Opinion issued October 14, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00072-CV

QUAN TIEN, Appellant

V.

JOHN J. ALAPPATT, M.D., Appellee

On Appeal from the 164th District Court
Harris County, Texas
Trial Court Case No. 0942307

MEMORANDUM OPINION

Appellant, Quan Tien, challenges the trial court's order dismissing his health-care-liability claim against appellee, John J. Alappatt, M.D., because of his failure to provide an expert report as required by Chapter 74 of the Texas Civil

Practice and Remedies Code ("the Act"). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon 2005 & Supp. 2010). In his sole issue, Tien contends that, because his action was based solely on Alappatt's alleged failure to disclose the risks and hazards involved in a surgical procedure, he was not required to file an expert report pursuant to section 74.351 of the Act.

We affirm.

BACKGROUND

In July 2007, Alappatt attempted to perform a pan-retinal photocoagulation ("PRP") on both of Tien's eyes. Tien alleged that Alappatt did not tell Tien that he could have a loss of vision from the PRP procedure, that Alappatt did not have Tien sign anything to let him know that he could have a loss of vision from the PRP procedure, and that Tien did not know that he could have a loss of vision from the PRP procedure. Prior to the PRP procedure, Alappatt administered a retrobulbar injection to anesthetize Tien's right eye. Due to complications that Tien had from the injection, Alappatt was unable to perform the PRP procedure.

Tien alleged that he lost all vision in his right eye when the injection was administered. Tien sought recovery for the injuries that he sustained as a result of the retrobulbar injection. Tien filed a Chapter 74 expert report as required for health-care-liability claims under section 74.351 of the Act. Alappatt subsequently filed a motion to dismiss, alleging that the report was insufficient. The trial court

held that the expert report was insufficient. It granted the motion to dismiss, and it dismissed the claims against Alappatt with prejudice.

EXPERT REPORT

A. Standard of Review

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). When we review matters within the trial court's discretion, we may not substitute our own judgment for that of the trial court. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). The trial court does not abuse its discretion merely because it decides a discretionary matter differently from the way we would in similar circumstances. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

B. Expert Report Requirements

Section 74.351 of the Civil Practice and Remedies Code requires a claimant in a health-care-liability claim 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. TEX. CIV. PRAC. & REM. CODE § 74.351(a); *Rivenes v. Holden*, 257 S.W.3d 332, 336 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). An expert report is a

written report by an expert that provides a fair summary of the expert's opinions regarding the applicable standard of care, the manner in which the care rendered by the physician or health care provider failed to meet the standard, and the causal relationship between that failure and the injury, harm, or damage claimed. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *Scoresby v. Santillan*, 287 S.W.3d 319, 321 (Tex. App.—Fort Worth 2009, no pet.). Although a report need not marshal all of a claimant's proof, it must include the expert's opinion on each of the elements identified in section 74.351. *Scoresby*, 287 S.W.3d at 321 (citing *Palacios*, 46 S.W.3d at 878).

Section 74.351(b) states that if an expert report has not been served within the 120-day period, the court, on the 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. TEX. CIV. PRAC. & REM. CODE § 74.351(b), (c); *Scoresby*, 287 S.W.3d at 321 (citing *Badiga v. Lopez*, 274 S.W.3d 681, 683 (Tex. 2009)). Section 74.351(b) makes clear that dismissal is mandatory and extensions are prohibited if no report—as opposed to a merely deficient report—is served within the 120-day deadline imposed by section 74.351(a). TEX. CIV. PRAC. & REM. CODE §

74.351(b); *Scoresby*, 287 S.W.3d at 322 (citing *Ogletree v. Matthews*, 262 S.W.3d 316, 319–20 (Tex. 2007)). If a timely served document intended by a claimant to be an expert report is determined by the trial court to be deficient in complying with statutory requirements, the trial court has discretion to either dismiss the claim or grant one 30-day extension to the claimant in order to cure the deficiency. TEX. CIV. PRAC. & REM. CODE § 74.351(c); *Scoresby*, 287 S.W.3d at 322.

Tien does not argue that the report he submitted was in fact sufficient; rather, he contends that he did not need to submit any expert report at all. He directs our attention to sections 74.106 and 74.102 of the Act. Section 74.106 provides that, in a health-care-liability claim, the

> failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed . . . shall be admissible in evidence and shall create a rebuttable presumption of a negligent failure to conform to the duty of disclosure . . . and this presumption shall be included in the charge to the jury . . . .

