Affirmed and Memorandum Opinion filed October 31, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00500-CV

MYRTIS ALEXANDER, Appellant

V.

COLONNADES HEALTH CARE CENTER LTD. CO. D/B/A THE COLONNADES AT REFLECTION BAY, Appellee

On Appeal from County Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 1060501

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

Myrtis Alexander appeals the trial court's order granting the motion of Colonnades Health Care Center Ltd. Co. d/b/a The Colonnades at Reflection Bay ("Colonnades") to dismiss Alexander's claim against Colonnades.[1] *See* Tex. Civ.

[1] Although Alexander referred to Colonnades in her pleading as "Defendant Colonnades Skilled Nursing Facility," Colonnades in its motion to dismiss stated that Alexander "misnamed" Colonnades and

Prac. & Rem. Code Ann. § 74.351 (Vernon 2017). Alexander contends dismissal is erroneous because (1) her claim against Colonnades is not a healthcare liability claim; and (2) Colonnades waived its right to seek dismissal. Because we conclude that Alexander's claim against Colonnades is a health care liability claim and that Colonnades did not waive its right to seek dismissal, we affirm the trial court's dismissal order.

BACKGROUND

Alexander sued Colonnades on March 23, 2015. She alleged in her original petition that she went to Colonnades, a nursing facility, "as a patient to be treated for wound care on [her] left knee" on March 15, 2013. She attributed a foot injury to the conduct of a Colonnades employee and stated in her pleading as follows:

> **GROSSLY INADEQUATE TRAINING**
>
> On March 24, 2013[,] I was in the hallway coming from the physical therapy room as I was walking with my walker Defendant's employee was walking behind me with a wheel chair. She instructed me to stop and stand on my tip toes. So I did. She then put her hands on top of my shoulder and pressed down on my shoulder aggressively which caused me to fall back into the chair and injuring my left foot. My foot became swollen and I was in a lot of pain.
>
> So I filed a complaint with Defendant's Coordinator Michelle. She sent an X-Ray technician to take some X-rays however the results showed nothing was wrong. Michelle than stated that if the pain did not reside [sic] than [sic] they would send me to get and MRI on my foot. After still continuing to be in a lot of pain on March 28, 2013[,] Michelle sent me to St. Joseph Hospital which they stated I had an ankle sprain.
>
> **COLONNADE SKILLED NURSING FACILITY FAILURE**
>
> I received no treatment by Defendant Colonnade Nursing Facility staff for this injury after the doctor gave the Defendant Colonnades Skilled

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that its correct name is Colonnades Health Care Center Ltd. Co. d/b/a The Colonnades at Reflection Bay. The trial court's dismissal order also refers to Colonnades Health Care Center Ltd. Co. d/b/a The Colonnades at Reflection Bay.

> Nursing Facility orders on how to treat the injury.
>
> So finally the pain was so unbearable that I checked myself out of Defendant Colonnade Skilled Nursing Facility on April 1, 2013[,] and immediately scheduled an appointment with my podiatrist who treated me for the injuries through injections and pain medicine. The pain still did not reside [sic] until after I had two (2) surgeries on my foot.

Alexander alleged a negligence claim against Colonnades stating as follows:

> **CAUSE OF ACTION: NEGLIGENCE**
>
> Plaintiff would show that the accident made the basis of this lawsuit resulted from the negligence of Defendant[']s employee. The Defendant's conduct, constituted negligence, and such negligence conduct was a proximate cause of the accident and injuries made the basis of this lawsuit.
>
> Colonnades Skilled Nursing Facility['s] negligent actions or omissions include, but are not limited to, one or more of the following.
>
> a. Failure of Defendant Skilled Nursing Facility to properly train employee.
>
> b. Failure of Defendant Skilled Nursing Facility to treat injury after the Doctor gave instructions on how to treat injury.
>
> c. Failure of Defendant to treat injury in a timely manner.
>
> Plaintiffs would show that one, some, or all of the above foregoing acts and/or omission, or others on the part of Defendants, separately and together, constitute negligence and proximately caused the occurrence and Plaintiffs' [sic] injuries and damages.

