Opinion issued December 20, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00085-CV

JONATHAN ARENO, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF REBECCA ARENO, DECEASED, NATHAN ARENO AND PENNY WADE ARENO, Appellants

V.

WILLIAM JAY BRYAN, M.D., Appellee

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2017-07238

MEMORANDUM OPINION

In this wrongful-death case, William Jay Bryan, M.D., an orthopedic surgeon, was sued for negligence in connection with his postoperative care of Rebecca Areno following knee-replacement surgery. The trial court granted

summary judgment for Dr. Bryan on his limitations defense, impliedly ruling that the medical records authorization accompanying a presuit notice of claim was deficient and thus did not toll limitations.

The appellants contend that although their medical records authorization omitted several material health-care providers, a court should consider whether the defendant otherwise acquired knowledge of the omitted health-care providers or their records and thus was not harmed by the omissions. Specifically, they contend that in the presuit period, Dr. Bryan obtained some of Rebecca's medical records and received an expert report that identified a material health-care provider. They therefore assert that Dr. Bryan had presuit access to or knowledge of the names of Rebecca's health-care providers who were omitted from the medical records authorization, his presuit investigation was not harmed by the omissions in the medical records authorization, and they should receive the benefit of the 75-day extension of the limitations period available to claimants who comply with the statutory notice provision.

We affirm.

Background

Rebecca Areno first presented to Dr. Bryan on November 19, 2014, seeking a knee replacement. Dr. Bryan noted Rebecca to be sixty-two years old and clinically obese. Her history included a previous pulmonary embolism in August

2012, which indicated she was at high risk for developing venous thromboembolism (VTE) after knee-replacement surgery.

After Dr. Bryan performed Rebecca's knee-replacement surgery at Memorial Orthopedic and Spine Hospital in Bellaire, Texas on December 2, 2014, he instructed her to take one aspirin a day as her method of VTE prophylaxis. Two weeks later, Dr. Bryan saw Rebecca in a postoperative office visit. She appeared to be doing well, and Dr. Bryan instructed her to resume her daily activities. The next day and while at home, Rebecca suddenly experienced severe shortness of breath, and she was rushed to a local hospital in full cardiac arrest. A CT scan performed at West Calcasieu Cameron Hospital indicated massive pulmonary embolisms encompassing Rebecca's right and left pulmonary arteries. Rebecca was diagnosed with severe anoxic encephalopathy consistent with clinical brain death and was placed on mechanical ventilation. Two days later, on December 18, 2014, Rebecca died after being removed from life support.

Because Rebecca was at high risk for VTE, her husband and children alleged that Dr. Bryan's choice of aspirin as an anticoagulant was below the standard of care. They contended that Dr. Bryan should have ordered molecular-weight heparin or another alternative stronger means of anticoagulation, as the aspirin was ineffective to prevent the massive embolisms that caused Rebecca's death.

Approximately five months before the applicable two-year statute of limitations expired, the appellants' attorney sent Dr. Bryan a Chapter 74 presuit notice of claim, dated July 12, 2016, including a medical records authorization. The authorization identified only Dr. Bryan and Memorial Orthopedic and Spine Hospital as health-care providers who treated Rebecca in connection with the alleged injuries relating to the claim. It did not identify West Calcasieu Cameron Hospital, where Rebecca was taken and treated for her pulmonary embolisms and where she died, nor did it identify any physicians or other health-care providers who treated her there.

For the physicians or other health-care providers who treated Rebecca in the five years before the incident made the basis for the claim against Dr. Bryan, the authorization listed seven physicians. The authorization omitted at least five physicians and health-care providers who treated Rebecca in this five-year period, including Lake Charles Memorial Hospital, where she was treated for a pulmonary embolism in 2012, and Dr. Anderson, her attending physician for that hospitalization. Dr. Bryan's attorney nevertheless obtained 1,928 pages of medical records from Houston Methodist Hospital, one of the omitted health-care providers, in August 2016 during the presuit period. In his brief, Dr. Bryan explains that he was able to obtain the Houston Methodist Hospital records, even though that provider had not been identified in the medical records authorization,

because the hospital's risk and insurance department was also the program manager for Dr. Bryan's malpractice insurance policy, and it was legally authorized to access its own records for legal services without an authorization.

Under cover of a letter dated September 16, 2016, the appellants' attorney provided Dr. Bryan's counsel an expert report that discussed Rebecca's December 2014 hospitalization at West Calcasieu Cameron Hospital, but the report did not identify any of the physicians or health-care providers who treated Rebecca there. The expert report also mentioned Rebecca's January 2012 pulmonary embolism.

In December 2016, the Arenos' attorney provided defense counsel with a blanket medical records authorization that did not identify any physicians or other health-care providers.

The appellants filed suit against Dr. Bryan on February 1, 2017, more than two years after Rebecca's death. Dr. Bryan filed a motion for summary judgment and asserted that the Arenos' claims were barred by the statute of limitations because their deficient medical records authorization failed to invoke the 75-day tolling provision in subsection 74.051(c) of the Civil Practice and Remedies Code. The trial court granted summary judgment for Dr. Bryan.

Analysis

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). The movant has the burden of showing that no

genuine issue of material fact exists and that he is therefore entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). A defendant moving for summary judgment is required either to negate conclusively at least one essential element of the plaintiff's cause of action or to establish conclusively each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). To determine whether there is a disputed issue as to a material fact, we consider evidence favorable to the nonmovant as true and draw every reasonable inference in its favor, resolving all doubts in favor of the nonmovant. *Nixon*, 690 S.W.2d at 548–49.