TEX. CIV. PRAC. & REM. CODE § 74.106(a)(2) (Vernon 2005). Section 74.102 created the Texas Medical Disclosure Panel to determine the surgical procedures for which the risks and hazards involved must be disclosed. *See id*. §§ 74.102, 74.103.

Tien argues that, because the PRP procedure is a retinal and glaucoma surgery that the Panel determined required disclosure, no expert report is required and that a rebuttable presumption is thereby created that Alappatt was negligent by failing to

disclose the risks. Furthermore, Tien contends that an expert report is not required because obtaining informed consent from a patient is an administrative procedure, not a medical procedure.

Appellant's arguments are without merit. The Texas Supreme Court has held that an action alleging a physician's failure to inform a patient fully of the risks of surgery is a negligence claim governed by the procedural requirements of the Act. *McKinley v. Stripling*, 763 S.W.2d 407, 409–10 (Tex. 1989). Expert testimony is necessary, even in a failure-to-disclose action, because, as the Texas Supreme Court has explained, proximate cause remains an issue that must be proven by a plaintiff in such a case:

> Traditional notions of liability in negligence actions require a finding of a duty, a breach of that duty, the breach was a proximate cause of injuries, and that damages occurred . . . A medical procedure informed consent case does not differ merely because a statute imposes the duty of disclosure. An issue of proximate causation must be submitted as in ordinary negligence cases so the jury may determine whether any breach of duty caused the injuries suffered. To hold otherwise would amount to an imposition of strict liability wherein a failure to warn and an undesirable surgical result would automatically create liability on the doctor.

Id. at 409; *see Palacios*, 46 S.W.3d at 876 ("Texas courts have long recognized the necessity of expert testimony in medical-malpractice cases.").

In his brief, Tien cites two cases for the proposition that no expert report is needed when the rebuttable presumption arises. However, neither applies to the present case. The court in *Winkle v. Tullos* held that expert testimony is not

necessary to establish the standard of care because that standard is provided by statute. 917 S.W.2d 304, 313 (Tex. App.—Houston [14th Dist.] 1995, writ denied). The *Winkle* court did not speak to the need for expert testimony regarding causation, and establishing causation is an issue in this case. *Id.* The court in *Binur v. Jacobo* held that expert testimony was required when no presumption was established by the Act, but it does not, as Tien suggests, stand for the inverse proposition that such testimony is not required when a presumption does exist. 135 S.W.3d 646, 654 (Tex. 2004).

The Act 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 that proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract. Tien's action against Alappatt falls within this definition, and Tien was required to comply with section 74.351. Because causation was an issue to be determined in Tien's cause of action, section 74.106 did not relieve him of timely filing the required expert report.[1] In addition, obtaining informed consent was part of the medical procedure and not a separable,

[1] Tien cites *Vaughan v. Nielson* for the proposition that there is no need for an expert report as long as the facts of the case evidence causation. *See* 274 S.W.3d 732, 739 (Tex. App—San Antonio 2008, no pet.). Although the *Vaughan* court emphasized that a plaintiff must establish causation, it did not dispense the requirement that causation be established through an expert report.

administrative, or non-medical matter that the jury was competent to adjudge without considering expert testimony. *See Golden Villa Nursing Home, Inc. v. Smith*, 674 S.W.2d 343, 349 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e).

We conclude that Tien's failure to file a sufficient expert report within 120 days of filing his lawsuit left the trial court with the discretion to dismiss his suit with prejudice. *See Palacios*, 46 S.W.3d at 880. Accordingly, we hold that the trial court did not abuse its discretion in dismissing appellant's lawsuit.

RULE 45 SANCTIONS

In his brief, Alappatt contends that Tien's appeal is frivolous and requests monetary sanctions. Rule 45 of the Texas Rules of Appellate Procedure permits an appellate court to award a prevailing party "just damages" for a "frivolous" appeal. TEX. R. APP. P. 45; *Smith v. Brown*, 51 S.W.3d 376, 380 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). In determining whether an appeal is frivolous, we apply an objective test. *Smith*, 51 S.W.3d at 381. We review the record from the viewpoint of the advocate and ask whether the advocate had reasonable grounds to believe the judgment could be reversed. *Id.* We exercise prudence and caution and deliberate most carefully before awarding appellate sanctions. *Id.*

After reviewing the record and the arguments presented by the parties to the trial court and in their appellate briefs, we hold that Tien's appeal is not frivolous. Therefore, we deny Alappatt's motion for sanctions.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Higley and Massengale.