

Opinion issued February 24, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00451-CV

FRED SAMSON, Appellant

V.

**HENRY SMALL, M.D., SHANNON D'RE CHISHOLM,
AND HOUSTON ORTHOPEDIC SURGICAL HOSPITAL LLC D/B/A
FOUNDATION SURGICAL HOSPITAL OF HOUSTON, Appellees**

**On Appeal from the 280th District Court
Harris County, Texas
Trial Court Case No. 2008-65968**

MEMORANDUM OPINION

Appellant Fred Samson challenges the trial court's order dismissing his health care liability claim against appellees Henry Small, M.D., Shannon D'Re

Chisholm, and Houston Orthopedic Surgical Hospital LLC d/b/a Foundation Surgical Hospital of Houston because of his failure to provide an expert report as required by Chapter 74 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2010). Although he frames his issues differently, Samson essentially raises two issues on appeal. He first contends that the trial court erred in dismissing all of his claims against the appellees. He also argues that the expert report requirement in section 74.351 of the Civil Practice and Remedies Code is unconstitutional. We affirm.

Background

On November 10, 2010, licensed physician Dr. Henry Small performed a bilateral decompressive lumbar laminectomy and a posterolateral fusion on Samson at Foundation Surgical Hospital of Houston. Small was assisted in the procedure by Shannon Chisholm, a licensed physician's assistant. During the procedure, Small performed a bone graft and installed pedicle screws and spinal rods into Samson's vertebral column. Samson alleges that he agreed only to a bone graft procedure performed incident to the laminectomy. He contends that he specifically informed Small that he did not want any foreign objects placed in his body either temporarily or permanently. Upon waking and discovering that Small had installed the pedicle screw and spinal rods, Samson became angry. He demanded the removal of his catheter, which had been inserted during the

operation and which he contends was utilized without his permission, and he called 9-1-1 to report mistreatment by hospital staff. Samson claims that he was never informed of the risks, possible complications, or dangers associated with the procedure and that he never agreed to the posterolateral fusion procedure. He also claims that the appellees conspired to alter or remove information in his medical records.

On November 6, 2008, Samson sued Small, Chisholm, and Foundation Surgical Hospital of Houston. Samson alleged negligence, negligent misrepresentation, fraud, conspiracy, and violations of the Deceptive Trade Practices Act. He filed a first amended petition on March 16, 2009, adding a claim for battery. On March 19, 2009, pursuant to section 74.351 of the Civil Practice and Remedies Code, Foundation Surgical Hospital filed a motion to dismiss for failure to file an expert report within 120 days of filing suit. Small and Chisholm filed a separate motion to dismiss on the same grounds. Samson subsequently filed his second amended petition, alleging breach of contract, breach of fiduciary duty, fraud, civil conspiracy, and aiding and abetting civil conspiracy. Samson argued in his response to the appellees' motions to dismiss that Chapter 74 of the Civil Practice and Remedies Code did not apply because his claims were not health care liability claims. The trial court granted the motions and entered orders dismissing Samson's claims with prejudice. Samson subsequently filed a third amended

petition, a motion for reconsideration, and several motions for new trial, all of which were denied. On appeal, he contends that the trial court erred in dismissing all of his claims. He also argues that the expert report requirement violates his federal and state constitutional rights.

Analysis

I. Standard of review

Whether a claim is a “health care liability claim” subject to the statutory expert report requirements is a question of law and is reviewed de novo. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 (Tex. 2005). We review the trial court’s decision on a section 74.351 motion to dismiss for abuse of discretion. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

II. Expert report requirements

A health care liability claimant is required to serve on each party or the party’s attorney one or more expert reports with the curriculum vitae of each expert listed in the report no later than the 120th day after the date the original petition was filed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). If an expert report has not been served within the 120-day period, the court, on motion of the affected

physician or health care provider, shall—subject to an extension of time for a deficient report—enter an order that (1) awards to the physician or health care provider reasonable attorney’s fees and costs of court incurred by the physician or health care provider and (2) dismisses with prejudice the claim with respect to the physician or health care provider. *Id.* § 74.351(b), (c). Dismissal is mandatory and extensions are prohibited if no report is served within the 120-day deadline imposed by section 74.351(a). *Id.* § 74.351(b).

Pro se litigants are held to the same standards as attorneys and must comply with all applicable and mandatory rules of pleading and procedure. *De Mino v. Sheridan*, 176 S.W.3d 359, 369 n.17 (Tex. App.—Houston [1st Dist.] 2004, no pet.). To apply a different set of rules to pro se litigants would be to give them an unfair advantage over litigants represented by counsel. *Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978); *Holt v. F.F. Enters.*, 990 S.W.2d 756, 759 (Tex. App.—Amarillo 1998, pet. denied). Accordingly, the requirements of section 74.351 apply to pro se litigants just as they do litigants represented by counsel.

