

Affirmed and Memorandum Opinion filed September 12, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00883-CV

CAROLYN R. MILTON, Appellant

V.

VINH T. NGUYEN, Appellee

**On Appeal from County Court at Law No. 4
Fort Bend County, Texas
Trial Court Cause No. 15-CCV-054707**

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

Appellant Carolyn R. Milton filed suit against her dentist, appellee Vinh T. Nguyen, D.D.S., alleging claims of “overbilling and harm done as a result of not performing required procedures.” The trial court granted Nguyen’s motion to dismiss because Milton failed to file the statutorily required expert report. We affirm.

I. BACKGROUND

In August 2010, Nguyen provided dental care to Milton. Since that time, Milton, appearing *pro se*, has filed several matters in various forums complaining of the care she received. In January 2011, Milton filed suit against Nguyen in the 268th Judicial District Court of Fort Bend County, Texas, alleging negligence in the provisions of dental care. Milton, however, did not timely serve Nguyen with an expert report as required by section 74.351 of the Texas Civil Practice and Remedies Code, and the trial court, on Nguyen's motion, dismissed Milton's case in October 2011. On appeal, the First Court of Appeals affirmed the judgment. *Milton v. Nguyen*, No. 01-11-00958-CV, 2012 WL 3228835 (Tex. App.—Houston [1st Dist.] Aug. 9, 2012, pet. denied) (mem. op.) (affirming trial court dismissal because plaintiff failed to file statutorily required expert report).

Thereafter, Milton sued the Texas State Dental Board of Examiners in Travis County district court, alleging she suffered “severe financial harm” as a result of the Board's alleged failure to “enforce[e] the laws of Texas.” Milton's complaint appeared to stem from her dissatisfaction with the Board's handling of a complaint she filed against Nguyen. The trial court granted the Board's plea to the jurisdiction based on governmental immunity and dismissed her claims. The appeals court in Austin affirmed the trial court's judgment. *Milton v. Tex. State Dental Bd. Of Examiners*, No. 03-14-00346-CV, 2014 WL 7464137, at *2 (Tex. App.—Austin Dec. 30, 2014, no pet.) (mem. op.) (affirming trial court's dismissal because plaintiff's claims barred by governmental immunity).

This appeal arises from a case Milton filed against Nguyen in September 2014, in the Justice Court of Fort Bend County, Texas, Precinct 4. In Milton's “statement of claim” she alleges “overbilling and harm done as a result of not

performing required procedures.”¹ On January 21, 2015, Nguyen filed a motion to dismiss based on Milton’s failure to timely file the expert report required by section 74.351(a) of the Texas Civil Practice and Remedies Code. The Justice Court granted the motion and dismissed the case on March 5, 2015. Milton appealed the judgment to County Court at Law, No. 4 of Fort Bend County, Texas. Nguyen again filed a motion to dismiss based on Milton’s failure to timely file an expert report. The County Court granted Nguyen’s motion and entered judgment against Milton on October 24, 2016. Milton timely filed this appeal.

II. ISSUES

In Milton’s brief, she provides the following summary of her argument:

Appellant’s case is solely about Defendant’s gross negligence of not being properly educated; qualified; certified; authorized or permitted by the Texas Dental Board to perform or bill for Dental Code procedure D7210; which require the use of “general anesthesia; as shown in *Exhibit G*.”²

Milton identifies five “Issues” as follows:

- Whether Defendant was permitted by the Dental Board to perform or bill for Dental Code D7210; for determining qualifications.
- Whether Defendant completed the required education to perform or bill for Dental Code D7210.
- Whether Defendant[’s] actions were gross negligence; with fore thought of malice to defraud.

¹ Milton also alleged that Nguyen “breached our contractual agreement in which a plaintiff has four years to bring a civil suit.” However, Milton does not assert on appeal that she asserted a breach-of-contract claim or that her claim was not a health care liability claim because the claim is for breach of contract. Thus, we do not address these issues.

² Emphasis in the original.

- Whether Defendant committed malice and fraudulent acts.
- Whether appellant is entitled to be reimbursed her co-pay with interest.

