption the remaining claims are impermissibly recast health care liability claims. *See id.* at 65-66.

Because Appellant's alternative claims are all health care liability claims as the term is defined under Chapter 74, we find the trial court did not err in granting Appellees' motions for summary judgment on her claims for violations of the DTPA, fraud, breach of express warranty, and intentional infliction of emotional distress. Appellant's second issue is overruled.

CONCLUSION

We conclude Appellant's claims are all health care liability claims and affirm the trial court's judgments dismissing Appellant's claims for fraud, violations of the DTPA, breach of

express warranty, and intentional infliction of emotional distress. However, we find Appellant produced some evidence of the existence of duty and breach of duty, as well as damages for mental anguish, which we hold are recoverable by Appellant upon a showing of medical negligence by Appellees.

Having sustained Appellant's first issue, we reverse the trial court's order granting Appellees' motion for summary judgment on Appellant's medical negligence claim and remand it to the trial court for further actions consistent with our decision.

Having overruled Appellant's second issue, we affirm the judgment of the trial court dismissing Appellant's claims for fraud, violations of the DTPA, breach of express warranty, and intentional infliction of emotional distress.

YVONNE T. RODRIGUEZ, Chief Justice

April 8, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Palafox, J. dissenting without opinion