Opinion issued February 17, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-07-00649-CV

MARK ANTHONY HEGWOOD, INDIVIDUALLY, AS SURVIVING PARENT OF XAVIER ALEXANDER HEGWOOD, AS NEXT FRIEND OF KAMYRA FAITH HEGWOOD, AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF XAVIER ALEXANDER HEGWOOD, Appellant

V.

AMERICAN HABILITATION SERVICES, INC. D/B/A THOMAS CARE CENTER, Appellee

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On Appeal from the 129th District Court
Harris County, Texas
Trial Court Case No. 2005-35383-A

MEMORANDUM OPINION

Appellant, Mark Anthony Hegwood, appeals from the dismissal of his wrongful-death and survival causes of action against appellee, American

Habilitation Services, Inc. d/b/a Thomas Care Center, for failing to file a preliminary expert report in a health-care liability claim.[1] Hegwood sued American Habilitation over his son Xavier's death while Xavier was a patient in American Habilitation's care facility. Hegwood sued in his capacity as Xavier's father, as surviving parent of Xavier, as next friend of Xavier's sister, Kamyra, and as the personal representative of Xavier's estate.[2]

Hegwood's original suit was filed on June 10, 2005 in the 333rd District Court of Harris County. In its answer, American Habilitation claimed that Hegwood had failed to file a preliminary expert report as required by former Civil Practice and Remedies Code section 74.351(a). Rachel Ford, Xavier's mother, had filed a separate suit in the 129th District Court of Harris County, and both suits were consolidated in the 129th District Court on October 12, 2005.

On October 14, 2005, the Supreme Court of Texas issued its opinion in *Diversicare General Partner, Inc. v. Rubio*, in which the court held that a health-care liability claim cannot be recast as another cause of action to avoid the

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[1] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, sec. 74.351(a), 2003 Tex. Gen. Law 847, 875, *amended by* Act of May 18, 2005, 79th Leg., R.S., ch. 635, 2005 Tex. Gen. Law 1590 (former Civil Practice and Remedies Code section 74.351(a)).

[2] We previously held that no final judgment existed and abated the appeal. *Hegwood v. Am. Habilitation Servs., Inc.*, 294 S.W.3d 603 (Tex. App.—Houston [1st Dist.] 2009, order). The district court has since signed a final judgment.

requirements of the Medical Liability Insurance Improvement Act. 185 S.W.3d 842, 851 (Tex. 2005). On November 30, 2005, American Habilitation moved to dismiss Hegwood's suit based on the lack of a preliminary expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b)(2) (West Supp. 2010). Faced with American Habilitation's motion to dismiss and the *Diversicare* opinion, Hegwood on February 9, 2005 filed a reply and "motion for nonsuit." Hegwood argued that *Diversicare* should not be applied retroactively, but it should instead serve to start the 120-day period to file the preliminary expert report on October 14, 2005, making the expert report due no later than February 11, 2006. On April 12, 2006, Hegwood filed a "plea in intervention," claiming to appear for the first time as the personal representative of Xavier's estate.

On April 17, 2006, the trial court granted American Habilitation's motion and dismissed with prejudice "the causes of action asserted by plaintiff [Hegwood] herein" for failure to file a preliminary expert report. Hegwood contends that the April 17, 2006 order only dismissed his causes of action as Xavier's father, as surviving parent of Xavier, and as next friend of Xavier's sister, Kamyra, but did not dismiss his causes of action as the personal representative of Xavier's estate.

In June 2006, Hegwood served a copy of an expert report on American Habilitation. On February 7 and 23, 2007, American Habilitation filed an answer to Hegwood's plea in intervention and a motion to dismiss, arguing that

Hegwood's expert report was due no later than 120 days from the filing of the original suit, June 10, 2005. On April 13, 2007, the trial court granted the motion to dismiss with prejudice Hegwood's cause of action as the personal representative of Xavier's estate. On July 10, 2007, the trial court conditionally severed Hegwood's claims from the remainder of the suit, and this severance became final on March 29, 2009.