III. ANALYSIS

Milton appears *pro se*. Parties who appear *pro se* are held to the same standards as licensed attorneys, and they must comply with all applicable rules of procedure. *See, e.g., Mansfield State Bank v. Cohn*, 573 S.W.2d 181, 184–85 (Tex. 1978); *Reule v. M & T Mortg.*, 483 S.W.3d 600, 608 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

Milton argues that this case does not present a health care liability claim and, therefore, is not subject to section 74.135’s requirement that she file an expert report. Milton contends “[t]his suit is not about the Medical Liability Practice Act, Chapter 74; because the underlying cause of this matter lies under Chapter 41; which is a deviation from Chapter 74.”

A. Health-Care Liability

1. Chapter 74

Under Chapter 74, 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 healthcare, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of claimant, whether the claimant’s claim or cause of action sounds in tort or contract.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(13). A “health care provider” can be any person licensed, certified, registered, or chartered by the State of Texas to provide

health care, including a dentist. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(12)(A).

In Milton’s live pleading, *i.e.*, her “statement of claims,” she asserts that Nguyen engaged in “overbilling” and that Nguyen failed to perform “required services.” As a licensed dentist, Nguyen is a “health care provider” as that term is defined in the statute. *See id.*

Nguyen argues that Milton’s claims fall within the definition of a health care liability claim and accordingly require expert testimony to support them. Milton alleges, below and on appeal, an overbilling claim, in which she asserts that Nguyen billed her for dental procedures that he did not perform. Her other claim based on alleged harm resulting from Nguyen’s alleged failure to perform required procedures is a claim for lack of treatment or for another claimed departure from accepted standards of medical care or healthcare, which Milton claims resulted in injury her. Thus, the failure-to-perform-procedures claim is a health care liability claim and requires an expert report. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

As to the overbilling claim, the analysis is somewhat closer because this Court has held that some overbilling claims are not health care liability claims. *See Shanti v. Allstate Ins. Co.*, 356 S.W.3d 705 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

“When deciding whether a cause of action is a health care liability claim, we look at the facts underlying the cause of action, not how the cause of action is labeled.” *Ahmadi v. Moss*, No.14-16-00942-CV, ___ S.W.3d ___, 2017 WL 3567781, at *2 (Tex. App.—Houston [14th Dist.] Aug. 17, 2017, no pet. h.) (citing *Yamada v. Friend*, 335 S.W.3d 192, 196 (Tex. 2010)). A plaintiff cannot avoid the requirements of the Texas Medical Liability Act through artful pleading or by

splitting and splicing a health care liability claim into other causes of action with differing standards of care, damages, and procedures. *Yamada*, 335 S.W.3d at 197.

If we determine that the cause of action “is against a physician or health care provider and is based on facts implicating the defendant’s conduct during the course of a plaintiff’s care, treatment, or confinement,” then we must presume that the cause of action is a health care liability claim, which the plaintiff has the burden of rebutting. *See Loaisiga v. Cerda*, 379 S.W.3d 248, 256 (Tex. 2012); *Hopebridge Hosp. Houston, L.L.C. v. Lerma*, No. 14-16-00849-CV, ___ S.W.3d ___, 2017 WL 2125678, at *4 (Tex. App.—Houston [14th Dist.] May 16, 2017, no pet.). Also, “if expert medical or health care testimony is necessary to prove or refute the merits of the claim against a physician or health care provider,” then we must conclude that the cause of action is a health care liability claim. *See Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 182 (Tex. 2012).

Here, in response to Nguyen’s motion to dismiss, Milton argued that this case is “not about a health care liability” and is solely about “over-billing.” Milton further maintained that Nguyen was “not permitted to perform the over-billed specialized procedures that includes anesthesia; essentially deviating from the standard of care.” In Milton’s brief and reply brief on appeal, she continues to argue that this is an “overbilling complaint.” Milton, however, digresses throughout her pleadings, alleging gross negligence, fraud, malice, and evil intent in performing and billing for certain dental procedures. She alleges economic damages for alleged overbilling for services and this injury is the proximate result of Nguyen’s alleged departure from the standard of care. Milton asserts that Nguyen billed her for dental procedures that he did not perform; thus, Milton alleges that Nguyen did not perform procedures Nguyen says he did perform. If true, these alleged facts implicate Nguyen’s conduct during the course of Milton’s treatment. Accordingly, we presume that Milton has

asserted a health care liability claim. *See Loaisiga*, 379 S.W.3d at 256; *Ahmadi*, ___S.W.3d ___, 2017 WL 3567781, at *3–5.

