Affirmed and Memorandum Opinion filed June 15, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00472-CV

KAREN A. RITTINGER, Appellant

V.

THE DAVIS CLINIC; ROBERT DAVIS, M.D.; MEMORIAL HERMANN-MEMORIAL CITY MEDICAL CENTER D/B/A MEMORIAL HERMANN; AND UT PHYSICIANS, Appellees

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2018-84266

MEMORANDUM OPINION

Appellant Karen A. Rittinger ("Rittinger") appeals the summary judgment granted in favor of appellee Memorial Hermann-Memorial City Medical Center d/b/a Memorial Hermann ("Memorial Hermann").[1] In one issue with three sub-

[1] While the case style also lists The Davis Clinic; Robert Davis, M.D.; and UT Physicians as appellees, Rittinger complains on appeal of a summary judgment granted solely in favor of Memorial Hermann.

issues, Rittinger argues that the trial court erred by granting Memorial Hermann's motion for summary judgment because: (1) her claims against Memorial Hermann were timely; (2) her claims against Memorial Hermann are not healthcare liability claims subject to the Texas Medical Liability Act ("the TMLA"); and (3) her claims are not based on a violation of Health Insurance Portability and Accountability Act ("HIPAA"), despite being based upon the standard of care provided within HIPPA. We affirm.

I. BACKGROUND

On October 15, 2014, Rittinger underwent a gastric bypass surgery to alleviate the gastroesophageal reflux disease that she had been suffering from for over a decade. The surgery was performed at the Davis Clinic. The night she was discharged, the surgically-created connection between Rittinger's stomach and her small intestine burst, leading to a series of complications. Rittinger was readmitted to Memorial Hermann for emergency surgery on October 18, 2014. Ultimately, as a result of the break, she underwent a second surgery, developed sepsis, was induced into a coma, was placed on life support, was recommended to be taken off life support, eventually woke up after life support was continued, and then contracted gangrene, which tragically necessitated the amputation of both of her legs.

In January 2015, Rittinger's husband sent a release of personal health information ("PHI") to Memorial Hermann. Rittinger claims that the PHI released to her husband was "grossly insufficient," lacking numerous particulars such as operative reports. On July 9, 2015, Rittinger completed another PHI, which Memorial Hermann acknowledged it received; however, the response to the PHI request was incomplete due to an unsigned operative report. On January 30, 2015, Memorial Hermann invoiced Rittinger for medical records. On July 9, 2015, Rittinger completed a PHI for the Memorial City location and outpatient records.

Memorial Hermann acknowledged the PHI and invoiced Rittinger for the records in July of 2015. According to Rittinger, she spent the next year and a half focused on her physical and mental recovery, but her investigation resumed on May 6, 2016, when she called Paul O'Sullivan ("O'Sullivan"), the Chief Executive Officer of Memorial Hermann. However, Sonya Ochoa ("Ochoa"), Memorial Hermann's Medical Services Coordinator, answered the call instead of O'Sullivan. Speaking with Ochoa, Rittinger requested a complete medical record, including the names of the products that were used in or on her body during the October 14, 2014 surgery and the missing, signed operative report. Rittinger also sought an explanation from Ochoa as to why Memorial Hermann failed to comply with her earlier requests for a complete PHI. Ochoa informed Rittinger that Paula Hale ("Hale"), the Director of Medical Records, would reach out to Rittinger.

Rittinger filed two more PHI requests to Memorial Hermann, one for electronic records and one for physical copies. On May 10, 2016, instead of being contacted by Hale, Rittinger was contacted by Shayla Preston ("Preston"), Manager of Patient Relations. Preston informed Rittinger that a Peer Group Team reviewed the hospital medical records and confirmed that the October 18, 2014 operative report was signed within forty-eight hours of the original surgery, even though she had originally been told that the surgical operative report was unsigned. Hale called Rittinger back later the same day to inform her that she needed to submit a new PHI request.

