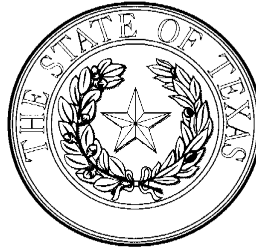
Opinion issued August 2, 2022



In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00206-CV

BRIAN DUANE NOEL, Appellant

V.

OAKBEND MEDICAL CENTER, Appellee

On Appeal from the 458th District Court
Fort Bend County, Texas
Trial Court Case No. 19-DCV-265821

MEMORANDUM OPINION

Pro se appellant Brian Duane Noel appeals from the trial court's order dismissing his claim for failing to file an expert report. Noel filed a claim against Oakbend Medical Center for the negligent treatment of his father. Noel contends that the trial court erred in treating his claim as a health care liability claim, which

required an expert report, in failing to apply the doctrine of res ipsa loquitur, and in failing to rule on his discovery motions. We affirm the trial court's dismissal order.

BACKGROUND

Noel's father, Richard David Collins, was admitted to Oakbend after he fell and hit the back of his head. While at Oakbend, Collins developed bedsores, and, although he was temporarily released from Oakbend to return home, he was readmitted to Oakbend after the bedsores became infected. Collins was again released from Oakbend, but he died shortly afterwards.

Noel, proceeding pro se, filed a claim against Oakbend, alleging negligence and seeking monetary damages. Oakbend moved to dismiss Noel's claim with prejudice for failing to comply with Section 74.351 of the Texas Civil Practice and Remedies Code, which requires a claimant to file an expert report in all health care liability claims. The trial court granted Oakbend's motion, dismissed Noel's claim with prejudice, and ordered that Noel pay Oakbend's attorney's fees. Noel now appeals.

DISCUSSION

In two points of error, Noel contends that the trial court erred by: (1) incorrectly applying the law to the facts of his case and dismissing his claim on that basis; and (2) failing to rule on his discovery motions.

A. Health care liability claim

Noel argues on appeal that the trial court erred by treating his claim as a health care liability claim under Chapter 74 of the Civil Practice and Remedies Code, when in fact his claim was for common law negligence under Chapter 101 of that code. He also argues that, even if Chapter 74 applied to his claims, the trial court should have applied the doctrine of res ipsa loquitur, which would have relieved him of the requirement to file an expert report because bedsores are within common knowledge. He argues the trial court's misapplication of the law resulted in the dismissal of his claim, violating the due-course-of-law guarantee in Article 1, Section 13 of the Texas Constitution. We construe this point of error as a challenge to the trial court's dismissal of his claim under Chapter 74 for failing to file an expert report.[1]

1. Standard of review and applicable law

Chapter 74 requires a claimant who asserts a "health care liability claim" against a "physician or health care provider" to serve on each defendant an expert report describing the applicable standard of care, how the defendant's actions failed to meet that standard, and the causal relationship between that failure and the damages claimed. TEX. CIV. PRAC. & REM. CODE § 74.351(a), (r)(6). A trial court,

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[1] "[I]t is our practice to construe liberally points of error in order to obtain a just, fair and equitable adjudication of the rights of the litigants." *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *see also* TEX. R. APP. P. 38.9 (briefing rules are to be construed liberally).

on the defendant's motion, must dismiss a health care liability claim and award attorney's fees to the defendant if the claimant does not timely serve the expert report. *Id.* § 74.351(b).

Whether a claim is a health care liability claim is a question of law that we review de novo. *See Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 500–01 (Tex. 2015). A claim is a health care liability claim if it satisfies three elements:

> (1) a physician or health care provider is a defendant;
>
> (2) the claim at issue concerns 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 proximately caused the injury to the claimant.

See Tex. W. Oaks Hosp., LP v. Williams, 371 S.W.3d 171, 179–80 (Tex. 2012) (citing TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)). A "health care provider" means any entity licensed by the state to provide health care, including a hospital. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(11), (12). In determining whether a claim is a health care liability claim, we focus on the "facts underlying the claim," not "artfully-phrased language" in the plaintiff's pleadings. *Loaisiga v. Cerda*, 379 S.W.3d 248, 255 (Tex. 2012).