Limitations is an affirmative defense. TEX. R. CIV. P. 94. Accordingly, the party moving for summary judgment based on the statute of limitations must establish as a matter of law that the limitations period expired on the relevant claim. *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

Health care liability claims in Texas are governed by the Texas Medical Liability Act, Chapter 74 of the Texas Civil Practice and Remedies Code. Health care liability claims are to be filed "within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed." TEX. CIV. PRAC. & REM. CODE § 74.251(a). The Legislature provided

an exception: A plaintiff may toll the two-year limitations period for 75 days by mailing to the defendant written notice of the health care liability claim and an authorization form for the release of protected health information. *Id.* § 74.051(a), (c). The notice and authorization form must be mailed at least 60 days before filing suit. *Id.* § 74.051(a). There is no dispute that the appellants' petition was filed more than two years after their claim accrued, but within the additional 75-day tolling period available to claimants who satisfy the notice provision.

"The notice and authorization form encourage pre-suit investigation, negotiation, and settlement of health care liability claims." *Johnson v. PHCC-Westwood Rehab. & Health Care Ctr., LLC*, 501 S.W.3d 245, 251–52 (Tex. App.—Houston [1st Dist.] 2016, no pet.); *see also Jose Carreras, M.D., P.A. v. Marroquin*, 339 S.W.3d 68, 73 (Tex. 2011). A medical authorization form that fails to include the information described in section 74.052 does not toll the statute of limitations when the missing information "interferes with the statutory design to enhance the opportunity for pre-suit investigation, negotiation, and settlement." *Mitchell v. Methodist Hosp.*, 376 S.W.3d 376, 833 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

When the appellants mailed the notice and authorization form to Dr. Bryan in July 2016, the 2003 version of section 74.052 prescribed the authorization form's requirements. *See* Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 10.01,

2003 Tex. Gen. Laws 864, 867–68 (amended 2017) (current version at TEX. CIV. PRAC. & REM. CODE § 74.052). Section 74.052 specified the form of the required medical records authorization and included several blanks to be completed with information specific to the claim. *Id.* The statute also required the claimant to provide the names and current addresses for two categories of health-care providers: those who provided treatment in connection with the injuries alleged to have been sustained in connection with the health care liability claim; and those who provided treatment to the allegedly injured patient during a period commencing five years before the incident made the basis of the health care liability claim. *Id.*

The appellants assert that the court's consideration of the motion for summary judgment is not limited to the four corners of their medical records authorization, and their provision of the expert report and the blanket authorization and Dr. Bryan's acquisition of the Houston Methodist Hospital records also should be considered. They contend that an application of the notice provision and its requirement that a claimant provide medical records authorizations does not serve the purpose of encouraging presuit investigation, negotiation, and settlement. Instead, they argue it will encourage claimants to file suit before two years without giving notice and an authorization, which they contend is an absurd result that contravenes the purpose of the notice provision.

Dr. Bryan contends that the appellants' medical records authorization was materially deficient and thus did not toll the statute of limitations because it failed to identify any physicians or health-care providers who treated Rebecca for the pulmonary embolisms that allegedly caused her death. He also argues that the appellants failed to identify any physicians or health-care providers who treated Rebecca for the pulmonary embolism in 2012, and they failed to identify several other health-care providers who treated her in the five years preceding December 2014.

Medical records authorizations that omit material health-care providers do not toll the TMLA's limitation provisions. *See Davenport v. Adu-Lartey*, 526 S.W.3d 544, 554 (Tex. App.—Houston [1st Dist.] 2017, pet. denied) (authorization form that "omitted physicians who treated [the plaintiff] in the five-year period preceding the 2012 surgery, numerous persons and entities involved in the 2012 surgery at the heart of this case, and a majority of the providers who treated [the plaintiff] after the 2012 surgery" did not toll limitations period); *Johnson*, 501 S.W.3d at 251–52 (authorization form that excluded five treating physicians and two other health care providers who treated the plaintiff for injuries forming the basis of her claim did not toll limitations); *see also Mitchell*, 376 S.W.3d at 835–38; *Nicholson v. Shinn*, No. 01-07-00973-CV, 2009 WL 3152111, at *5–6 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, no pet.) (mem. op.).

We conclude that the appellants' failure to identify any physicians or health-care providers who treated Rebecca for the pulmonary embolisms that allegedly caused her death and who treated her for the pulmonary embolism in 2012 materially interfered with the purpose of sections 74.051 and 74.502. *See Davenport*, 526 S.W.3d at 554; *Johnson*, 501 S.W.3d at 251–52. These key records would have been directly relevant to Dr. Bryan's presuit investigation and assessment of the appellants' claim. *See Johnson*, 501 S.W.3d at 251–52.

Although the expert report provided by the appellants during the presuit period identified one of the omitted health-care providers, the appellants provided a blanket medical records authorization, and Dr. Bryan acquired Houston Methodist Hospital records, none of these events substituted for the statutory standard for the application of the 75-day tolling period. TEX. CIV. PRAC. & REM. CODE § 74.251(a), (c). The statute does not authorize tolling merely because the defendant independently obtained some of the records necessary to evaluate the claim. *See Mitchell*, 376 S.W.3d at 838.

Conclusion

The appellants' deficient medical records authorization did not toll the statute of limitations under subsection 74.051(c). Accordingly, we affirm the trial court's summary judgment.

Michael Massengale
Justice

Panel consists of Justices Keyes, Massengale, and Brown.