Analysis

Hegwood brings five arguments on appeal, which we will treat as issues presented. In issue one, he contends American Habilitation waived its right to challenge his capacity to represent Xavier's estate because it did not move to strike the April 12, 2006 "plea in intervention." Hegwood claims "[t]he record clearly shows that at the time of [his April 12, 2006] intervention [he] had been dismissed from the case in all the capacities asserted." Hegwood thus argues that he was not a party to the suit at the time he filed the plea in intervention.

Hegwood's chronology of the case is not correct. On April 17, 2006, five days *after* he filed his "plea in intervention," the trial court dismissed with prejudice "the causes of action asserted by plaintiff [Hegwood] herein" for failure to file a preliminary expert report. Hegwood cites Texas Rule of Civil Procedure 60 for the proposition that any party may intervene in a case, subject to being

stricken out. While this is true, Hegwood was already a party to the lawsuit on April 12, 2006.

Regardless of Hegwood's status as an intervenor, he cites no authority for the proposition that the trial court committed reversible error in dismissing his claims with prejudice merely because American Habilitation did not file a motion to strike. *See* TEX. R. APP. P. 38.1(i) (requiring appellant's brief to contain appropriate citations to authorities). We overrule issue one.

In issue two, Hegwood contends that the claim he brought in his capacity as personal representative of Xavier's estate is separate and distinct from the claims that the trial court dismissed on April 17, 2006, which he brought in his capacity as Xavier's father, as surviving parent of Xavier, and as next friend of Xavier's sister, Kamyra. Without citation to authority, Hegwood contends that "[f]or purposes of the 120-day rule, each party in their capacity must meet the requirement."

This Court has recently interpreted Civil Practice and Remedies Code section 74.351(a) to require a claimant to file an expert report for each physician or health care provider against whom a cause of action—i.e., group of operative facts giving rise to one or more bases for suing—is asserted. *Certified EMS, Inc. v. Potts*, No. 01-10-00106-CV, slip op. at 13 (Tex. App.—Houston [1st Dist.] Jan. 27, 2011, no pet. h.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West Supp. 2010); *In re Jorden*, 249 S.W.3d 416, 421 (Tex. 2008) (defining "cause of

action"). By focusing on a cause of action rather than particular liability theories that may be contained within a cause of action, the plain language does not require an expert report to set out each and every liability theory that might be pursued by the claimant as long as at least one liability theory within a cause of action is shown by the expert report. *Certified EMS, Inc.*, No. 01-10-00106-CV, slip op. at 13 (citing TEX. CIV. PRAC. & REM. CODE § 74.351(a); *In re Jorden*, 249 S.W.3d at 421).

Similarly, by replacing the word "claim" with the term "cause of action" and its definition, the plain language in Section 74.351(b) requires dismissal of the cause of action, or group of operative facts giving rise to one or more bases for suing, with respect to the physician or health care provider. *Certified EMS, Inc.*, No. 01-10-00106-CV, slip op. at 14 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b); *In re Jorden*, 249 S.W.3d at 421). By focusing on a cause of action rather than particular liability theories that may be contained within a cause of action, the plain language establishes that the entire cause of action is dismissed with respect to the defendant when the claimant has failed to file an expert report that sets out at least one liability theory within a cause of action. *Certified EMS, Inc.*, No. 01-10-00106-CV, slip op. at 14 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b); *In re Jorden*, 249 S.W.3d at 421).

Here, Hegwood does not assert that Xavier's estate has a different cause of action from those Hegwood brought in his original petition. His argument is that, because the personal representative of an estate could have been someone other than himself, he should be considered a separate claimant when he sued American Habilitation in that capacity. But we need not decide that hypothetical situation because Hegwood also sued under the survival statute. TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (West 2008). Any personal-injury action that could be brought under the wrongful-death statute could have been brought either by Hegwood as an heir or a legal representative of Xavier's estate. *See id.* § 71.021(b); *see also Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998) (holding that heir can sue under wrongful-death statute only if no administration of deceased's estate is pending and none is necessary). Accordingly, we overrule issue two.