Colonnades filed its original answer on April 10, 2015, and its first amended answer on July 30, 2015. It generally denied Alexander's allegations and pleaded "special exceptions, affirmative defenses, inferential rebuttals, and limitations on damages." Colonnades also stated: "Pleading affirmatively, Defendant asserts that Plaintiff's claims should be dismissed in its entirety due to Plaintiff's failure to provide an expert report as required by Chapter 74 of the Texas Civil Practice and Remedies Code."

Colonnades filed a section 74.351 motion to dismiss on March 11, 2016,

contending that Alexander filed a negligence health care liability claim and failed to serve an expert report within 120 days after Colonnades filed its original answer as required by section 74.351(a).

Alexander filed a response in opposition to the motion to dismiss on March 21, 2016. She argued that her "claim is not a health care liability claim because (1) Defendant's employee's assault of Plaintiff is [sic] does not constitute a health care liability claim and (2) Defendant waived its right to dismissal by litigating this case for more than a year, conducting discovery and mediating this case." Alexander further argued that her (1) "injury is not the result of treatment or lack of treatment;" (2) "injury is not the result of medical care, health care, safety or professional or administrative services;" (3) "[c]laim is separable from the rendition of health care;" and (4) "[c]laim concerns an assault" by one of Colonnades's employees.

Colonnades filed a reply to Alexander's response in opposition to the motion to dismiss on March 21, 2016. It argued that Alexander "unequivocally allege[d] a medical negligence cause of action," Alexander could not "recast this case as an alleged assault to circumvent the expert report requirement," and "there is no deadline to file a motion to dismiss for failure to serve a Chapter 74 expert report."

The trial court held a hearing on the motion to dismiss on March 22, 2016. At the hearing, Alexander argued that she did not have to file an expert report because "this is a personal injury case" and "not a medical negligence case." Alexander asserted that Colonnades's employee assaulted her when she pushed her aggressively, which caused injury to her foot. She claimed that "[t]his action occurred not during treatment, not based on a lack of treatment, it has nothing to do with the medical care that plaintiff was receiving at the facility at the time."

Alexander also argued that Colonnades waived its right to seek dismissal of her claim because the parties had "two substantive hearings, one on a motion to

transfer venue, another on a motion to compel by the plaintiff. They have also mediated the case all before . . . October. They have also exchanged written discovery, both parties have sent and received written discoveries and exchanged documents. It wasn't until a week before the scheduled trial date the defendant chose to file their motion and seek fees."

The trial court signed an order granting Colonnades's motion to dismiss with prejudice on March 22, 2016. Alexander filed a motion for new trial on April 20, 2016, which was overruled by operation of law. Alexander filed a notice of appeal on June 20, 2016.

STANDARD OF REVIEW

We review a trial court's ruling on a section 74.351(b) motion to dismiss for abuse of discretion. *See Jernigan v. Langley*, 195 S.W.3d 91, 93 (Tex. 2006); *Obstetrical & Gynecological Assocs., P.A. v. McCoy*, 283 S.W.3d 96, 100 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). We defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations *de novo*. *Stockton v. Offenbach*, 336 S.W.3d 610, 615 (Tex. 2011).

Waiver ordinarily is a question of fact; it becomes a question of law and is reviewed *de novo* when the surrounding facts and circumstances are undisputed or clearly established. *See Jernigan v. Langley*, 111 S.W.3d 153, 156-57 (Tex. 2003) (per curiam); *see also Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 394 (Tex. 2014). The *de novo* standard also applies when the question is whether a claim is a health care liability claim. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753, 757 (Tex. 2014).

ANALYSIS

I. Health Care Liability Claim

Alexander argues in her first issue that "the trial court erred when it granted Colonnade's motion to dismiss because Alexander's injury was not the result of a 'departure from accepted standards of medical care'" when no medical treatment was provided to Alexander at the time of her injury. She says "the true underlying nature of her claim was the assault on her by a Colonnade employee." Alexander contends in her second issue that her assault claim was "not an inseparable part of the rendition of medical services" and thus not a health care liability claim.

The limited record before us contains the parties' pleadings and their filings regarding the motion to dismiss; no evidence was offered during the motion to dismiss hearing.