We review a trial court's decision on a motion to dismiss a health care liability claim for an abuse of discretion. *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 858 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Am. Transitional Care Ctrs.*

of Tex., Inc. v. Palacios, 46 S.W.3d 873, 875 (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." *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010). A trial court has no discretion in determining what the law is or in applying the law to the facts. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) ("[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion.").

2. Analysis

Noel argues that the trial court erred by applying Chapter 74 to his claim, which required him to file an expert report, and then disregarding the doctrine of res ipsa loquitur. Noel argues that his claim was for general negligence, not medical malpractice, and so Chapter 74 should not have applied to his claim. Finally, he argues that the trial court violated the open-courts and due-course-of-law provisions of the Texas Constitution by dismissing his claim. For the reasons explained below, we conclude that the trial court correctly applied Chapter 74 to Noel's claim because the facts he alleged stated a claim for health care liability, res ipsa loquitur did not relieve Noel of the expert-report requirement, and the trial court did not violate Noel's constitutional rights by dismissing his claim for failing to comply with the statutory expert-report requirement.

a. Whether Noel's claim was a health care liability claim

Noel concedes that, on its face, his claim might appear to be a health care liability claim under Chapter 74, but he argues that the trial court erred in applying Chapter 74 because there was no physician-patient relationship and because he instead brought his claim under Article 1, Section 13 of the Texas Constitution.

The alleged facts underlying Noel's claim are simply stated: Collins, Noel's father, developed bedsores while at Oakbend due to the negligence of its employees. The bedsores were left untreated and became infected, which led to Collins's death.

With these facts, Noel has alleged all three elements of a health care liability claim: Oakbend is a hospital and therefore a health care provider, as defined by Chapter 74. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(11), (12). Noel's claim concerns the development of and lack of treatment of his father's bedsores. And Noel alleges that this lack of treatment caused his father's injury and death. Thus, Noel has stated the three basic elements of a health care liability claim within the meaning of Chapter 74. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Williams*, 371 S.W.3d at 179–80.

Noel argues that his claim does not involve a physician-patient relationship, and so Chapter 74 should not apply. In his live pleading, he asserts that he does not allege a physician-patient relationship or malpractice by any doctor, and he attempts to withdraw "any and all claims that directly or indirectly implicate" Chapter 74.

Even though Noel's claim is not against a specific physician, it meets the criteria of a health care liability claim under Chapter 74, as explained above, because it is against a health care provider, and health care liability claims by definition include claims against health care providers. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

Noel relies on this statement by the Supreme Court interpreting the definition of a health care liability claim: "Because a claim under the health care prong of [S]ection 74.001(a)(13) incorporates the definition of 'health care,' such a claim must involve a patient-physician relationship." *Williams*, 371 S.W.3d at 181. In the *Williams* case, the Supreme Court considered whether a claim brought by a non-patient employee against his employing hospital fell under the "health care" prong or "safety" prong of a health care liability claim. *See id.* at 180–81 (discussing definition of "health care liability claim" as departure from accepted standards of medical care, health care, or safety). The Court did not, as Noel seems to argue, state that if there is no physician-patient relationship between the claimant and the defendant, then Chapter 74 does not apply to the claim. In fact, the claim at issue in *Williams* was not between a patient and physician, yet the Supreme Court still held that it was a health care liability claim within the meaning of Chapter 74. *See id.* at 193 (concluding employee's claim was properly characterized as health care liability claim and dismissing claim for failure to file expert report).

The Supreme Court explained that a claim under the "health care" prong of a health care liability claim must *involve* a physician-patient relationship but did not say that a health care liability claim must be *limited* to claims between a patient and physician. *See id.* at 181. The definition of "health care" in Chapter 74 supports this conclusion. Chapter 74 defines "health care" as:

> any act or treatment performed or furnished, or that 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.

TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10). Chapter 74 also defines "medical care" as any act of "practicing medicine" by a person licensed to practice medicine—a physician. *Id.* § 74.001(a)(19); *see also id.* § 74.001(a)(23) (defining "physician" as "an individual licensed to practice medicine in this state"). Because "health care" includes "medical care," the term "health care" necessarily involves the act of practicing medicine by a physician. *See Williams*, 371 S.W.3d at 181. But the definition of "health care" includes more than just treatment by a physician; "health care" also includes treatment by "any health care provider" related to the patient's medical care, treatment, or confinement. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(10). While "health care" must involve a physician-patient relationship, it also includes "any act or treatment" that was or should have been provided by "any health care provider," *see id.*, and Noel concedes that Oakbend is a health care

provider. To the extent Noel argues that Chapter 74 does not apply because his claim is not between a physician and patient, he is incorrect.

