BUSH v. PARKUS

JOSHUA BUSH, Appellant,
v.
DAVID PARKUS and CHRISTUS HEALTH SOUTHEAST TEXAS D/B/A CHRISTUS HOSPITAL ST. ELIZABETH, Appellees.

No. 09-09-00060-CV.

Court of Appeals of Texas, Ninth District, Beaumont.

Submitted on January 25, 2010.

Opinion Delivered April 1, 2010.

Before GAULTNEY, KREGER, and HORTON, JJ.

MEMORANDUM OPINION

CHARLES KREGER, Justice.

Plaintiff, Joshua Bush, appeals the trial court's orders dismissing the underlying lawsuit as to both defendants, David Parkus, M.D. and Christus Health Southeast Texas d/b/a Christus Hospital St. Elizabeth ("St. Elizabeth"), as a result of Bush's failure to timely file an expert report as required by Chapter 74 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-.507 (Vernon 2005 & Supp. 2009). Because we find that Bush's claims are health care liability claims we affirm the trial court's orders.

Pursuant to a search warrant, Bush was transported by the Port Arthur Police Department to St. Elizabeth's emergency room to remove a bullet from his forehead. According to the petition, Bush told the emergency room physician, Dr. Parkus, to refrain from touching him and verbally expressed his lack of consent to the removal procedure. At the hearing on the motion to dismiss, St. Elizabeth's attorney explained that Dr. Parkus made an incision in Bush's forehead in an attempt to remove the bullet. After making the incision, Dr. Parkus determined that the bullet had become lodged in Bush's forehead and bone had started growing around the bullet. At that point, Dr. Parkus stitched up the incision and stated that he could not remove the bullet. Subsequently, Bush sued Dr. Parkus and St. Elizabeth Hospital for medical battery and intentional infliction of emotional distress.

When Bush failed to file an expert report, Dr. Parkus and St. Elizabeth Hospital each filed a motion to dismiss the suit pursuant to section 74.351(a) and (b) of the Texas Civil Practice and Remedies Code. *See id.* § 74.351(a),(b). After a hearing, the trial court dismissed the suit. This appeal followed. In a single issue Bush asserts that the trial court erred when it dismissed his suit and awarded attorneys' fees to defendants. He contends his claims do not fall under Chapter 74.

DISMISSAL UNDER CHAPTER 74

Though we generally review a trial court's ruling on a motion to dismiss for an abuse of discretion, the determination of whether a claim is a health care liability claim involves an interpretation of Chapter 74 and is reviewed de novo. *See Med. Hosp. of Buna Tex., Inc. v. Wheatley,* 287 S.W.3d 286, 290 (Tex. App.-Beaumont 2009, pet. filed). Chapter 74 sets forth the Medical Liability Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-.507. The Act provides that unless a plaintiff files an expert report within 120 days after the filing of health care liability claims, those claims are subject to dismissal with prejudice. *See id.* § 74.351(a),(b). The Act provides the following definition of a "health care liability claim":

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(13) (Vernon 2005); *see also Diversicare Gen. Partner, Inc. v. Rubio,* 185 S.W.3d 842, 848 (Tex. 2003) ("A cause of action . . . is a health care liability claim . . . if it is based on a claimed departure from an accepted standard of medical care, health care, . . . [regardless of] whether the action sounds in tort or contract."). 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(10); *see generally Diversicare,* 185 S.W.3d at 847. "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 Bush's claims are health care liability claims we must focus on the essence of the claims and consider the alleged wrongful conduct and the duties allegedly breached, rather than the injuries allegedly suffered. *Id.* at 851. A health care liability claim may not be recast as another cause of action to avoid the requirements of the Act. *Id.* Therefore, we are not bound by Bush's characterization of his claims. *Id.*

In 2005, the Texas Supreme Court held that a battery claim may constitute a health care liability claim under the prior version of the Act.[1] *See Murphy v. Russell,* 167 S.W.3d 835 (Tex. 2005). In *Murphy,* a hospital patient filed suit against an anesthesiologist, in part for battery, after the anesthesiologist administered a general anesthetic, despite plaintiff's specific request for only a local anesthetic and her express instruction that no general anesthetic be administered during the procedure. *Id.* at 836-37. In addressing whether plaintiff's battery claim (based on lack of consent) constituted a health care liability claim, the Court stated as follows:

Medical treatment will not constitute a battery unless it is provided without the patient's consent. But failure to obtain consent does not automatically result in liability. There may be reasons for providing treatment without specific consent that do not breach any applicable standard of care. The existence or nonexistence of such reasons is necessarily the subject of expert testimony.

. . . .