On June 3, 2016, Rittinger received a disk and a hard copy of her medical records, which failed to identify the staplers, staples, and related products used during her surgery. After speaking with numerous individuals at Memorial Hermann, Rittinger was referred to Hannah Butler ("Butler"), a medical record staff member, on June 22, 2016. Butler relayed to Rittinger by telephone that the bar codes and identifying information for the products and tools used during her

surgery were "stored in other places" and that the availability of such information "just depends." Butler then redirected Rittinger to Irene Aguilar ("Aguilar"), the Inpatient Coding Manager for Memorial Hermann, to further discuss the missing information. Rittinger attempted to contact Aguilar multiple times, but she was transferred to Aguilar's voicemail every time. Despite leaving multiple voicemails, Aguilar never returned Rittinger's calls.

Because of the lack of response from Aguilar, Rittinger contacted Hale, who informed her that the request had been sent to Preston for handling, who would call Rittinger back. Several days later, with no call from Preston, Rittinger called Preston's direct number, and left a detailed message requesting information regarding the bar code and identification information for her surgery. Rittinger called Preston and left messages on June 27, June 28, and for days thereafter. She also called the main switchboard on June 30, 2016 and was told to call O'Sullivan. Because O'Sullivan was not available, Ochoa handled the call, and advised Rittinger that someone would call her.

On June 30, 2016, Steven Hartranft ("Hartranft"), Memorial Hermann's Risk Manager, called Rittinger to assist her with obtaining the requested medical information. He told her that the bar codes for the products used in her surgery would not normally be included in the medical records. When Rittinger asserted that other records she obtained from Memorial Hermann had included bar codes, Hartranft assured Rittinger that he would ask around in the billing department for the missing information.

On July 15, 2016, Preston e-mailed Rittinger, advising her that "we are collaborating with the appropriate parties to provide answers" concerning her medical records. Preston estimated that July 19, 2016 was the latest date that Rittinger could expect to receive her requested medical information. However, on July 20, 2016, Preston e-mailed Rittinger again, simply requesting to speak with

Rittinger concerning the "efforts conducted" in pursuing the medical records she requested. Rittinger requested a response as to why they were unable to give her the information she requested. After several more telephone calls and voicemails, Hartranft responded to Rittinger on July 28, 2016, explaining to her that he was working with the billing personnel and that he expected answers by the end of the week. Rittinger sent an e-mail to Hartranft on August 11, 2016 because she had not received any updates or responses. On September 6, 2019, Rittinger e-mailed Ochoa to inform her that Hartranft never responded and that her request for the medical information was still outstanding.

On September 20, 2016, Gail Cline ("Cline"), a Risk Manager for Memorial Hermann, called Rittinger to answer some questions. Cline admitted that a nurse had failed to include all the products used in her original surgery in the Intraoperative Nursing Record. He informed Rittinger that he would conduct some research via the internet on what products were likely used. On September 22, 2016, Cline e-mailed Rittinger and provided a list of products potentially used during the surgery in "as much detail as [Hermann Memorial] is able to provide." However, this list did not include the product serial numbers and bar codes that Rittinger sought.

On February 27, 2017, Rittinger filed a federal lawsuit against Memorial Hermann and several other defendants. In her petition, she alleged that the proximate cause of her injuries was the "negligently and defectively designed staplers" used during her surgery. Also, Rittinger suspected that staples that had been recalled might have been used during the surgery; however, because she still had not received the medical reports and product information she had requested, she did not know which manufacturers specifically to sue, and thus could not properly pursue legal action for her damages. As Rittinger admits on appeal, she "hoped to use [the federal lawsuit] to, inter alia, force Memorial Hermann to

finally turn over the requested information relating to the staples and staple guns." In her lawsuit, Rittinger asserted product liability claims against the presumed manufacturers of the staples and negligence claims against Memorial Hermann for failing to deliver her complete medical records. On February 1, 2018, the federal court dismissed Rittinger's claims against Memorial Hermann for lack of federal subject-matter jurisdiction. *See Rittinger v. Davis Clinic*, No. 4:17-CV-626, 2018 WL 690868, at *2 (S.D. Tex. Feb. 1, 2018) (noting that Rittinger's claims "sound firmly in Texas law and do not turn crucially on the application or interpretation of HIPAA"). On February 1, 2018 and March 21, 2018, the federal district court granted the staple and stapler manufacturers' motions to dismiss, having determined that Rittinger's claims were barred by the statute of limitations. *See Rittinger v. Davis Clinic*, No. 4:17-CV-626, 2018 WL 1470592, at *5 (S.D. Tex. Mar. 23, 2018); *Rittinger v. Davis Clinic*, No. 4:17-CV-626, 2018 WL 690869, at *2 (S.D. Tex. Feb. 1, 2018).

