Affirmed and Memorandum Opinion filed October 17, 2023

In The

Fourteenth Court of Appeals

NO. 14-22-00735-CV

ALICE BUSBY, Appellant

V.

GINGER N. CATHEY, MD; WOMEN'S PELVIC RESTORATIVE CENTER, PLLC; PRIVIA MEDICAL GROUP-GULF COAST, PLLC; AND BAHRAM SALMANIAN, MD, Appellees

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On Appeal from the 215th District Court
Harris County, Texas
Trial Court Cause No. 2021-27646

MEMORANDUM OPINION

Appellant Alice Busby appeals from the trial court's order granting the no-evidence summary judgment motion filed by appellees Ginger N, Cathey, MD; Women's Pelvic Restorative Center, PLLC; Privia Medical Group-Gulf Coast, PLLC; and Bahram Salmanian, MD. We affirm.

Background

This is a health care liability claim governed by Chapter 74 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001-.507. Busby sued appellees for alleged negligence in performing gynecological surgery and providing post-surgical care at The Woman's Hospital of Texas. Busby also alleged that after her discharge her condition worsened, prompting a return to the emergency room of Texas Woman's Hospital. Busby was transferred to Clear Lake Regional Medical Center for a suspected sepsis and bowel perforation. Following further evaluation, doctors there performed surgery to repair the bowel perforation. Busby alleged that appellees' were negligent during the initial gynecological surgery which led to the perforated bowel. Busby also alleged that appellees were negligent when they failed to timely diagnose and treat the bowel perforation, which then allowed sepsis to develop, which in turn required a second surgery to repair the bowel perforation, as well as protracted post-surgery care and recovery.

Busby timely served the required Chapter 74 expert report on appellees. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a)(r)(6). Appellees lodged objections to the adequacy of Busby's expert report. After hearing appellees' objections, the trial court granted Busby a thirty-day extension of time to cure the report's deficiencies. Busby served a supplemental expert report on February 25, 2022. Appellees did not lodge objections to Busby's supplemental report.

The parties entered into an Agreed Level III Scheduling Order on July 7, 2021. The Agreed Order set Busby's deadline to designate her expert witnesses on March 18, 2022. Appellees' expert designation date was set a month later. Busby's lead attorney, Brian Sutton, provided authority for signature by permission for submission to the court. Sutton received notice that the agreed

docket control order was filed. The trial court signed the agreed docket control order soon after the proposed order was filed. Sutton's co-counsel received notice that the trial court had signed the agreed docket control order. Busby did not designate her expert witnesses by the deadline in the agreed docket control order.

More than a month later, appellees filed a joint no-evidence motion for summary judgment. Appellees argued that, because Busby had not timely designated any expert witnesses, she had no evidence that appellees breached any applicable standard of care, or that any alleged breach proximately caused her injury. Appellees' no-evidence motion was initially set on the trial court's May 30, 2022, submission docket. On April 29, 2022, Busby filed a Motion to Modify the Docket Control Order, or in the alternative, Motion for Continuance. Busby did not file a motion for leave to designate her expert witnesses late. The trial court scheduled both Busby's motion and appellees' no-evidence motion for summary judgment for oral hearing on July 28, 2022, almost two months later than the summary judgment was originally set for submission.

Busby filed two responses to appellees' no-evidence motion for summary judgment. Neither response included evidence from medical expert witnesses which addressed the challenged elements of her medical malpractice claim. Instead, Busby repeated the arguments she raised in her Motion to Modify the Docket Control Order, or in the alternative, Motion for Continuance. Busby did, however, admit that she did not meet "her burden to raise a genuine issue of material fact." She offered a reason for that failure: "that because [of] the Defendants' (October 7, 2021) Objection to the Plaintiff's Chapter 74.351 Expert Report and the time between said objection, the hearing thereon, and the curative period until the Supplemental Expert Report was filed . . . that [Busby] was precluded from obtaining discovery." Busby continued that she "had only 21 days

to obtain discovery" before her expert witness designation deadline and that, as a result, it was "impossible for her to Raise a Genuine Issue of Material Facts [sic] in the circumstances of the instant matter."