A. Governing Standards

Turning to the analysis of Alexander's first two issues, the Texas Medical Liability Act provides that, "[i]n a health care liability claim, 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, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted." *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). If, as to the health care provider, an expert report has not been served within the specified time period, the court shall on the motion of the health care provider enter an order dismissing with prejudice the claimant's claim with respect to the health care provider. *See id*. § 74.351(b).

"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." *Id*. § 74.001(a)(13) (Vernon 2017).

According to its definition, a health care liability claim thus has three elements: (1) the defendant is a health care provider or physician; (2) the claimant's cause of action is for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must proximately cause the injury to the claimant. *Psychiatric Sols., Inc. v. Palit*, 414 S.W.3d 724, 725 (Tex. 2013).

Here, there is no dispute that Colonnades and its employee qualify as health care providers. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(11), (a)(12)(A), (a)(12)(B)(ii) (Vernon 2017).

This case focuses on the second element, which concerns the nature of Alexander's cause of action and the definition of health care. The Texas Medical Liability Act does not define the term "cause of action" but the "generally accepted meaning of that phrase refers to the 'fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.'" *Loaisiga v. Cerda*, 379 S.W.3d 248, 255 (Tex. 2012) (quoting *In re Jorden*, 249 S.W.3d 416, 421 (Tex. 2008)).

"Health care" is broadly defined 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 Ann. § 74.001(a)(10) (Vernon 2017); *see Loaisiga*, 379 S.W.3d at 255.

"Analysis of the second element—the cause of action—focuses on the facts underlying the claim, not the form of, or artfully-phrased language in, the plaintiff's pleadings describing the facts or legal theories asserted." *Loaisiga*, 379 S.W.3d at 255. In ascertaining the gravamen of a claim, we are not bound by the plaintiff's characterization of the claim; instead, we look at the trial court record as a whole and the overall context of the plaintiff's suit, including the nature of the factual allegations in the pleadings, the motion to dismiss, the response, and any relevant evidence properly admitted. *Hopebridge Hosp. Houston, L.L.C. v. Lerma*, 521 S.W.3d 830, 835-36 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *see Loaisiga*, 379 S.W.3d at 258-59.

A claim based on one set of facts cannot be spliced or divided into both a health care liability claim and another type of claim. *Loaisiga*, 379 S.W.3d at 255; *see Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005). Thus, a claim premised on facts that could support a claim against a health care provider for departures from accepted standards of medical care, health care, or safety is a health care liability claim regardless of whether the plaintiff alleges the defendant is liable for breach of any of those standards. *Loaisiga*, 379 S.W.3d at 255.

The broad language of the Texas Medical Liability Act evidences legislative intent for the statute to have expansive application. *Id*. at 256. "The breadth of the statute's text essentially creates a presumption that a claim is [a health care liability claim] if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the course of a patient's care, treatment, or confinement." *Id*. This presumption is rebuttable; for example, "[i]n some instances the only possible relationship between the conduct underlying a claim and the rendition of medical services or healthcare will be the healthcare setting (*i.e.*, the

physical location of the conduct in a health care facility), the defendant's status as a doctor or health care provider, or both." *Id*.

B. Application of Standards

Alexander's appellate arguments focus only on the following allegations in her pleading under the heading "Grossly Inadequate Training:" "On March 24, 2013 I was in the hallway coming from the physical therapy room as I was walking with my walker Defendant's employee was walking behind me with a wheel chair. She instructed me to stop and stand on my tip toes. So I did. She then put her hands on top of my shoulder and pressed down on my shoulder aggressively which caused me to fall back into the chair and injuring my left foot."

Alexander makes no argument regarding her pleading allegations under the heading "Colonnade Skilled Nursing Facility Failure" that she received no treatment from Colonnades staff for her foot injury after a doctor gave Colonnades "orders on how to treat the injury." Alexander also ignores that under the heading "Cause of Action: Negligence" she alleged that Colonnades's "negligent actions or omissions include, but are not limited to" a failure by Colonnades to "properly train employee;" a failure by Colonnades to "treat injury after the Doctor gave instructions on how to treat injury;" and a failure by Colonnades to "treat injury in a timely manner."

We now turn to Alexander's contention that the trial court erroneously concluded that her claim against Colonnades is a health care liability claim because "there was no medical treatment being given to Alexander at the time of her injury, such that the Colonnade employee's actions could constitute a 'departure' from accepted standards of medical care."

