

Affirmed and Memorandum Opinion filed November 23, 2010.



In The

**Fourteenth Court of Appeals**

---

NO. 14-08-01077-CV

---

**DOROTHY ARMSTRONG, Appellant**

**V.**

**MARILU ROBINSONS D/B/A AFFORDABLE DENTAL, Appellee**

---

**On Appeal from the County Court at Law No 2  
Galveston County, Texas  
Trial Court Cause No. 58,779**

---

**M E M O R A N D U M    O P I N I O N**

Appellant Dorothy Armstrong (“Dorothy”) sued appellee Marilu Robinsons d/b/a Affordable Dental<sup>1</sup> (“Affordable Dental”), relative to certain dentures she had purchased. She filed an original petition making various claims and later amended the petition to include only a claim for “money had and received.” The trial court dismissed her claim with prejudice for Dorothy’s failure to serve an expert report under chapter 74 of the

---

<sup>1</sup>Dorothy sued appellee as “Marilu Robinsons d/b/a Affordable Dental”; however, appellee asserts that her correct name is Marilu Robbins and that she has never done business as Affordable Dental. We need not address these issues to decide this appeal.

Texas Civil Practice and Remedies Code. On appeal, Dorothy contends chapter 74 does not apply, and the trial court abused its discretion in dismissing her claim. We affirm.

## I.

### BACKGROUND

Dorothy paid Affordable Dental \$1,730.64 to provide her with a set of dentures. When she received them, she was unhappy with the way they fit. Dorothy returned to Affordable Dental and requested that Affordable Dental adjust the dentures to better fit her. She claims Affordable Dental instead tried to have her sign a document stating she would take the dentures “as is,” but she refused because she claims that the dentures did not fit. According to Dorothy, Affordable Dental then told her to leave the office and not to come back any more. Dorothy says that she left the office with the top dentures but that the bottom dentures were not returned to her.

Dorothy sued Affordable Dental, and in her original petition she alleged claims for (1) breach of contract and (2) violations of the Texas Deceptive Trade Practices–Consumer Protection Act (“DTPA”). Affordable Dental claimed that Dorothy was asserting “health care liability claims” subject to chapter 74 of the Texas Civil Practice and Remedies Code.

Chapter 74 requires a claimant bringing a health care liability claim to file an expert report within 120 days of filing suit, or risk dismissal of the action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2009). When Dorothy failed to file an expert report within the prescribed period, Affordable Dental filed a motion to dismiss her claims. In response to the motion to dismiss, Dorothy filed an amended petition alleging only one claim: “money had and received.” In her amended petition, Dorothy alleged that Affordable Dental held \$1,730.64 that in equity and good conscience belongs to Dorothy, and Dorothy sought a money judgment for this amount. Dorothy did not seek the return of the bottom dentures. The trial court ultimately granted the motion to dismiss, and Dorothy perfected this appeal.

## II. DISCUSSION

Under chapter 74, 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West 2005). Dorothy does not dispute that Affordable Dental falls under the statutory definition of a “health care provider.” See § 74.001(a) (12)(A)(ii) (“Health care provider” . . . includ[es] . . . a dentist.”). Whether a claim falls within the definition of “health care liability claim” requires an examination of the essence or underlying nature of the plaintiff’s claim. *Diversicare Gen. Partners, Inc. v. Rubio*, 185 S.W.3d 842, 851 (Tex. 2005). A claim against a dentist is a health care liability claim if the act or omission that allegedly caused injury is an inseparable part of the rendition of dental services. See *id.* at 848 (stating that, in *Walden v. Jeffery*, the Supreme Court of Texas held that a claim against a dentist for ill-fitting dentures was a health care liability claim governed by the Medical Liability Insurance Improvement Act based on the *Walden* court’s conclusion that providing dentures was an inseparable part of the dentist’s rendition of dental services); *Walden v. Jeffery*, 907 S.W.2d 446, 447–48 (Tex. 1995). When the essence of a suit is a health care liability claim, a claimant cannot avoid the requirements of the legislature’s statutory scheme through artful pleading. See *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004).

On appeal, Dorothy asserts that her claim is based on two wrongful acts of Affordable Dental: (1) “[Affordable Dental] refused to properly fit the dentures,” and (2) “[Affordable Dental] required Ms. Armstrong to leave the office without the bottom dentures.” Dorothy argues that, even if the first alleged wrongful act is an inseparable part of the rendition of dental services, Affordable Dental’s refusal to return the bottom

dentures was not an inseparable part of the rendition of dental services.

The Supreme Court of Texas has concluded that a claim against a dentist based on ill-fitting dentures is a health care liability claim, even if the claimant seeks to cast her claim as a complaint about a product. *See Diversicare Gen. Partners, Inc.* at 848; *Walden*, 907 S.W.2d at 448. Dorothy does not seek the return of the bottom dentures; instead, she seeks a full refund of the amount she paid for both the top and the bottom dentures. According to Dorothy's petition, despite repeated attempts over a seven-month period, Affordable Dental did not provide her with dentures that fit properly. The essence of Dorothy's claim is that she paid Affordable Dental to make and fit dentures for her but that Affordable Dental provided her with ill-fitting dentures. Therefore, Dorothy seeks a full refund, alleging that Affordable Dental holds money that in equity and good conscience belongs to her. Under the plain meaning of Chapter 74 and the *Walden* precedent, Dorothy's claim is a health care liability claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13); *Diversicare Gen. Partners, Inc.*, 185 S.W.3d at 848; *Walden*, 907 S.W.2d at 448. Dorothy's allegation that Affordable Dental refused to return the bottom dentures to her does not change the underlying nature of her claim. Dorothy would not be entitled to the full refund that she seeks unless Affordable Dental did not properly fit the dentures.

The acts or omissions of which Dorothy complains are an inseparable part of the rendition of dental services, and her claim is a health care liability claim. *See Diversicare Gen. Partners, Inc.*, 185 S.W.3d at 848; *Walden*, 907 S.W.2d at 448. Because Dorothy failed to file the required expert report within the prescribed period, the trial court properly granted Affordable Dental's motion to dismiss Dorothy's suit. Accordingly, we overrule Dorothy's two appellate issues and affirm the trial court's judgment.

#### PER CURIAM

Panel consists of Chief Justice Hedges and Justices Frost and Boyce.