Construing his brief liberally, Samson argues on appeal that he was not required to serve an expert report on the parties in this case because his claims were not health care liability claims governed by Chapter 74 of the Civil Practice and Remedies Code. Small, Chisholm, and Foundation Surgical Hospital contend

that the procedure performed by Small forms the basis of Samson's complaint. They argue that Samson cannot avoid the requirements of Chapter 74 through "creative pleading" when his claim is really a health care liability claim.

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 § 74.001(a)(13) (West 2005). A health care provider is "any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care." *Id.* § 74.001(a)(12). To determine whether a cause of action is a health care liability claim, the court examines the underlying nature of the claim and is not bound by the form of the pleadings. *Diversicare*, 185 S.W.3d at 847; *Marks v. St. Luke's Episcopal Hosp.*, 229 S.W.3d 396, 400 (Tex. App.—Houston [1st Dist.] 2007), *aff'd*, 319 S.W.3d 658 (Tex. 2010). A cause of action against a health care provider is a health care liability claim under Chapter 74 if it is based on a claimed departure from an accepted standard of medical care, health care, or safety of the patient, whether the action sounds in tort or contract. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Diversicare*, 185 S.W.3d at 847. 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. *See Diversicare*, 185 S.W.3d at 848; *Marks*, 229 S.W.3d at 400.

Samson asserted causes of action for negligence, negligent misrepresentation, fraud, fraudulent nondisclosure, conspiracy, violations of the DTPA, battery, breach of contract, and breach of fiduciary duty. More specifically, he claimed that he was injured by “the occurrence of an undisclosed risk” and that he was never informed that spinal rods would be installed along several of his vertebrae. With respect to the civil conspiracy claim, Samson alleged that Small conspired with an unidentified person to alter his medical records by including a pre-operative certification from Samson’s cardiologists in the surgical records. Samson’s fraud, breach of contract, and breach of fiduciary duty claims all stem from the same incident—the procedure performed by Small—and involve the same complaints—Samson’s allegation that he was not apprised of the risks associated with the procedure and that he did not consent to installation of the pedicle screws and spinal rods.

Claims based on the failure to obtain informed consent are governed by Chapter 74 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 74.101 (West 2005); *Schaub v. Sanchez*, 229 S.W.3d 322, 323–24 (Tex. 2007); *Baylor Univ. Med. Ctr. v. Biggs*, 237 S.W.3d 909, 914 (Tex. App.—Dallas

2007, pet. denied). Likewise, assault and battery claims are health care liability claims when the plaintiff's factual allegations are related to medical treatment provided by the defendant. *See Hunsucker v. Fustok*, 238 S.W.3d 421, 426–29 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (holding that claims for fraud, assault, and battery, based on surgeon's performance of one surgical procedure when he allegedly had agreed to perform another surgical procedure, were health care liability claims under former article 4590i).

Claims for conspiracy, breach of contract, fraud, and violations of the DTPA are also health care liability claims when, as in this case, the acts or omissions that form the basis of the plaintiff's allegations are an inseparable part of the rendition of health care services. *See Murphy v. Russell*, 167 S.W.3d 835, 837–39 (Tex. 2005); *Ramchandani v. Jimenez*, 314 S.W.3d 148, 152–53 (Tex. App.—Houston [14th Dist.] 2010, no pet.). Samson does not allege any facts other than those related to the surgical procedure performed by Small. All of his claims stem from the same incident and are either expressly covered under section 74.101 or are an inseparable part of the rendition of health care services. *See TEX. CIV. PRAC. & REM. CODE ANN. § 74.101; Murphy*, 167 S.W.3d at 837–39.

Because we conclude that Samson's claims were health care liability claims, it follows that he was required to serve Small, Chisholm, and Foundation Surgical Hospital with an expert report no later than the 120th day after the date the original

petition was filed. TEX. CIV. PRAC. & REM. CODE § 74.351(a). He did not. Accordingly, we hold that the trial court properly dismissed with prejudice his claims against Small, Chisholm, and Foundation Surgical Hospital. *Id.* § 74.351(b) (“[T]he court, on the motion of the affected physician or health care provider, shall . . . enter an order that . . . dismisses the claim . . . with prejudice to refiling of the claim.”). Samson’s first issue is overruled.

III. Constitutional claims

Samson argues for the first time on appeal that the trial court’s dismissal of his claims violates his federal and state constitutional rights. He contends that dismissing his claims pursuant to section 71.351 violates the open courts provision of the Texas Constitution, his right to a jury trial, separation of powers, due process, and equal protection. Samson did not make this argument in the trial court. As a rule, a claim, including a constitutional claim, must be asserted in the trial court in order to raise an issue on appeal. *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993); *Nguyen v. Yovan*, 317 S.W.3d 261, 269 n.5 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). As discussed above, a pro se litigant is held to the same standards as an attorney and must comply with mandatory rules of pleading and procedure. *De Mino*, 176 S.W.3d at 373; see TEX. R. APP. P. 33.1(a). Because these issues were not raised below, we hold that they are waived.

Conclusion

We affirm the judgment of the trial court.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.