Alexander contends that, in the absence of immediate medical treatment being administered at the time of the alleged injury, Colonnades's employee's action of

pressing down on Alexander's "shoulder aggressively[,] which caused [her] to fall back into the [wheel] chair" and injure her left foot, cannot constitute a departure from standards of medical care.

Alexander impermissibly seeks to define a health care liability claim more narrowly than the governing statute. As outlined above, a health care liability claim is defined not only as (1) a cause of action against a health care provider for a claimed departure from accepted standards of medical care, but also as (2) a departure from accepted standards of health care, or safety or professional or administrative services directly related to health care that resulted in injury. Even if no medical care was being provided to Alexander at the exact moment of her injury, she nonetheless alleges that Colonnades departed from accepted standards of health care.

We are mindful that "a claim alleges a departure from accepted standards of health care if the act or omission complained of is an inseparable or integral part of the rendition of health care." *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 180 (Tex. 2012). We also note the supreme court's admonition that "'health care' involves more than acts of physical care and medical diagnosis and treatment. It involves '*any* act 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 . . . confinement.'" *Omaha Healthcare Ctr., LLC v. Johnson*, 344 S.W.3d 392, 394 (Tex. 2011) (emphasis in original).

Alexander alleged that she entered Colonnades on March 15, 2013, "as a patient to be treated for wound care on [her] left knee." She alleged that she injured her left foot on March 24, 2013, after "coming from the physical therapy room" because a Colonnades employee "pressed down on [her] shoulder so aggressively which caused [her] to fall back into the [wheel] chair" and injure her foot. Alexander alleged that Colonnades was negligent by failing to properly train its employee how

to provide care for her and keep her from harm.

The services a nursing facility provides to its patients during their confinement include, among others, providing routine examinations and visits with physicians, providing pharmaceutical services, administering medications, and meeting patients' fundamental care needs. *See Diversicare*, 185 S.W.3d at 849. "Part of the fundamental patient care required of a nursing home is to protect the health and safety of the" patients, *Johnson*, 344 S.W.3d at 394, as well as feeding, dressing, and assisting the patients with walking. *Diversicare*, 185 S.W.3d at 849. "These services are provided by professional staff including physicians, nurses, nurse aides, and orderlies." *Diversicare*, 185 S.W.3d at 849-50; *see Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 661 (Tex. 2010). And "th[e]se services, including the monitoring and protection of the patient, as well as training and staffing policies" are considered "integral components of [a health care facility']s rendition of health care services[.]" *Marks*, 319 S.W.3d at 661; *see Diversicare*, 185 S.W.3d at 850; *Williams*, 371 S.W.3d at 180.

Colonnades through its staff provided for Alexander's "fundamental needs including assuming care and custody of this . . . patient" after she received physical therapy during her stay at Colonnades; these services "were part of her health care." *Diversicare*, 185 S.W.3d at 850. Further, Colonnades's training and staffing policies and protection of Alexander are integral components of Colonnades's rendition of health care services to Alexander. *See Marks*, 319 S.W.3d at 661; *Diversicare*, 185 S.W.3d at 850; *see also Williams*, 371 S.W.3d at 180. Alexander pleaded that Colonnades failed to properly train its employee to care for her and protect her from harm during her stay at Colonnades for wound care and physical therapy. This type of claim asserts a departure from accepted standards of health care and thus qualifies as a health care liability claim. *See Marks*, 319 S.W.3d at 661; *Diversicare*, 185

S.W.3d at 850; *Bain v. Capital Senior Living Corp.*, No. 05-14-00255-CV, 2015 WL 3958714, at *2-4 (Tex. App.—Dallas June 30, 2015, pet. denied) (mem. op.) (holding that claims alleging that assisted living facility was negligent for "failing to provide proper care and services to [wheel chair-bound resident] to keep her from harm" and failing to properly train its employee "as to the manner in which to restrain wheelchair bound individuals when transporting" were health care liability claims "because they assert departures from accepted standards of health care").