Moreover, Noel's claim does involve a physician-patient relationship. Noel asserts that the defendant in this case, Oakbend, is a hospital and a governmental unit, not a physician. While he is correct, he is attempting to hold the hospital liable for the acts and omissions of its employees: the doctors and nurses who treated his father. Noel's claim is for injury and death caused by the treatment, or lack of treatment, of his father's bedsores while in the care of Oakbend's employees, whom Noel describes as "medical staff of doctors and nurses." Even though there is no physician-patient relationship directly between the hospital and Noel's father, Noel's claim involves a physician-patient relationship between his father and his father's treating physicians at the hospital. That relationship is the basis of his claim because Noel alleges that Oakbend's medical staff failed to properly treat his father's bedsores.

Noel also argues that his claim is for general negligence, not medical malpractice, but a medical malpractice claim is a claim for negligence in the provision of health care. *See, e.g.*, *Pediatrics Cool Care v. Thompson*, No. 21-0238, 2022 WL 1509741, at *4 (Tex. May 13, 2022) (describing medical malpractice as a claim for negligence). Regardless of how Noel characterizes this claim, the

underlying facts demonstrate a claim for medical malpractice, which is a type of health care liability claim.

Noel also argues that his claim is not a health care liability claim because it is a claim for common-law negligence as guaranteed by Article 1, Section 13 of the Texas Constitution: Collins suffered an injury due to the negligence of Oakbend, and his estate is therefore entitled to an adequate remedy by due course of law under the Constitution. *See* TEX. CONST. art. I, § 13. But the Constitution does not create a private right of action for money damages. *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 147–49 (Tex. 1995).[2] In other words, a person cannot recover money damages if he sues under Section 13. *See City of Houston v. Downstream Env't, L.L.C.*, 444 S.W.3d 24, 40 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (dismissing constitutional claim for money damages).

Noel has stated a claim against Oakbend that meets the three elements of a health care liability claim under Chapter 74. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13); *Williams*, 371 S.W.3d at 179–80. The trial court did not err in applying Chapter 74 to Noel's claim.

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[2] Suits seeking equitable remedies for constitutional violations are permissible, but suits seeking money damages for constitutional violations are not. *Tex. S. Univ. v. Araserve Campus Dining Servs. of Tex., Inc.*, 981 S.W.2d 929, 935 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *see also Bouillion*, 896 S.W.2d at 148–49 (explaining that Texas Bill of Rights is self-executing and therefore does not authorize money damages because any law contrary to it is void).

b. Whether the trial court erred in dismissing claim

Having concluded the trial court properly applied Chapter 74 to Noel's claim, we next consider whether the trial court properly dismissed the claim for failure to timely file an expert report. When a claimant fails to timely file an expert report for a health care liability claim under Chapter 74, then on the defendant's motion, the trial court must dismiss the claim with prejudice. TEX. CIV. PRAC. & REM. CODE § 74.351(b); *see also Lal v. Harris Methodist Fort Worth*, 230 S.W.3d 468, 476 (Tex. App.—Fort Worth 2007, no pet.) (concluding claimant's failure to timely serve expert report left trial court with no discretion but to dismiss health care liability claim with prejudice).

Noel concedes that he did not file an expert report. But he argues that the trial court selectively applied the provisions of Chapter 74 to his detriment, and, had the trial court applied the law correctly, he would have been able to file an expert report. Noel filed a motion to compel discovery that asked the trial court to order Oakbend's expert witness to provide written opinions on bedsores as a contributing cause of death when left untreated or treated improperly, on antibiotic-resistant staph infections as a cause of death when left untreated or treated improperly, on dehydration as a cause of death, and on the benefits of intravenous saline solutions in preventing death from dehydration. The trial court never ruled on the motion, and Oakbend never provided expert witness testimony to Noel on these topics. If the trial

court had granted his motion, Noel argues, he would have been able to file an expert report, and his case would not have been dismissed.