In issue three, Hegwood contends that the trial court erred in applying the supreme court's opinion in *Diversicare General Partner, Inc. v. Rubio* to this case, because he brought his case "pursuant to a Court of Civil Appeals adjudicative interpretation of a wrongful death claim that was based on common law negligence." *Diversicare*, 185 S.W.3d at 851. At trial, Hegwood relied on *Zuniga v. Healthcare San Antonio, Inc.*, a case in which the plaintiff was sexually assaulted while involuntarily committed in a hospital. 94 S.W.3d 778, 780 (Tex.

App.—San Antonio 2002, no pet.). In *Zuniga*, the San Antonio Court of Appeals concluded that the plaintiff's common-law negligence claims were not based on the rendition of medical treatment and thus not subject to the Medical Liability Insurance Improvement Act. *Id.* at 783.

At trial in the instant case, American Habilitation moved to dismiss, citing the recent *Diversicare* opinion from the supreme court. Hegwood filed a response in which his sole argument was that *Diversicare* should not be applied retroactively: "Plaintiff's position is that since the existing case law changed or the *Rubio* [*Diversicare*] decision on October 14, 2005 replaced the *Zuniga* decision, *Rubio*'s application should not be given retroactive treatment back to the date of the plaintiff's filing of the lawsuit on June 10, 2005." On appeal, Hegwood argues that *Diversicare* is factually distinct from the present case and that the trial court should have allowed him to replead pursuant to Texas Rule of Civil Procedure 68.

We hold that Hegwood did not preserve his complaint in the trial court regarding why his case was factually distinguishable from the supreme court's *Diversicare* opinion. *See* TEX. R. APP. P. 33.1 (a). We overrule issue three.

In issue four, Hegwood contends that the supreme court's *Diversicare* opinion should not be applied retroactively, citing to the Open Courts provision of the Texas Constitution and several federal cases, including a Supreme Court opinion discussing the constitutionality of retroactive legislation. *See* TEX. CONST.

art. I, § 13; *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994). The Texas Supreme Court has discussed the question of whether a state court's ruling of state law should be given prospective or retroactive application and concluded that it is a matter for the state court to decide. *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 516 (Tex. 1992) (citing *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364–66, 53 S. Ct. 145, 148–49 (1932)).

In *Diversicare*, the court reversed the judgment of the court of appeals and rendered judgment, thus retroactively applying its ruling in that case. 185 S.W.3d at 855. Hegwood characterizes applying the ruling in *Diversicare* prospectively as a "Utopian Approach," but does not otherwise explain how this Court can fail to follow the supreme court's retrospective application of that opinion. We overrule issue four.

In issue five, Hegwood contends the trial court erred in not recognizing his February 9, 2005 "motion for nonsuit." We agree with Hegwood that a plaintiff generally has an absolute right to a nonsuit under Texas Rule of Civil Procedure 162. *See C/S Solutions, Inc. v. Energy Maint. Servs. Grp. LLC*, 274 S.W.3d 299, 304–07 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Hegwood's "motion for nonsuit," however, was not a motion for an unconditional nonsuit. Instead, Hegwood's motion primarily argued that the trial court should not apply the

supreme court's *Diversicare* opinion. To the extent that the motion requested a nonsuit, it was only as one of three alternatives, the others being (1) granting a 30-day extension to file an expert report and (2) ruling on Hegwood's motions for "repleader." We also note that Hegwood later filed a "plea in intervention" in a case he claims to have nonsuited. Absent a specific motion for nonsuit of his entire case, Hegwood has not preserved a complaint for appellate review. *See* TEX. R. APP. P. 33.1(a).

We overrule issue five.

Conclusion

We affirm the trial court's judgment.

Jim Sharp
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.