We reject Alexander's attempt to recast her claim as an assault. Alexander contends on appeal that "Colonnade's employee caused bodily injury to Alexander's foot by, without warning or permission, pushing her down aggressively on March 24, 2013," and "[t]hese actions constitute an assault." Alexander contends that this alleged assault "was not an inseparable part of the rendition of medical services" because the "only connection to medical services is that the injury occurred at a Colonnade facility. Therefore, the employee's assault on Alexander . . . was not a health care liability claim."

Even if we accept Alexander's contention that she alleged a claim for assault against Colonnades in her pleading, the record before us does not establish that her claim falls outside the definition of a health care liability claim.

"[A] claim against a medical or health care provider for assault is not a [health care liability claim] if the record conclusively shows that (1) there is no complaint about any act of the provider related to medical or health care services other than the alleged offensive contact, (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and (3) the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place." *Loaisiga*, 379 S.W.3d at 257.

We need not focus on the first two elements because the third element is

dispositive on the facts of this case. Here, the record does not conclusively show that "the only possible relationship between the alleged offensive contact" and Colonnades's rendition of care to Alexander was the setting in which the asserted assault took place. *See id*.

Alexander alleged she "entered" Colonnades as a patient; she received wound care and physical therapy there. During her stay, a Colonnades employee allegedly pressed down on her shoulder aggressively and this action caused injury to her foot. Alexander alleged that Colonnades was negligent by failing to properly train its employee how to care for her and protect her from harm while she was staying at Colonnades for care and therapy.

As we have discussed above, during her stay at the nursing facility, Colonnades through its staff provided for Alexander's "fundamental needs including assuming care and custody of" her; and these services Colonnades provided "were part of her health care." *Diversicare*, 185 S.W.3d at 850. Further, we explained that Colonnades's "training and staffing policies" and "protection of [Alexander] . . . are integral components of [Colonnades]'s rendition of health care services to [Alexander]" during her confinement. *Marks*, 319 S.W.3d at 661; *Diversicare*, 185 S.W.3d at 850; *see also Williams*, 371 S.W.3d at 180.

The facts as pleaded show that the complained-of conduct in this case arose from one or more integral components of Colonnades's rendition of health care to Alexander as a patient while she stayed at Colonnades. Accordingly, the trial court did not erroneously (1) conclude that Alexander's claim against Colonnades is a health care liability claim, and (2) grant Colonnades's motion to dismiss for failure to serve an expert report.

Additionally, Alexander makes no argument on appeal with regard to her allegation that Colonnades was negligent in failing to treat her injured foot per her

doctor's instructions and in a timely manner. She does not argue that her negligence claim predicated on an alleged failure to treat her injured foot falls outside the definition of a health care liability claim.

Alexander's claim predicated on an alleged failure to treat her injured foot is a health care liability claim. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001 (13)("'Health care liability claim' means a cause of action against a health care provider or physician for treatment, lack of treatment . . ., 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."). Because Alexander's claim for lack of treatment of her injured foot is a health care liability claim, she was required to serve an expert report. Therefore, the trial court correctly granted Colonnades's motion to dismiss for failure to serve an expert report in connection with her negligence claim for lack of treatment.

Accordingly, we overrule Alexander's first and second issues.

II. Waiver

Alexander contends in her third issue that, "[b]y conducting discovery, mediating, and waiting ten days before trial to file its motion, Colonnade waived its right to seek dismissal."

A plaintiff alleging a health care liability claim must serve the required expert report within 120 days of filing the initial petition. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). If a timely expert report is not filed, the affected defendant health care provider may file a motion to dismiss, and the court must dismiss the claim with prejudice. *Id*. § 74.351(b). Although section 74.351 does not impose a deadline for a health care provider to file a motion to dismiss, a health care provider can waive its right to seek dismissal for failure to file an expert report. *See Jernigan*, 111

S.W.3d at 156-58.

"Waiver is defined as 'an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.'" *Id*. at 156 (quoting *Sun Expl. & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)). Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances. *Id*. "There can be no waiver of a right if the person sought to be charged with waiver says or does nothing inconsistent with an intent to rely upon such right." *Id*.

"[T]he mere fact that a defendant waits to file a motion for dismissal under section [74.351] is insufficient to establish waiver unless the defendant's silence or inaction shows an intent to yield the right to dismissal . . . ." *Id*. at 157. Instead, to establish an intent to waive the right to dismissal under section 74.351, a defendant's silence or inaction must be inconsistent with the intent to rely upon the right to dismissal. *Id*.

