

**Affirmed and Memorandum Opinion filed March 30, 2010.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-09-00450-CV**

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**MATTHEW W. WASSERMAN, M.D., Appellant**

**V.**

**CHRISTINA BERGERON GUGEL, Appellee**

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**On Appeal from the 151st District Court  
Harris County, Texas  
Trial Court Cause No. 2008-24997**

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**MEMORANDUM OPINION**

This is an interlocutory appeal from an order denying appellant, Matthew W. Wasserman, M.D.'s motion to dismiss for failure to file an expert report as required by section 74.351(a) of the Texas Civil Practice and Remedies Code. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Appellant is an orthopedic surgeon licensed in the State of Texas. In her Plaintiff's Original Petition, appellee, Christina Bergeron Gugel, alleged that during a medical appointment, Wasserman sexually assaulted her. Gugel's specific allegations include the following. Gugel scheduled an appointment with Wasserman for a physical examination and review of medical history to determine if she needed back surgery. On November 16,

2006, Gugel, accompanied by her sister-in-law, arrived for that appointment. During the appointment, which took place in the presence of Gugel's sister-in-law, Wasserman conducted a physical examination, reviewed Gugel's medical history, and questioned her regarding any present pain and numbness. Wasserman then asked Gugel to return the next day to receive his recommendation regarding her need for back surgery.

Gugel returned, alone, the next afternoon for the surgery consult. A nurse escorted Gugel into an examination room and explained to her that she was only there for a consult. The nurse departed and left the door open at the request of Gugel. Then, through the open door, Gugel saw Wasserman review her magnetic resonance imaging ("MRI") films. Wasserman then entered the examination room. Wasserman explained that he did not believe Gugel needed back surgery. Wasserman then took Gugel out of the examination room and showed her the MRI films. Wasserman then led Gugel back into the examination room and he then shut the door behind them.

Now alone in the examination room with Gugel, Wasserman began a second physical examination of Gugel.<sup>1</sup> Wasserman, who was not wearing examination gloves, began this second physical examination in two days by pulling Gugel's sweat pants down over her hips, discovering she was not wearing underpants. Wasserman examined Gugel's thigh and legs and inquired where she felt numbness. Wasserman then asked Gugel to walk on her heels, then on tip-toe. Wasserman then asked Gugel to touch her toes. All of these requests duplicated exactly the physical examination Wasserman had conducted the previous day. Wasserman then had Gugel lie down on the examination table. Wasserman pressed his hands down on Gugel's hips and asked if that hurt. Gugel replied that it did not. Wasserman then, suddenly and without warning, grabbed Gugel's sweat pants from the front and pulled them down low enough to expose her entire pubic area. Wasserman then put his hands between Gugel's legs, touched the top part of her

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<sup>1</sup> In her petition, appellee alleged that since the November 17, 2006 visit was to be a surgery consult only and would not involve a physical examination, she was wearing sweat pants but no underwear.

vulva at the opening of her vagina, and asked Gugel if she had feelings there. Wasserman then pulled appellee's sweat pants up, and assisted Gugel in rolling over onto her stomach. Following a brief check of an area of Gugel's back she had already revealed was experiencing pain, Wasserman suddenly pulled Gugel's sweat pants down below her buttocks. Wasserman then spread Gugel's buttocks apart, and inserted his finger into her vagina and asked if she had feelings in her vaginal area. Following this, Gugel quickly left Wasserman's office.

Gugel also alleged that, following this office incident, Wasserman made numerous harassing telephone calls to her.

Gugel filed suit against Wasserman as well as his alleged employers, Richmond Bone & Joint Clinic, P.A. and Richmond Surgical, PLLC. Gugel asserted causes of action for sexual assault and battery, intentional infliction of emotional distress, and harassment. Gugel alleged Wasserman's alleged employers were liable under a respondeat superior theory of liability. Gugel did not file a section 74.351(a) of the Texas Civil Practice and Remedies Code expert report. After the 120 day deadline to file the expert report had passed, Wasserman, as well as his alleged employers, moved to dismiss Gugel's suit pursuant to section 74.351(a) of the Texas Civil Practice and Remedies Code. The trial court granted the motion to dismiss Wasserman's alleged employers, Richmond Bone & Joint Clinic, P.A. and Richmond Surgical, PLLC, and that action is not at issue in this appeal. The trial court denied Wasserman's motion as to Gugel's claims against him. This interlocutory appeal followed.

## **DISCUSSION**

### **I. The standard of review and the applicable law.**

We review a trial court's order granting or denying a motion to dismiss for failing to timely file a section 74.351(a) expert report under an abuse of discretion standard. *See Holguin v. Laredo Regional Medical Ctr., L.P.*, 256 S.W.3d 349, 352 (Tex. App.—San

Antonio 2008, no pet.) (citing *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001)). However, when the issue presented requires statutory interpretation or a determination of whether Chapter 74 applies to a claim, that is, a question of law, we apply a de novo standard of review. *Id.*

Section 74.351(a) requires that, not later than the 120th day after filing suit, a claimant serve on each party or the party's attorney one or more expert reports for each physician or health care provider against whom a claim is asserted. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (Vernon Supp. 2009). If the claimant does not serve the report, the trial court is required upon motion by the affected physician or health care provider to dismiss the claim with prejudice and award reasonable attorney's fees and cost. *Id.* at § 74.351(b). The expert report requirement applies to all claims that fall within the statutory definition of a "health care liability claim." *Holguin*, 256 S.W.3d at 352. The statute defines "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 to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

*Id.* (quoting Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13)). Whether a claim falls within the definition of health care liability claim requires an examination of the essence or underlying nature of the claim. *Id.* 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. *Id.* "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." *Id.* (quoting *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 848 (Tex. 2005)). When the essence of a suit is a health care liability claim, a claimant cannot avoid the expert report requirements through artful pleading. *Id.* at 353. Therefore, we must determine whether

Gugel’s claims against Wasserman are “so inextricably interwoven with the rendition of medical care or health care so as to constitute a health care liability claim.” *Id.* (citing *Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 546 (Tex. 2004)).

**II. Appellee’s claim against appellant is not a health care liability claim.**

Gugel’s claim against Wasserman is that he sexually assaulted her during a surgical consult. Like the San Antonio court of appeals before us, we conclude that it would “defy logic to suggest that a sexual assault [such as that alleged by Gugel], is an inseparable part of the rendition of medical care or a departure from accepted standards of health care.” *Id.* (internal quotation marks omitted). Gugel’s claim against Wasserman, that he injured her by his own actions, has nothing to do with a lapse in professional judgment or a failure to protect a patient due to an absence of supervision or monitoring. *Id.* at 354; *see Buck v. Blum*, 130 S.W.3d 285, 291 n. 6 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (noting that a physician’s assaultive conduct would not be considered an inseparable part of the rendition of medical care). Therefore, we hold that Gugel’s claim is not a health care liability claim governed by Chapter 74 of the Texas Civil Practice and Remedies Code and the trial court did not abuse its discretion when it denied Wasserman’s motion to dismiss. We overrule Wasserman’s single issue on appeal.

**CONCLUSION**

Having overruled appellant’s single issue on appeal, we affirm the trial court’s order denying Wasserman’s motion to dismiss.

/s/     John S. Anderson  
          Justice

Panel consists of Justices Anderson, Boyce, and Mirabal.<sup>2</sup>

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<sup>2</sup> Senior Justice Margaret G. Mirabal sitting by assignment.