Section 74.351(a) states that a "claimant shall, not later than the 120th day after the date each defendant's original answer is filed . . . , serve on that party or the party's attorney one or more expert reports." TEX. CIV. PRAC. & REM. CODE § 74.351(a). The word "shall" in a statute "imposes a duty." TEX. GOV'T CODE § 311.016(2) (Code Construction Act). Section 74.351(a), therefore, imposes a duty on a claimant—not the defendant or the trial court—to file an expert report.

Noel argues that an expert report by a physician who treated Collins would have been included in Collins's medical records that were subject to discovery, but an expert report is not a medical record. An expert report is a "written report by an expert" that describes the "applicable standards of care," whether the treating physician or health care provider "failed to meet the standards," and the "causal relationship between that failure and the injury, harm, or damages claimed." TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). The expert report is intended to provide "specific information about what the defendant should have done differently." *Palacios*, 46 S.W.3d at 880. For this reason, the expert report is provided by a physician or health care provider other than the treating physician or health care provider. The information provided in the report is not treatment information that would be included in a patient's hospital or medical records. The need for specific

information about what the defendant should have done differently is also why, even though bedsores are a condition within a layperson's common knowledge as Noel argues, expert testimony is needed: a layperson may understand what bedsores are, but an expert is needed to explain the applicable standard of care and how Collins's treating physicians and health care providers did not meet that standard and caused Collins's bedsores. No statute or rule of procedure requires a defendant in a health care liability claim to provide this information; instead, Section 74.351(a) imposes this duty squarely on the claimant. "Compliance with this provision is mandatory; the claimant must serve an expert report to proceed with a health care liability claim." *Stockton v. Offenbach*, 336 S.W.3d 610, 614 (Tex. 2011). If the claimant fails to comply, the trial court must dismiss the claim with prejudice. *Id.* at 614–15.

Here, Noel concedes that he did not file the mandatory expert report. Therefore, the trial court did not abuse its discretion in dismissing his claim with prejudice. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b); *Stockton*, 336 S.W.3d at 614–15; *Lal*, 230 S.W.3d at 476.

c. Whether Noel's claim fell under Texas Tort Claims Act

Noel concedes that on its face, his claim might have appeared to meet the criteria for a health care liability claim, but he argues that he brought his claim under Chapter 101 of the Texas Civil Practice and Remedies Code and not Chapter 74, and so he did not need to file an expert report because Chapter 101 did not require one.

Noel argues his claim is for common-law negligence under Chapter 101 of the Civil Practice and Remedies Code. He is correct that Chapter 101 applies to his claim because he alleged a tort claim against a governmental unit. *See* TEX. CIV. PRAC. & REM. CODE § 101.025 (waiving sovereign immunity for tort claims against governmental units in certain circumstances). However, Chapter 101 does not create a separate cause of action; instead, it waives immunity to allow certain tort claims that already exist under Texas law to proceed against governmental units. *Jefferson County v. Farris*, 569 S.W.3d 814, 828 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (per curiam); *see also* TEX. CIV. PRAC. & REM. CODE § 101.021 (describing tort claims against governmental units for which immunity from liability is waived). In other words, Chapter 101 does not create another type of claim against governmental units, it only allows certain claims that already exist, including negligence, to proceed against governmental units when the claims would otherwise be barred by sovereign immunity. The fact that Chapter 101 applies to Noel's claim does not mean it is not also a health care liability claim. *See, e.g.*, *Univ. of Tex. Med. Branch at Galveston v. Tatum*, 389 S.W.3d 457, 461 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (stating that when claimant asserts health care liability claim against health care provider that is also governmental unit, claimant must comply with both Chapter 74 and Chapter 101). Thus, Noel has not demonstrated that the

trial court erred in applying Chapter 74 to his claim, even though Chapter 101 also applies to his claim.

d. Whether res ipsa loquitur applied to Noel's claim

Noel argues that, even if Chapter 74 applies to his claim, the trial court erred by not applying the doctrine of res ipsa loquitur, which would relieve him of the requirement to provide an expert report because Collins's injury was common knowledge.