Alexander argues that Colonnades's conduct has been inconsistent with an intent to assert its right to seek dismissal. She contends that "the parties have conducted discovery for over 365 days, the case has been set for trial three times, Colonnade has produced over 300 pages of documents, the parties have mediated the case," the trial court heard Colonnades's motion to transfer venue and Alexander's motion to compel, and, "[a]lthough the case had been pending only for 12 months, Colonnade did not file its motion until 10 days" before trial. Alexander cites *Memorial Herman Hospital System v. Hayden*, No. 01-13-00154-CV, 2014 WL 2767128 (Tex. App.—Houston [1st Dist.] June 17, 2014, pet. denied), and *Murphy v. Gutierrez*, 374 S.W.3d 627 (Tex. App.—Fort Worth 2012, pet. denied), to support her contention that the facts and circumstances in this case show Colonnades intended to waive its right to seek dismissal.

There is no evidence in the record to support Alexander's assertion that the parties conducted discovery for over 365 days, or that Colonnades produced over 300 pages of documents.[2] And contrary to Alexander's contention, the facts in *Hayden* or *Murphy* are not analogous to the facts here.

In *Hayden*, Memorial Hermann filed a motion to dismiss soon after Hayden filed suit. *Hayden*, 2014 WL 2767128, at *1. Hayden amended her petition and simultaneously filed a response to Memorial Hermann's pending motion to dismiss, arguing that her amended claim did not constitute a health care liability claim. *Id*. Memorial Hermann's pending motion had already been set for the trial court to rule on, but Memorial Hermann passed on the hearing. *Id*. For the next 22 months, Memorial Hermann did not reset its motion to dismiss. *Id*. at *2. Instead, both parties engaged in extensive discovery and trial preparations. *Id*. at *2, 9.

"As part of that discovery, Memorial Hermann 'propounded multiple sets of written discovery' and 'participated in ten fact and expert witness depositions.'" *Id*. at *2. In August 2011, one month after Hayden's deposition, Memorial Hermann moved for summary judgment on Hayden's premises liability claim arguing that Hayden had recast her health care liability claim as a premises liability claim. *Id*. The trial court denied summary judgment; and Memorial Hermann did not reset its motion to dismiss for hearing. *Id*.

"Approximately one year later, on June 29, 2012, the Texas Supreme Court issued *Texas West Oaks Hospital, L.P. v. Williams*,[3] holding that a hospital employee who sued the hospital for the hospital's failure to provide a safe work

[2] The clerk's record contains Colonnades's motion to transfer venue and Alexander's response to the motion; there is no ruling with regard to the motion to transfer venue. The record does not contain a motion to compel from Alexander, any response to such a motion, or a ruling from the trial court regarding a motion to compel.

[3] *Tex. W. Oaks Hosp., L.P. v. Williams*, 371 S.W.3d 171, 175 (Tex. 2012).

environment after the employee was assaulted by a patient was required to comply with the expert-report requirement." *Id*. "Six weeks later, which was four days before the trial court actually called the case to trial, Memorial Hermann filed a second motion to dismiss Hayden's suit, contending that under *Williams* Hayden was required—but failed—to serve a section 74.351 expert report." *Id*. In response, Hayden argued that Memorial Hermann waived its right to seek dismissal because it delayed pursuing its second motion to dismiss and conducted extensive trial preparation. *Id*. "Memorial Hermann excused its failure to pursue its motion based on its pre-*Williams* good faith belief that Hayden's amended petition did not state a health care liability claim subject to the expert report requirement." *Id*. The trial court concluded that Memorial Hermann waived its right to seek dismissal and denied the motion to dismiss. *Id*. at *3.

Viewing the totality of the circumstances, the First Court of Appeals concluded that the trial court did not err in denying Memorial Hermann's motion to dismiss based on waiver. *Id*. at *10. The court explained that Memorial Hermann "not only conducted most of the discovery—it completed its discovery." *Id*. The court emphasized that Memorial Hermann announced that it was ready for trial twice before pursuing its second motion to dismiss, and it did not move to dismiss until four days before the trial court called the case to trial. *Id*. The court stated that "Memorial Hermann had filed a motion to dismiss 22 months earlier and intentionally did not pursue it. Effectively, Memorial Hermann strategically decided not to pursue its initial motion; instead, it attempted to obtain a final judgment through other means." *Id*.