On November 27, 2018, Rittinger filed suit against Memorial Hermann and others in Texas state court. Rittinger argues that only two of the claims in her petition were directed at Memorial Hermann: (1) fraudulent misrepresentation and (2) gross negligence. As to her claim for fraudulent misrepresentation, Rittinger averred that Memorial Hermann made multiple fraudulent statements regarding the availability of her medical records for the "sole purpose of impeding Ms. Rittinger's ability to obtain her PHI." Rittinger's claim for gross negligence alleged that Memorial Hermann was grossly negligent by withholding her PHI in violation of HIPAA.

On April 2, 2019, Memorial Hermann filed a motion for summary judgment on two grounds: (1) Rittinger's claims were barred by the statute of limitations because her claims are healthcare liability claims; and (2) HIPAA does not provide for a private cause of action to individuals. Rittinger filed a response to the

summary judgment on May 15, 2019.

On May 17, 2019, the trial court granted Memorial Hermann's motion for summary judgment, and it also granted motions for summary judgment filed by Memorial Hermann's co-defendants, UT Physicians and The Davis Clinic, thus dismissing Rittinger's entire suit. This appeal timely followed.

II. ANALYSIS

Rittinger argues that the trial court erred in granting Memorial Hermann's motion for summary judgment. More specifically, Rittinger argues that her claims: (1) were timely filed based on the statute of limitations for fraud and negligence; (2) are not healthcare liability claims; and (3) are not based on the violation of HIPAA; instead, HIPAA merely provides the standard of care.

A. STANDARD OF REVIEW & APPLICABLE LAW

We review the granting of a traditional motion for summary judgment de novo. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). In a traditional motion for summary judgment, the movant has the burden to show both that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Provident Life & Acc. Ins. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). Once the movant meets its burden, the burden shifts to the non-movant to present evidence raising a genuine issue of material fact; if the non-movant raises a fact issue, summary judgment is not appropriate. *See Ayeni v. State*, 440 S.W.3d 707, 709 (Tex. App.—Austin 2013, no pet.). All evidence favorable to the non-movant must be taken as true, and all reasonable doubts must be resolved in non-movant's favor. *See Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998). "Summary judgment is proper if the defendant disproves at least one element of each of the plaintiff's claims, or establishes all elements of an affirmative defense to each claim." *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *see Lujan v. Navistar Fin. Corp.*,

433 S.W.3d 699, 704 (Tex. App.—Houston [1st Dist.] 2014, no pet.). When a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious. *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989).

Whether a claim is a health care liability claim depends on the underlying nature of the claim being made. *See Garland Cmty. Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004); *TTHR, L.P. v. Coffman*, 338 S.W.3d 103, 107 (Tex. App.—Fort Worth 2011, no pet.). A party may not avoid the requirements of the TMLA through artful pleading. *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 854 (Tex. 2005); *Garland Cmty. Hosp.*, 156 S.W.3d at 543.

The TMLA, which is codified in chapter 74 of the Texas Civil Practice and Remedies Code, defines a healthcare 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 or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13); *Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 179–80 (Tex. 2012) (noting that a healthcare liability claim has three basic elements: "(1) a physician or health care provider must be a defendant; (2) the claim or claims at issue must concern 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 must proximately cause the injury to the claimant"). "'Professional or administrative services' is defined as 'those duties or services that a physician or health care provider is required to

provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs.'" *Coffman*, 338 S.W.3d at 107 (quoting Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(24).

A cause of action alleges a departure from accepted standards of medical care or health care if the act or omission complained of is an inseparable part of the rendition of medical services. *Diversicare*, 185 S.W.3d at 848. In determining whether a cause of action is an inseparable part of the rendition of medical services, the necessity of expert testimony from a medical professional to prove the claim is an important factor. *See id.* Whether a claim constitutes a healthcare liability claim is a question of law we review de novo. *See Williams*, 371 S.W.3d at 177.

