Affirmed and Majority and Concurring Memorandum Opinions filed August 31, 2023

In The

Fourteenth Court of Appeals

NO. 14-22-00711-CV

WALTER HANNAH, Appellant

V.

LATRICIA THOMPSON, MD AND HOUSTON METHODIST WILLOWBROOK HOSPITAL, Appellees

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2021-54516

MAJORITY MEMORANDUM OPINION

Appellant Walter Hannah sued appellees Latricia Thompson, MD and Houston Methodist Willowbrook Hospital for a procedure Hannah alleged was negligently performed by Thompson, which resulted in Kiesha Ann Hannah's death. Appellees moved for summary judgment arguing that Hannah's health care liability claim is barred by the two-year statute of limitations. *See* Tex. Civ. Prac. & Rem. Code § 74.251(a). The trial court rendered final summary judgment and ordered that

Hannah take nothing against appellees. We affirm.

Background

On June 25, 2019, Thompson performed a routine robotic laparoscopic hysterectomy on Kiesha. According to Hannah, Thompson negligently cut Kiesha's aorta, which resulted in her death. On August 27, 2021, Hannah, Kiesha's surviving spouse, filed this wrongful death and survival action alleging health care provider negligence by appellees. Hannah attached Dr. Maria Pimentel's report to his original petition. Dr. Pimentel's report stated that she was retained as a medical expert to determine if "Thompson has deviated from the standard of care in this matter." According to Dr. Pimentel, Kiesha "was not a good surgical candidate for a robotic/laparoscopic surgery."

On March 11, 2021—more than sixty days before filing suit on August 27, 2021—Hannah provided presuit notice of claim to appellees by certified mail, return receipt requested, accompanied by an authorization for the release of Kiesha's health care information, both of which are required by the Texas Medical Liability Act (TMLA). After filing an answer to the lawsuit on November 5, 2021, appellees filed their motion for traditional summary judgment on February 7, 2022 claiming Hannah's suit was time-barred. Appellees alleged that Hannah's medical authorization form was deficient, and this deficiency deprived Hannah of the extended filing period.

On July 4, 2022, Hannah filed a response to appellees' summary judgment motion. He asserted that his medical authorization form "substantially complied" with section 74.052 and did not prevent appellees from obtaining Kiesha's medical records. Tex. Civ. Prac. & Rem. Code § 74.052. After a hearing, the trial court rendered summary judgment in favor of appellees on the ground that Hannah's claim was barred by limitations. This appeal followed.

Standard of Review

We review de novo the trial court's ruling on a motion for summary judgment. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 908 (Tex. App.—Houston [14th Dist.] 2009, no pet.). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and resolve any doubts in the nonmovant's favor. *Dorsett*, 164 S.W.3d at 661; *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).

When a defendant moves for traditional summary judgment on an affirmative defense, such as the statute of limitations, it must conclusively establish all elements of its defense, leaving no issues of material fact. Tex. R. Civ. P. 166a(c); *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). If the movant meets that burden, the burden shifts to the nonmovant to present evidence raising a fact issue, but the burden does not shift if the movant does not satisfy its initial burden. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014).

In a traditional motion for summary judgment, the motion must state the specific grounds relied upon for summary judgment. Tex. R. Civ. P. 166a(c); *Dorsett*, 164 S.W.3d at 661. Summary judgment motions must stand or fall on their own merits, and the nonmovant has no burden unless the movant conclusively establishes its cause of action or defense. *Id.* at 511–12. Likewise, in our review, we are restricted to considering the arguments the nonmovant presented to the trial court in its written motion or response. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993).

Governing Law

The statute of limitations in health care liability cases commences from the occurrence of the breach or tort, the last date of the relevant course of treatment, or the last date of the relevant hospitalization. Tex. Civ. Prac. & Rem. Code § 74.251; *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). A plaintiff, however, may obtain a seventy-five-day tolling period by complying with certain statutory notice requirements. *See* Tex. Civ. Prac. & Rem. Code § 74.051(a), (c).

To allow a defendant physician or health care provider in a health care liability case to obtain medical information from health care providers, the TMLA requires plaintiffs to accompany their mandatory presuit notice of their claim with a medical authorization for the release of the claimant's medical records to each defendant against whom a claim is made. *Id.* at § 74.051(a). If the plaintiff provides both the notice and medical authorization under section 74.051, the two-year limitations period is tolled for a period of seventy-five days. *Id.* § 74.051(a), (c). "[F]or the statute of limitations to be tolled in a health care liability claim pursuant to Chapter 74, a plaintiff must provide both the statutorily required notice and the statutorily required authorization form." *Carreras v. Marroquin*, 339 S.W.3d 68, 74 (Tex. 2011).