Res ipsa loquitur, which means "the thing speaks for itself," is a rule of evidence that allows a jury to infer negligence in some cases when only circumstantial evidence is available. *See Haddock v. Arnspiger*, 793 S.W.2d 948, 950 (Tex. 1990). The legislature explicitly preserved particular applications of res ipsa loquitur in Chapter 74. *See* TEX. CIV. PRAC. & REM. CODE § 74.201 ("The common law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of August 29, 1977.").

However, courts have agreed that res ipsa loquitur is not an exception to Chapter 74's expert-report requirement. *Merry v. Wilson*, 498 S.W.3d 270, 277 (Tex. App.—Fort Worth 2016, no pet.) (collecting cases holding plaintiff not relieved of requirement to file expert report even if res ipsa loquitur applies to claim). Thus, the

trial court did not err in dismissing Noel's claim for failure to comply with Chapter 74's expert report requirement, even if res ipsa loquitur applies to his claim.

Oakbend also correctly notes that res ipsa loquitur has only been applied to three areas in medical-malpractice claims, none of which are at issue in this case: (1) negligence in the use of mechanical instruments; (2) operating on the wrong portion of the body; and (3) leaving surgical instruments or sponges in the body. *Haddock*, 793 S.W.2d at 951; *Losier v. Ravi*, 362 S.W.3d 639, 643 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

e. Constitutional arguments

Finally, Noel argues that dismissal of his common-law claim violated the guarantees in Article 1, Sections 13 and 19 of the Texas Constitution. *See* TEX. CONST. art. I, § 13 ("All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."); TEX. CONST. art. I, § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.").

The open-courts provision of Article 1, Section 13 of the Texas Constitution "prohibits the [l]egislature from abrogating well-established, common-law claims unless the reason for doing so outweighs a litigant's constitutional right of redress." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 209 (Tex. 2002). This provision

"guarantees litigants the right to their day in court." *Abraham v. Greer*, 509 S.W.3d 609, 615 (Tex. App.—Amarillo 2016, pet. denied). Noel has not demonstrated that the legislature has abrogated, or formally abolished, a common-law claim. Nor has he shown that he did not have a reasonable opportunity to be heard on his claim against Oakbend; instead, his failure to timely serve an expert report prevented him from continuing his claim against Oakbend. These facts do not demonstrate a violation of the open-courts provision. *See Univ. of Tex. Health Sci. Ctr. at Houston v. Joplin*, 525 S.W.3d 772, 783 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (collecting cases that similarly concluded dismissal for failing to file expert report did not violate open-courts provision); *see also Hernandez v. Kanlic*, 583 S.W.3d 878, 889 (Tex. App.—El Paso 2019, pet. denied) (concluding open-courts provision not violated because claim could have proceeded if claimant had timely served expert report).

The due-course-of-law provision of Article 1, Section 19 of the Texas Constitution guarantees due process of law to the same extent as the United States Constitution. *Univ. of Tex. Med. Sch. at Houston v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (describing Texas "due course" guarantee and federal "due process" guarantee as "without meaningful distinction"). Other appeals courts have concluded Section 74.351's mandatory dismissal for failure to comply with the expert-report

requirement does not violate due process. *See Joplin*, 525 S.W.3d at 783 (collecting cases rejecting similar due-process challenges to Section 74.351).

It is not the statute, but rather Noel's failure to comply with the expert-report requirement, that prevents him from pursuing his claims against Oakbend. *See id.* Therefore, Noel has not shown that Chapter 74's application has violated his constitutional rights.

In sum, we conclude that Chapter 74 applied to Noel's claim against Oakbend for negligence in the treatment, or lack thereof, of his father's bedsores, and the trial court did not abuse its discretion in dismissing Noel's claim for failing to file an expert report, which Noel conceded he did not do. Noel has not demonstrated that he was excused from filing the expert report for any reason, nor has he demonstrated that dismissal of his claim violated the Texas Constitution's open-courts or due-course-of-law provisions. Noel's first point of error is overruled.

B. Trial court's rulings

Noel next contends that the trial court erred by failing to hear his pre-trial discovery motions, which violated his rights under Article 1, Sections 13 and 19 of the Texas Constitution. Oakbend responds by asserting that Noel did not preserve this complaint for review.