B. APPLICATION

1. HEALTHCARE LIABILITY CLAIMS

In its first ground for summary judgment, Memorial Hermann argued that all of Rittinger's claims were barred by the statute of limitations because they were healthcare liability claims and should have been filed within two years. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.251(a). Therefore, we first address whether Rittinger's claims are healthcare liability claims.

As to the first element for a healthcare liability claim, there is no dispute that Memorial Hermann is a healthcare provider. *See Williams*, 371 S.W.3d at 179. However, Rittinger argues that her claims do not meet the second and third elements. *See id.* As to the second element, Rittinger asserts that her claims against Memorial Hermann do not allege a departure from accepted standards of medical care. *See id.* Additionally, under the third element, Rittinger argues that she has not asserted healthcare liability claims because she has asserted only economic damages in her claims against Memorial Hermann. *See id.*

Regarding the second element of a healthcare liability claim, Rittinger repeatedly maintains in her appellate briefs that her claims are not "medical malpractice" claims, and that her claims do not allege a departure from "accepted standards of medical care or health care or safety." However, Rittinger's focus on "medical malpractice" and "standards of medical care or health care or safety" overlooks a crucial part of the statute. Looking at the statute in its entirety, we must decide whether Rittinger's claims against Memorial Hermann concern "the 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. Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13) (emphasis added); *see Coffman*, 338 S.W.3d at 109.

As the Texas Supreme Court has observed, "[t]he maintenance of accurate medical records" falls within the definition of professional and administrative services related to healthcare. *Baylor Scott & White, Hillcrest Med. Ctr. v. Weems*, 575 S.W.3d 357, 364 (Tex. 2019); *see Coffman*, 338 S.W.3d at 109 ("There can be no 'administrative service' more directly related to the rendition of health care than the memorialization of that care."); *see also Fort Duncan Med. Ctr., L.P. v. Martin*, No. 04-11-00897-CV, 2012 WL 3104527, at *3 (Tex. App.—San Antonio Aug. 1, 2012, no pet.) (mem. op.). ("The preparation of medical records is an 'administrative service' directly related to the rendition of health care and a memorialization of that care."). The duty to provide medical records to the patients cannot be separated from the duty to maintain them. *Coffman*, 338 S.W.3d at 109. Indeed, healthcare providers are required to disclose healthcare information when they receive a written, authorized request. *See* Tex. Health & Safety Code Ann. § 241.154; *see also id.* § 241.152. The Department of State Health Services may assess administrative penalties against a hospital that violates this requirement. *See id.* § 241.059. Therefore, we conclude that Rittinger's claims concern the departure

from accepted standards of professional and administrative services directly related to health care under the TMLA. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(24) (defining "professional administrative services" as "duties or services that a physician or health care provider is required to provide as a condition of maintaining the physician's or health care provider's license, accreditation status, or certification to participate in state or federal health care programs."); *Coffman*, 338 S.W.3d at 109; *see also McAllen Hosps., L.P. v. Gomez*, No. 13-12-00421-CV, 2013 WL 784688, at *3 (Tex. App.—Corpus Christi–Edinburg Feb. 28, 2013, no pet.) (mem. op.) (concluding that the plaintiff's claims concerning hospital billing constituted healthcare liability claims because the complained-of service was one that hospitals are required to provide by law and penalties could be assessed against hospitals for failing to comply).

Furthermore, Memorial Hermann demonstrated that the conduct Rittinger complains of in her gross negligence and fraudulent misrepresentation claims "proximately result[ed] in [her] injur[ies]." More specifically, Rittinger asserts that Memorial Hermann's actions ultimately resulted in Rittinger's healthcare liability claims against other parties being dismissed due to the statute of limitations, which caused her economic damage. Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13); *see Rubio*, 185 S.W.3d at 848. Thus, according to Rittinger, her claims against Memorial Hermann are not healthcare liability claims because she alleged only nonphysical injuries. However, cases that only allege nonphysical injuries can still fall under the TMLA. *See Coffman*, 338 S.W.3d at 109, 111 (collecting cases and refusing "to add the word 'physical' to the injury requirement of the TMLA.").