Discussion

In his sole issue on appeal, Hannah challenges the trial court's final summary judgment. Specifically, Hannah argues that notice "sent by the *Hunter v. Thompson* plaintiffs" applies "to all parties and potential parties" and tolled the two-year statute of limitations for seventy-five days in the instant suit.[1] Appellees contend that

[1] Kiesha's parents, Michael and Gloria Hunter, and adult children from a prior marriage, Mylon Walker IV, Zachary Elijah Walker, and Micah Izaiha Walker, filed suit against appellees on June 11, 2021 in the 334th Judicial District of Harris County. These individuals are not parties to the instant suit, and their notice and medical authorization form is not part of this appellate record. *See Smith v. Smith*, 541 S.W.3d 251, 256 (Tex. App—Houston [14th Dist. 2017, no pet.)

Hannah failed to preserve this "new argument" made on appeal because he never presented the argument to the trial court. We will first analyze whether appellees conclusively established each element of their statute of limitations defense. We will then turn to the question of whether Hannah preserved his sole issue on appeal.

Statute of Limitations. Hannah does not dispute that his health care liability claim is governed by section 75.241 of the TMLA, which provides for a two-year statute of limitations period, commencing from (1) the occurrence of the breach or tort, (2) the last date of the relevant course of treatment, or (3) the last date of the relevant hospitalization. Tex. Civ. Prac. & Rem. Code § 74.251(a); *Mitchell v. Methodist Hosp.*, 376 S.W.3d 833, 835 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

Here, the date of appellees' alleged breach is ascertainable. In his petition, Hannah alleges that his cause of action accrued on June 25, 2019—the date that Thompson performed a robotic laparoscopic hysterectomy, which resulted in Kiesha's death. Hannah filed suit on August 27, 2021, more than two years after the breach. Therefore, appellees conclusively established that Hannah's claim is barred by section 74.251, unless the running of limitations was tolled by some other provision of the TMLA.

Limitations Was Not Tolled Under Section 74.051. It is undisputed that Hannah provided the notice and medical authorization form to appellees on March 11, 2021. If Hannah sent proper notice of his claim, he stopped the running of the two-year limitations period for seventy-five days, making his August 27, 2021 suit timely. For the reasons explained below, we conclude that the statute of limitations was not tolled because Hannah's medical authorization form omitted statutorily

(providing that an appellate court cannot consider documents that are not part of the record).

required information.

In section 74.052(c), the Legislature directed the use of a specific form for authorizing health care providers to both obtain and disclose protected health information for the purpose of investigating, evaluating, and defending against health care liability claims. Tex. Civ. Prac. & Rem. Code § 74.052(c) (providing that medical authorization "shall be" in given form and then setting forth form beginning with "I ____, (name of patient or authorized representative), hereby authorize ____ (name of physician or other health care provider to whom the notice of health care claim is directed) to obtain and disclose (within the parameters set out below) the protected health information described below"); *see also Myles v. St. Luke's Episcopal Hosp.*, 468 S.W.3d 207, 209 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Mitchell v. Methodist Hosp.*, 376 S.W.3d 833, 835 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (holding that because plaintiffs' medical authorization form "neglected to comply with both the treating-physicians-disclosure requirement and the authorization-to-obtain-records requirement," presuit notice was insufficient to toll limitations)).

Hannah did use the section 74.052(c) authorization form and identified Thompson as a treating physician and Houston Methodist as a health care provider. However, Hannah's medical authorization failed to include any other health care providers who "examined, evaluated, or treated [Kiesha] during a period commencing five years prior to the incident made the basis" of the claim. *See* Tex. Civ. Prac. & Rem. Code § 74.052(c); *see also Nicholson v. Shinn*, No. 01-07-00973-CV, 2009 WL 3152111, at *5 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, no pet.) (mem. op.) (observing that section 74.052 requires such information).

Here, Hannah concedes that the medical authorization form he provided appellees is "lacking information" but disputes that this omission is important to our

determination of whether the seventy-five-day tolling provision applies because appellees "had the requisite information about [Kiesha]'s medical history" several months prior to the date that Hannah filed his lawsuit. Relying on *Borowski*, he argues that substantial compliance with the notice requirement is sufficient to toll limitations. *Borowski v. Ayers*, 524 S.W.3d 292, 299–303 (Tex. App.—Waco 2016, pet denied).

The plaintiffs in *Borowski* sent notice of their claim to defendants and provided the required authorization form but failed to list the name and current address of any health care provider who examined, evaluated, or treated the patient during the five years before the incident that was the basis of the notice of health care claim. *Id.* at 301. The Waco Court of Appeals held that the authorization:

> did not substantially comply with sections 74.051 and 74.052 . . . and that failing to list any of the names and addresses of a patient's treating physicians or health care providers during the five years before the incident made the basis of the notice of health care claim seriously hinders the statutory design to enhance pre-suit investigation, negotiation, and settlement.