In *Murphy*, Ken and Deanna Murphy sued Gutierrez for claims relating to the design and construction of a swimming pool. *Murphy*, 374 S.W.3d at 628. Gutierrez filed a motion to dismiss the Murphys' claims against him, arguing that the Murphys

failed to file an accompanying certificate of merit with their lawsuit pursuant to section 150.002 of the Texas Civil Practice and Remedies Code. *Id*. at 628-29. After that, the parties litigated the case for over three and one-half years. *Id*. at 629. Five days before a scheduled trial on the merits, Gutierrez filed an amended motion to dismiss — again based on the Murphys' failure to file a section 150.002 certificate of merit; the trial court granted the motion to dismiss. *Id*.

The Fort Worth Court of Appeals held that Gutierrez so thoroughly invoked the judicial process for over three and a half years prior to filing his motion to dismiss that he waived his right to reurge his motion to dismiss. *Id*. The court considered that Gutierrez in three and a half years participated extensively in discovery; sought affirmative action or judgment on the merits by filing motions for traditional and no-evidence summary judgment, which the trial court granted in part; participated in court-ordered mediation; and filed claims against a co-defendant before reurging his motion to dismiss five days before trial was scheduled. *Id*. at 633-36.

We conclude that *Hayden* and *Murphy* are distinguishable, and that the circumstances here are more analogous to *Jernigan*. *See Jernigan*, 111 S.W.3d at 155, 157-58. There, Dr. Jernigan waited more than 600 days after receiving an expert report to move for dismissal. *Id*. at 155-56. During that time, he engaged in discovery, filed a motion for summary judgment based on charitable immunity, and filed an amended answer to delete references to the plaintiff's failure to follow statutory prerequisites to suit. *Id*. The supreme court held that these actions were not inconsistent with the intent to assert the right to dismissal. *Id*. at 157-58.

The court explained that, although Dr. Jernigan waited more than 600 days after receiving expert reports to move for dismissal, "the mere fact that a defendant waits to file a motion for dismissal . . . is insufficient to establish waiver." *Id*. at 157. The court found that Dr. Jernigan's participation in discovery also was insufficient

to establish waiver because attempting to learn more about the case in which one is a party does not demonstrate an intent to waive the right to move for dismissal. *Id*. The Court noted that most of Dr. Jernigan's participation was in response to discovery initiated by the plaintiff and the discovery that he initiated occurred before he had received the expert reports. *Id*.

Further, "although Dr. Jernigan had filed a motion for summary judgment on other grounds, that was not inconsistent with an intent to assert the right to dismissal" because "there had been no hearing on that motion nor had a conventional trial begun when Dr. Jernigan moved for dismissal." *Id*. The court also addressed Dr. Jernigan's action in amending his answer to delete the statement, "'By way of affirmative defense, Defendant pleads the defense of failure to follow the statutory steps to perfect a claim.'" *Id*. This amendment was not inconsistent with an intent to seek dismissal because it was a general and ambiguous statement that did not "necessarily refer to an alleged inadequacy of the expert report, and could have, as Dr. Jernigan asserts, referred to the failure to file pre-suit notice of the claim." *Id*. at 157-58.

We apply *Jernigan*'s teaching here. Alexander sued Colonnades on March 23, 2015. Colonnades filed its first amended answer on July 30, 2015, and alleged as follows: "Pleading affirmatively, Defendant asserts that Plaintiff's claims should be dismissed in its entirety due to Plaintiff's failure to provide an expert report as required by Chapter 74 of the Texas Civil Practice and Remedies Code." Colonnades filed its motion to dismiss on March 11, 2016 — less than a year after Alexander filed suit. There is no evidence that the parties conducted extensive discovery or completed discovery. The record contains discovery requests propounded by Alexander and directed at Colonnades; but it does not contain any discovery requests from Colonnades. At the motion to dismiss hearing,

Colonnades's attorney stated, "We have only exchanged some discovery;" Alexander did not contradict this statement. No fact or expert witness depositions were taken.