Additionally, we note that proximate cause has two components: (1) cause-in-fact and (2) foreseeability. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109, 113 (Tex. 2013); *see Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001) (noting that there may be more than one act or omission that is

the proximate cause of an injury); *Rodriguez v. Moerbe*, 963 S.W.2d 808, 819 (Tex. App.—San Antonio 1998, pet. denied) ("Proximate cause does not necessarily mean the last cause, or the act immediately preceding the injury."). According to Rittinger, Memorial Hermann is the but-for cause of her economic injuries and her injury was foreseeable. *See Goss*, 392 S.W.3d at 113. Thus, her injuries, as alleged, were proximately caused by Memorial Hermann's alleged conduct. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13).

Having analyzed all three elements, we conclude that Rittinger's claims against Memorial Hermann are healthcare liability claims. *See id.*; *Williams*, 371 S.W.3d at 179. We next address whether her claims were timely filed.

2. TIMELINESS

Healthcare liability claims are subject to a two-year statute of limitations from the date of the breach, tort, or date the hospitalization for the health care or medical treatment is completed, unless the party is a minor under the age of 12. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.251(a). Rittinger first received medical records in January 2015, which she realized were "grossly insufficient." Accordingly, Rittinger had until January 2017 to file her negligence claim; however, she did not do so. Her negligence claim is therefore barred by the applicable statute of limitations.[2] *See id.* Likewise, the allegedly fraudulent statements made by Memorial Hermann occurred on January 30, 2015 and June

[2] Rittinger concedes that her negligence claim is subject to a two-year statute of limitations, but she contends that Memorial Hermann's failure to deliver complete medical records constitute a continuing tort. And because Memorial Hermann still has not given her the medical information she seeks, she argues that "no limitations period has yet been commenced." However, with a few rare exceptions, the Texas Supreme Court has concluded that most healthcare liability claims must be filed within the two-year statute of limitations, regardless of when the injury was discovered. *See Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292, 298 n.28 (Tex. 2010); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.251(a) (requiring healthcare liability claims to be filed within two years of the date the breach or tort occurred).

22, 2016, in addition to other potential, but unspecified, dates. Assuming, arguendo, that the complained of misrepresentations took place in June 2016, Rittinger was still required to file her fraudulent misrepresentation claim by June 2018. However, Rittinger did not file the present suit until November 2018. Therefore, her fraudulent misrepresentation claim is also barred by the statute of limitations.[3] *See id.*

We further note that Texas Civil Practice & Remedies Code § 16.064 provides that if, for lack of jurisdiction, an action filed in one court is dismissed or the judgment is set aside or annulled in a direct proceeding, the statute of limitations will be suspended for the period until it is refiled if the case is refiled in a court of proper jurisdiction within sixty days after the dismissal or other disposition becomes final. *See id.* § 16.064. Rittinger's federal lawsuit was dismissed for lack of jurisdiction in February 2018, and her subsequent state court lawsuit was filed on November 27, 2018, approximately nine months after dismissal of the federal court action. Therefore, we conclude that the statute of limitations was not suspended and that Rittinger's claims against Memorial Hermann are untimely.

Because we have concluded that Rittinger's claims are healthcare liability claims and that they were untimely filed, the trial court did not err by granting Memorial Hermann's motion for summary judgment. *See* Tex. R. Civ. P. 166a(c); *Knott*, 128 S.W.3d at 216. Accordingly, we do not need to address Rittinger's third sub-issue concerning whether HIPAA provides private causes of action. *See* Tex. R. App. P. 47.1; *Carr*, 776 S.W.2d at 569. We overrule Rittinger's sole issue.

---

[3] Rittinger asserts that her fraudulent misrepresentation claims were subject to a four-year statute of limitations. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(4). However, we concluded that her claims are healthcare liability claims, and healthcare liability claims are subject to the two-year statute of limitations with few exceptions. *See id.* Thus, her fraudulent misrepresentation claims were subject to the two-year statute of limitations. *See id.*

III. CONCLUSION

We affirm the trial court's order granting summary judgment.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Zimmerer, Poissant, and Wilson.