Id. at 301–03 (citing *Nicholson*, 2009 WL 3152111, at *5–6 (concluding that the plaintiff failed to substantially comply with sections 74.051 and 74.052 with her two authorization forms because she overlooked that the required authorization must include a form authorizing the physician or other health care provider "to obtain and disclose . . . the protected health information" and a form for the patient to identify her treating physicians for the past five years); *Mitchell*, 376 S.W.3d at 838 ("Like the *Nicholson* claimant, the [plaintiffs] neglected to comply with both the treating-physicians-disclosure requirement and the authorization-to-obtain-records requirement; therefore, their medical authorization form does not comport with the Legislature's stated intent of encouraging presuit investigation, negotiation, and settlement."); *Brannan v. Toland*, No. 01-13-00051-CV, 2013 WL 4004472, at *2–

3 (Tex. App.—Houston [1st Dist.] Aug. 6, 2013, pet. denied) (mem. op.) (concluding the form did not list any treating physicians for the five years preceding the claim and did not authorize the defendants to obtain medical records from those providers, as required by section 74.052, the plaintiffs failed to give proper notice under sections 74.051 and 74.052, and the statute of limitations was not tolled under section 74.051); *Myles*, 468 S.W.3d at 210 (concluding that the plaintiff's authorization form failed to substantially comply with sections 74.051 and 74.052)).

Like the plaintiffs in *Borowski*, *Nicholson*, *Mitchell*, *Brannan*, and *Myles*, Hannah's medical authorization form did not substantially comply with sections 74.051 and 74.052 because it failed to list any of the names and addresses of Kiesha's treating physicians or health care providers during the five years before the incident made the basis of the notice of health care claim. *See* Tex. Civ. Prac. & Rem. Code §§ 74.051–.052. Though Hannah contends that his medical authorization substantially complied with sections 74.051 and 74.052, "substantial compliance" does not permit a party to ignore statutory requirements. *Methodist Hosps. of Dallas v. Mid–Century Ins. Co. of Tex.*, 259 S.W.3d 358, 360 (Tex. App.—Dallas 2008, no pet.). The courts possess no legislative powers; therefore, the courts cannot excuse a plaintiff's non-compliance with statutory requirements merely because a defendant, despite a plaintiff's noncompliance, is able to accomplish some of the Legislature's purpose in imposing the statutory requirements. *Borowski*, 524 S.W.3d at 305.

As discussed above, we conclude that an essential requirement of sections 74.051 and 74.052 is listing in the authorization form the name and current address of any health care provider who examined, evaluated, or treated the patient during the five years before the incident that was the basis of the notice. Because Hannah failed to do so, the medical authorization form he provided did not toll the statute of

limitations. *Walthour v. Advanced Dermatology*, No. 14-17-00332-CV, 2018 WL 1725904, at *3 (Tex. App.—Houston [14th Dist.] Apr. 10, 2018, no pet.) (mem. op.) (providing that "[a] medical authorization form that does not contain section 74.052's required information does not toll the statute of limitations when the missing information 'interferes with the statutory design to enhance the opportunity for presuit investigation, negotiation, and settlement.'") (quoting *Mitchell*, 376 S.W.3d at 837). Accordingly, we conclude that Hannah's presuit notice was insufficient to toll limitations.

Error Preservation. As discussed above, Hannah suggests that the presuit notice sent by different plaintiffs in a separate wrongful death and survival action related to Kiesha was sufficient to toll limitations in this case.

To preserve a complaint for appellate review the record must show that (1) the complaint was made to the trial court by a timely request, objection, or motion that: (A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and (B) complied with the requirements of the Texas Rules of Evidence or the Texas Rules of Civil or Appellate Procedure; and (2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal. Tex. R. App. P. 33.1(a).

Hannah failed to raise his argument regarding the *Hunter* notice and medical authorization form in the trial court; therefore, he cannot raise this issue for the first time on appeal. We conclude that Hannah waived his sole issue on appeal by failing to preserve it in the trial court. *See In re E.W.*, No. 14-19-00666-CV, 2020 WL 742327, at *13 (Tex. App.—Houston [14th Dist.] Feb. 13, 2020, pet. denied) (mem. op.).

Accordingly, we overrule Hannah's sole issue on appeal.

Conclusion

We affirm the trial court's judgment.

/s/ Frances Bourliot
Justice

Panel consists of Justices Wise, Bourliot, and Spain. (Spain, J., concurring).