[Plaintiff] cannot circumvent an expert examination of her claims [as required by the Act] simply by asserting that she did not consent to a general anesthetic and that the physician admitted he failed to follow her wishes regarding anesthesia . . . . *Id.* at 838-39 (footnote omitted). Likewise, the fact that Dr. Parkus performed the procedure without Bush's consent does not remove Bush's claims from the scope of the Act.

The *Murphy* Court emphasized that the expert report requirement is a *threshold* over which a claimant must proceed to continue a lawsuit, not a requirement for recovery. *Id.* at 838. The Court stated as follows:

[T]he legislature envisioned that discovery and the ultimate determination of what issues are submitted to the factfinder should not go forward unless at least one expert has examined the case and opined as to the applicable standard of care, that it was breached, and that there is

a causal relationship between the failure to meet the standard of care and the injury, harm, or damages claimed.
Id. The court further stated, "The fact that in the final analysis, expert testimony may not be necessary to support a verdict does not mean the claim is not a health care liability claim." *Id.*

As in *Murphy,* the San Antonio Court of Appeals in *Mata v. Calixto-Lopez,* No. 04-06-00540-CV, 2007 WL 3003139, at **1-2 (Tex. App.-San Antonio Oct. 17, 2007, no pet.) held that plaintiff's claims for assault and battery were health care liability claims. Following his arrest for driving while intoxicated and before being taken to the county jail, Mata was transported to a hospital to obtain medical clearance. *Id.* at *1. In his suit against the treating physician and hospital, Mata alleged various claims including assault and battery. *Id.* In determining whether his claims were health care liability claims, the San Antonio Court of Appeals stated:

[T]he actions of taking the urine and blood samples were an inseparable part of the rendition of medical services. The samples were needed for testing so that a diagnosis could be made regarding Mata's altered condition and complaints of abdominal pain and nausea. Expert testimony would be necessary to establish the standard of care because a layman does not have the experience to know when and how urine and blood samples can be forcibly taken from a patient or what an ordinarily prudent physician or health care provider would do under the circumstances.
Id. at * 2; *see also Brzozowski v. Se.Baptist Hosp.,* No. 04-07-00031-CV, 2007 WL 3003141, **1-2 (Tex. App.-San Antonio, Oct. 17, 2007, pet. denied) (Hospital's provision of medical services without plaintiff's consent, after plaintiff was brought to hospital by police following automobile accident, was an inseparable part of the rendition of medical services.).

Bush's claims for medical battery and intentional infliction of emotional distress arise from the medical procedure that Dr. Parkus performed, without the specific consent of Bush, in St. Elizabeth's emergency room. The actions taken by Dr. Parkus were an inseparable part of the rendition of medical care. *See Mata,* 2007 WL 3003139, at *2; *Brzozowski,* 2007 WL 3003141, at **1-2; *Groomes v. USH of Timberlawn, Inc.,* 170 S.W.3d 802, 805-06 (Tex. App.-Dallas 2005, no pet.). It is not disputed that Dr. Parkus performed the procedure in compliance with a search warrant requiring the bullet to be removed from Bush's forehead for use in criminal proceedings. There may be reasons for providing medical care without specific consent that do not breach any applicable standard of care.

Bush argues that, because he did not consent to the removal procedure, no physician-patient relationship existed between Bush and Dr. Parkus, and, therefore, Dr. Parkus had no duty to exercise professional medical care in performing the procedure. However, whether a patient-physician relationship exists is not the standard by which the trial court determines whether a claim is a health care liability claim. *Smalling v. Gardner,* 203 S.W.3d 354, 363 (Tex. App.-Houston [14th Dist.] 2005, pet. denied); *see generally* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(13); *Diversicare,* 185 S.W.3d at 847-48.

While a physician-patient relationship is generally necessary to establish liability for medical malpractice, it does not affect the threshold question of whether the plaintiff asserts a health care liability claim and must comply with the filing requirements under the Act. *See Smalling,* 203 S.W.3d at 363; *cf. Garland Cmty. Hosp. v. Rose,* 156 S.W.3d 541, 544-47 (Tex. 2004) (Because plaintiff's claims involved claimed departures from accepted standards of health care, suit against hospital for negligent credentialing of the doctor was a health care liability claim within the scope of the Act even though the credentialing activities began before plaintiff was a patient.); *but cf. Lopez v. Aziz,* 852 S.W.2d 303, 305 (Tex. App.-San Antonio 1993, no

writ) (In addressing the elements of liability under former version of the Act, the court stated that former "article 4590i of the revised civil statutes implicitly recognize[d] that a physician-patient relationship must exist before a health care liability claim may be asserted.").

Because we conclude the claims asserted by Bush are health care liability claims and no expert report was timely filed, we find the dismissal of the suit and the award of attorneys' fees to defendants were proper. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b)(1), (2). We affirm the orders of the trial court dismissing the suit for plaintiff's failure to comply with the Act.