Milton attempts to recast her suit as not involving an alleged deviation from the standard of care and, thus, not involving as a health care liability claim. *See Shanti*, 356 S.W.3d at 713–14. This case is distinguishable from *Shanti* on several grounds. First, Milton is a natural person and a claimant under Chapter 74, assuming that all elements of a health care liability claim are satisfied. *See Tex. R. Civ. P.* 74.001(a)(2). Additionally, the issues on which she bases her claims are not tangential to the rendition of medical services. Milton was a patient of Nguyen’s, and her complaint is that Nguyen failed to perform various procedures during the course of her treatment that he claims he performed. Finally, expert testimony would be needed to prove or refute the merits of Milton’s claim that Nguyen failed to perform these procedures. *See Tex. W. Oaks Hosp.*, 371 S.W.3d at 182; *Tex. Cypress Creek Hosp., L.P. v. Hickman*, 329 S.W.3d 209, 215–216 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

Thus, despite Milton’s assertion of a variety of arguments to support her position, we conclude that Milton asserted a health care liability claim against Nguyen. *See Tex. W. Oaks Hosp.*, 371 S.W.3d at 182; *Ahmadi v. Moss*, ___S.W.3d ___, 2017 WL 3567781, at *2–5; *see also Hickman*, 329 S.W.3d at 216 (plaintiff “may not use artful pleading to avoid chapter 74’s requirements when the essence of the suit is a healthcare liability claim.”)

2. Expert Report

We review a trial court’s decision on a motion to dismiss pursuant to section 74.351 of the Texas Civil Practice and Remedies Code for an abuse of discretion. *Am. Transitional Care Ctrs. 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. *Id.*

The Texas Medical Liability Act requires that a health care liability claimant serve expert reports on each defendant physician or provider within 120 days after filing suit. Tex. Civ. Prac. & Rem. Code § 74.351(a). This requirement is “ ‘a threshold over which a claimant must proceed to continue a [health care liability] lawsuit.’ ” *Garcia v. Gomez*, 319 S.W.3d 638, 640 (Tex. 2010) (quoting *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005) (per curiam)). If no report is timely served, the trial court, on motion, must dismiss the claim and award reasonable attorney’s fees and costs to the affected physician or provider. *See* Tex. Civ. Prac. & Rem. Code § 74.351(b); *Garcia v. Gomez*, 319 S.W.3d 638, 640 (Tex. 2010).

As set forth, *supra*, Milton’s claims are health care liability claims. Pursuant to section 74.351 of the Texas Civil Practice and Remedies Code, Milton was required to produce an expert report. *See* Tex. Civ. Prac. & Rem. Code § 74.351(a). Because Milton failed to timely file the statutorily required expert report, the trial court did not abuse its discretion in granting Nguyen’s motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code § 74.351(b); *Garcia*, 319 S.W.3d at 640. Milton’s challenge to the trial court’s dismissal is overruled.

B. Remaining Claims

In her brief on appeal, Milton attempts to advance other arguments concerning the Patient Protection and Affordable Care Act, the False Claims Act of 1964, and section 41.003 of the Texas Civil Practice and Remedies Code. Before we may address the merits of Milton’s arguments, we must determine if her complaints were preserved for appellate review. Generally, to preserve error, a party must make the trial court aware of the complaints, timely and plainly, and obtain a ruling. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). Where the party has failed to do so, the

complaints are waived. *See Wash. DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 736 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc). Milton did not plead claims under these statutes nor did she otherwise raise these issues concerning the Patient Protection and Affordable Care Act, the False Claims Act of 1964, and section 41.003 of the Texas Civil Practice and Remedies Code in the trial court and, as such, she has waived these complaints. *See Tex. R. App. P. 33.1(a)*; *see also Ad Villarai, LLC, et al. v. Pak*, 519 S.W.3d. 132, 137 (Tex. 2017). Accordingly, Milton’s remaining issues are overruled.

IV. CONCLUSION

Having overruled all of Milton’s issues, we affirm the trial court’s judgment.

/s/ John Donovan
Justice

Panel consists of Justices Chief Justice Frost and Justices Donovan and Wise.