The trial court granted appellees' no-evidence motion for summary judgment without specifying the grounds. Busby subsequently filed a motion for new trial, which the trial court denied. This appeal followed.

ANALYSIS

Busby raises two issues in this appeal challenging the trial court's summary judgment. We address them in order.

I. Standard of review

We review the trial court's grant of summary judgment de novo. *See, e.g.*, *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See Mack Trucks, Inc. v. Tamez,* 206 S.W.3d 572, 582 (Tex. 2006).

In a no-evidence motion for summary judgment, the movant represents that there is no evidence of one or more essential elements of the claims for which the nonmovant bears the burden of proof at trial. Tex. R. Civ. P. 166a(i). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *Tamez*, 206 S.W.3d at 582. Evidence raises a genuine issue of material fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

When a party moves for a continuance to conduct discovery, we review the denial of the motion for a clear abuse of discretion. *See Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Id.*; *Muller v. Stewart Title Guaranty Co.*, 525 S.W.3d 859, 866 (Tex. App.—Houston [14th Dist.] 2017, no pet.). The test is whether the trial court acted without reference to guiding rules and principles. *Cire v. Cummings*, 134 S.W.3d 835, 838–38 (Tex. 2004). Under this standard of review, we do not substitute our judgment for that of the trial court. *See In re Nitla S.A. de C.V.*, 92 S.W.3d 150, 161 (Tex. 2004).

We review the trial court's decision on Busby's motion to modify the agreed docket control order under the same standard of review. *See Basket v. Brister*, 889 S.W.2d 324, 325 (Tex. App.—Houston [14th Dist.] 1994, orig. proceeding) ("While the record reflects dubious rulings by the trial court, the rules provide a trial judge with broad discretion in the management of his court's docket."). We also review a trial court's denial of a party's motion for additional time to designate expert witnesses under an abuse-of-discretion standard. *Bailey v. Hillcrest Baptist Medical Center*, No. 10-18-00346-CV, 2022 WL 711119, at *2 (Tex. App.—Waco March 9, 2022, no pet.) (mem. op.).

II. The trial court did not err when it granted appellees' no-evidence motion for summary judgment.

Busby initially argues that the trial court erred when it granted appellees' no-evidence motion for summary judgment because, in her view, a stay on discovery was in place until the time for appellees to object to her supplemental expert report had passed. She argues that, as a result of this stay, she had an inadequate time for discovery to respond to the summary judgment motion. Busby cites an opinion

from this court, *Harvey v. Kindred*, in support of her argument. 525 S.W.3d 281, 285 (Tex. App.—Houston [14th Dist.] 2017, no pet.). In *Harvey*, a medical malpractice case, we held:

> We first address whether the chapter 74 discovery stay applies when an adequate expert report has not been served and conclude, consistent with established authority, that it does. We then hold for the first time that the chapter 74 discovery stay supersedes a conflicting docket control order governing discovery and a trial court may not grant a motion for no-evidence summary judgment in a healthcare liability suit for failure to designate experts when the chapter 74 discovery stay is in effect.

Id. at 283. At first glance *Harvey* would seem to control the outcome here, but an examination of the facts of that case lead us to conclude that it is distinguishable.

In *Harvey*, the trial court issued a docket control order which included a deadline for the plaintiffs to designate expert witnesses. *Id.* The plaintiffs timely served two expert reports in accordance with section 74.351's requirements. *Id.* Defendant objected and, after plaintiffs' expert witness designation deadline had passed, the trial court held a hearing where it sustained the objections but granted plaintiffs a thirty-day extension to serve amended expert reports. *Id.* Plaintiffs timely served an amended expert report and defendants once again objected. *Id.* Plaintiffs also filed a motion for leave to designate expert witnesses past the docket control order's deadline, which the trial court denied. *Id.* at n.6. The trial court had not ruled on defendants' new objections when defendants filed a no-evidence motion for summary judgment arguing that, because plaintiffs had not timely designated experts, they were unable to prove their claims, which required expert testimony. *Id.* Plaintiffs responded to the motion and attached expert witness affidavits and other evidence to the response. *Id.* Plaintiffs also filed a verified motion for continuance of trial and requested a new docket control order, which

the trial court denied. *Id.* at n.7. Defendants objected to plaintiffs' expert witness affidavits, which the trial court sustained. *Id.* The trial court then granted defendants' summary judgment motion. *Id.* On appeal, we reversed. *Id.* at 286. We held that, because there was a pending challenge to plaintiffs' expert reports, discovery was stayed by chapter 74 until there was a final judicial determination that the amended expert report was adequate. *Id.* at 285. Finally, we held that chapter 74's stay provision controlled over the expert witness designation deadline in the trial court's docket control order. *Id.*