The parties mediated the case before Colonnades filed its motion to dismiss, but Colonnades did not file a summary judgment motion or try to obtain a final judgment and dispose of the case through other means. Colonnades did not file a motion to dismiss and then fail to pursue it. And there is no evidence that Colonnades at any time announced ready for trial. The docket sheet shows trial settings, but trial settings do not equate to an announcement of ready. Colonnades filed a motion in limine, proposed jury charge, exhibit list, and witness list only after it filed its motion to dismiss. *See Seifert v. Price*, No. 05-08-00655-CV, 2008 WL 5341045, at *2 (Tex. App.—Dallas Dec. 23, 2008, pet. denied) ("[S]igning scheduling orders or taking acts preparatory to trial to conform with a trial court's scheduling order does not clearly evince an intent inconsistent with the right to seek dismissal.").

By way of comparison, the defendants in *Seifert* undertook more extensive actions in the trial court than Colonnades did here before filing a motion to dismiss — and these actions still were insufficient to establish waiver. *See id*. at *1-3. In *Seifert*, the plaintiff served his expert report outside the statutory deadline, and defendants filed their motion to dismiss more than two years later to complain about plaintiff's failure to timely file the expert report. *Id*. at *1. The trial court denied defendants' motion, concluding that they waived their right to move for dismissal "by taking 'abundant actions in preparation for trial' without raising a question about the timeliness of the report in the previous two-and-a-half years." *Id*. The trial court focused on the following actions: the defendants (1) served written discovery and responded to written discovery and discovery motions; (2) filed and argued two sets

of special exceptions on these claims; (3) signed multiple scheduling orders; (4) designated multiple medical experts for trial testimony; (5) took five depositions, including that of plaintiff's medical expert who prepared the expert report; (6) passed on six trial settings and agreed to specially set the seventh; (7) filed multiple dispositive motions with no mention of dismissal; and (8) filed a motion to strike plaintiff's expert's trial testimony based on the Robinson/Daubert standard. *Id*.

The court of appeals reversed the trial court's denial of defendants' motion to dismiss. *Id*. at *2-3 (citing *Jernigan*, 111 S.W.3d at 157). The court stated that, "as in *Jernigan*, a considerable amount of time elapsed" before defendants moved to dismiss and that during that time defendants "engaged in discovery, filed a combined traditional/no-evidence motion for summary judgment on other grounds, argued special exceptions, passed trial settings, and designated experts for trial." *Id*. at *2. The court concluded that "none of these actions, singularly or cumulatively, is clearly inconsistent with the intent to rely on their right to seek dismissal." *Id*. The court also concluded that "signing scheduling orders or taking acts preparatory to trial to conform with a trial court's scheduling order does not clearly evince an intent inconsistent with the right to seek dismissal." *Id*.

Based on the record before us, we conclude that Colonnades's actions were not inconsistent with an intent to assert the right to dismissal under section 74.351 and did not waive that right. *See Jernigan*, 111 S.W.3d at 157; *Seifert*, 2008 WL 5341045, at *1-3; *cf*. *Spinks v. Brown*, 211 S.W.3d 374, 378-79 (Tex. App.—San Antonio 2006, no pet.) (finding waiver of the right to seek dismissal by party that (1) fully participated in pretrial discovery; (2) fully participated in a jury trial and an appeal; (3) filed motion to dismiss after reversal on appeal and one month before the start of a second trial; (4) waited 1,400 days before filing the motion to dismiss; and (5) stated during the motion to dismiss hearing that he intentionally chose not to raise

the expert report issue before the first trial); *In re Sheppard*, 197 S.W.3d 798, 801-02 (Tex. App.—El Paso 2006, orig. proceeding) (finding waiver of the right to seek dismissal by party that (1) waited 1,183 days to move for dismissal; (2) extensively participated in and completed discovery; and (3) announced ready for trial). Therefore, the trial did not err by concluding that Colonnades did not waive its right to seek dismissal of the case under section 74.351.

Accordingly, we overrule Alexander's third issue.

CONCLUSION

We affirm the trial court's dismissal order.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Busby and Wise.