1. Applicable law

To preserve a complaint for appellate review, a party must present to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if not apparent from the context. TEX. R. APP. P. 33.1(a)(1)(A). Simply filing a motion or even setting the motion for hearing is insufficient to preserve error if the record does not also show the motion was brought to the trial court's attention. *Quintana v. CrossFit Dallas, L.L.C.*, 347 S.W.3d 445, 448–49 (Tex. App.—Dallas 2011, no pet.). The complaining party must get a ruling—either express or implied—from the trial court. TEX. R. APP. P. 33.1(a)(2)(A), (b). If the trial court refuses to rule, the party preserves error by objecting to that refusal. TEX. R. APP. P. 33.1(a)(2)(B). If the trial court does not rule and the party does not object to the refusal to rule, error is not preserved, and the complaint is waived. *See* TEX. R. APP. P. 33.1(a); *see also Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (per curiam). This is true even for constitutional challenges. *See Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993); *see also Harris v. Kareh*, No. 01-18-00775-CV, 2020 WL 4516878, at *10 (Tex. App.—Houston [1st Dist.] Aug. 6, 2020, pet. denied) (mem. op.) (affirming dismissal of health care liability claim in part because claimant failed to preserve constitutional complaint by not raising it in trial court); *In re T.J.S.*, No. 05-15-00138-CV, 2016 WL 4131959, at *5 (Tex. App.—Dallas Aug. 2, 2016, no pet.) (mem. op.) (holding appellant waived due-process challenge

to trial court's failure to rule on discovery motion because appellant did not seek hearing or request ruling on motion).

2. Analysis

Here, although Noel filed several motions to compel discovery, the record does not reflect that Noel set the motions for hearing or otherwise brought them to the trial court's attention. Nor does the record show that the trial court ruled on the motions or that Noel objected to the trial court's refusal to rule. Therefore, the error has not been preserved and the complaint is waived. *See* TEX. R. APP. P. 33.1(a); *Bushell*, 803 S.W.2d at 712.

Noel argues that he preserved error by filing a motion for new trial after the trial court dismissed his claim. However, a motion for new trial is not sufficient to preserve error on a discovery issue. *See St. Paul Surplus Lines Ins. Co. v. Dal–Worth Tank Co.*, 974 S.W.2d 51, 53 (Tex. 1998) (per curiam) (raising complaint for first time in motion for new trial insufficient to satisfy requirement for timely objection where complaint could have been raised earlier). Rule 33.1 requires that an objection must be timely asserted at the earliest opportunity or when the potential error becomes apparent. *See Hoxie Implement Co. v. Baker*, 65 S.W.3d 140, 145 (Tex. App.—Amarillo 2001, pet. denied). Raising the objection in a motion for new trial does not satisfy the rule's timeliness requirement if the complaint could have been raised earlier. *Id.* Thus, Noel's objection to the trial court's refusal to rule on his

discovery motions raised for the first time in a motion for new trial was not timely under Rule 33.1. *See St. Paul Surplus Lines Ins. Co.*, 974 S.W.2d at 53; *Hoxie Implement Co.*, 65 S.W.3d at 145.

Further, even if the complaint had been preserved, Noel has not demonstrated that the trial court would have abused its discretion in denying his discovery requests. *See Macy v. Waste Mgmt., Inc.*, 294 S.W.3d 638, 651 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (appellate court reviews trial court's ruling on motion to compel discovery under abuse-of-discretion standard). As explained above, Noel asked the trial court to order Oakbend to provide the expert report he needed to avoid dismissal under Section 74.351 of the Civil Practice and Remedies Code. If the trial court had granted his request, he argues, he would have had the expert report he needed to avoid dismissal. But again, as explained above, Oakbend would not have been in possession of an expert report Noel needed to avoid dismissal—it is not a medical record that would have been included in Collins's hospital and medical records. *See* TEX. R. CIV. P. 192.3(b) (requiring person to produce discoverable "document or tangible thing that is within the person's possession, custody, or control"). The duty to provide the expert report was Noel's. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (stating claimant "shall" serve expert report within 120 days of defendant's answer). Therefore, the trial court would not have acted arbitrarily in denying Noel's discovery request.

Noel failed to preserve his complaints about the trial court's discovery rulings for our review, but even if he had, we would not find the trial court abused its discretion in denying his motions to compel. Noel's second point of error is overruled.

CONCLUSION

The trial court's order dismissing Noel's claim with prejudice is affirmed.

Gordon Goodman
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Hightower.