While *Harvey* has remarkably similar facts, there was one key difference: there was a pending challenge to the plaintiffs' expert witness reports when defendants moved for a no-evidence summary judgment. Here, appellees did not challenge Busby's amended expert report, thus there were no pending challenges when the docket control order's expert witness designation deadline passed. As a result, there was no chapter 74 stay in place when the agreed docket control order's deadline for Busby to designate her expert witnesses passed. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (placing burden on defendant to lodge objection to plaintiff's expert witness report); (s) (staying most discovery until the plaintiff has served required expert report). Because Harvey is factually distinguishable, we conclude it does not control the outcome here.

Busby next argues that the trial court abused its discretion when it impliedly denied her motion to modify the agreed docket control order. In Busby's view, she established both good cause and that appellees would not be prejudiced if the motion was granted. Busby has not demonstrated that the trial court abused its discretion when it denied her motion to modify the agreed docket control order.

We turn first to Busby's argument that she established good cause for the trial court to modify the agreed docket control order. Busby first asserts that the

mandatory stay under chapter 74 left her with insufficient time to conduct the discovery needed to designate an expert witness by the deadline provided by the agreed docket control order. Busby overlooks the fact that not all discovery is stayed during a chapter 74 stay. Pursuant to section 74.351(s) of the Texas Civil Practice and Remedies Code, Busby was permitted to acquire "medical or hospital records or other documents or tangible things, related to the patient's health care through" written discovery as defined in Rule 192.7 of the Texas Rules of Civil Procedure, depositions on written questions as provided by Rule 200 of the Texas Rules of Civil Procedure, and also discovery from nonparties under Rule 205 of the Texas Rules of Civil Procedure. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(s). Busby offered no explanation why this discovery would have been insufficient to make it possible for her to designate her expert witnesses in compliance with the agreed docket control order. Busby instead states that she "purposely did not conduct discovery" until the stay ended. Busby also offered no explanation on what specific discovery she needed, nor the amount of time needed to complete it. We conclude that the trial court could have reasonably rejected this argument as establishing good cause. *See Stierwalt v. FFE Transportation Services, Inc.*, 499 S.W.3d 181, 189 (Tex. App.—El Paso 2016, no pet.) ("In general, a litigant is not entitled to a continuance if he or she fails to diligently use the rules of civil procedure for discovery purposes prior to filing a motion for continuance.").

Busby also argues that she established good cause because her "lead counsel and his firm never received notice of the signed docket control order by the court and was unaware of the expert witness deadline." This exact argument was recently raised, and rejected, by the Waco Court of Appeals. *See Bailey*, 2022 WL 711119, at *2 (observing that the "Texas Supreme Court has repeatedly held that

inadvertence of counsel does not constitute good cause"). We agree with our sister court and hold that the fact Busby's lead counsel did not receive notice that the agreed docket control order had been signed did not establish good cause. *Id.*

Busby next argues that the trial court abused its discretion when it denied her motion because she established that appellees would not experience unfair surprise or prejudice if her motion were granted. Initially, Busby asserts that appellees did not respond to this argument in the trial court. An examination of the record establishes otherwise. Busby then emphasizes the timing of her request, pointing out that she promptly filed her motion. Finally, she summarizes the purpose of the discovery rules. In the trial court, Busby offered no evidence addressing lack of unfair surprise or prejudice. Instead, she argued there was no unfair surprise or prejudice to appellees because it was "obvious" to appellees that Busby's medical expert would be Dr. Jay Schrapps, the doctor who completed the chapter 74 expert report. On appeal, however, Busby denies that she sought to designate Dr. Schrapps as a testifying expert. We conclude that the trial court, based on the record before it, could have reasonably determined that Busby did not meet her burden to establish lack of prejudice or unfair surprise. *See F 1 Construction, Inc., v. Banz*, No. 05-19-00717-CV, 2021 WL 194109, at *3 (Tex. App.—Dallas Jan. 20, 2021, no pet.) (mem. op.) ("Because Construction did not meet its burden to show good cause or lack of surprise or prejudice—an exception to Rule 193's automatic, mandatory exclusion penalty—the trial court did not abuse its discretion by excluding the untimely disclosed evidence.").

Finally, Busby argues that the trial court abused its discretion when it denied her motion for continuance because she did not have an adequate time for discovery. The record does not reflect an explicit ruling on Busby's motion for continuance. It is arguable that the trial court did not deny Busby's request for a

continuance. Busby filed her motion to modify the agreed docket control order and alternative motion for continuance on April 29, 2022. Busby then filed her Verified Motion for Continuance of the hearing on appellees' motion for summary judgment on May 20, 2022. After this motion was filed, the hearing on the motion for summary judgment was reset from May 23, 2022, to July 28, 2022, more than two months later.

But, even if the trial court denied Busby's motions, we conclude it did not abuse its discretion when it did so because, as summarized above, Busby did not include evidence on her due diligence, nor did she point out what evidence she needed to obtain, nor how much time she needed to obtain it. *See Triad Home Renovators, Inc. v. Dickey*, 15 S.W.3d 142, 145 (Tex. App.—Houston [14th Dist.] 2000, no pet.) ("When a party contends it has not had adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance" doing the same).

Rule 166a(i) of the Texas Rules of Civil Procedure allows a party to file a no-evidence motion for summary judgment after an adequate time for discovery has passed. *McInnis v. Mallia*, 261 S.W.3d 197, 200 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The rule does not, however, require that discovery be completed. *Id.* When addressing an argument that there has been an inadequate time for discovery, the pertinent date is the final date on which the motion is presented to the court for a ruling. *Id.* In *McInnis* we established seven factors to consider whether an adequate time for discovery has passed: (1) the nature of the case, (2) the nature of the evidence necessary to controvert the no-evidence motion, (3) the length of time the case was active, (4) the amount of time the no-evidence motion was on file, (5) whether the movant had requested stricter

deadlines for discovery, (6) the amount of discovery that has already taken place, and (7) whether the discovery deadlines in place were specific or vague. *Id.* at 201. We review a trial court's decision whether there has been an adequate time for discovery under an abuse of discretion standard. *Id.* An examination of these factors does not establish that the trial court abused its discretion when it impliedly determined that Busby had an adequate time for discovery before the no-evidence summary judgment motion was heard.

The first two factors address the nature of the case and the type of evidence necessary to controvert the no-evidence motion. This is a medical malpractice case which requires expert testimony. Therefore, to prevent summary judgment, a medical malpractice plaintiff must offer expert testimony on the essential elements of its claim, including the standard of care, breach, and causation. *American Transitional Care Ctrs., Inc. v. Palacios*, 46 S.W.3d 873, 876 (Tex. 2001); *Godinez v. Hodges*, No. 14-22-00409-CV, 2023 WL 4945382 at *2 (Tex. App.—Houston [14th Dist.] Aug. 3, 2023, no pet. h.) (mem. op.) ("To defeat a no-evidence summary judgment in a medical malpractice case, the plaintiff must offer expert testimony on the challenged elements of the claim, including, if challenged, the standard of care, breach, and causation."). Because her case requires expert testimony, Busby asserts that her case qualifies as a complex case. Busby does not, however, explain how that complexity impacts whether she had an adequate time for discovery. Here, there was an agreed docket control order setting forth various deadlines to ensure that the case progressed. It is presumed Busby considered the complexity of her case when she agreed to the docket control order deadlines, including the deadline to designate experts. *See McInnis*, 261 S.W.3d at 202 ("Generally, a trial court may presume that plaintiffs have investigated their cases prior to filing suit."). These factors do not support Busby's argument.

The next factors address the length of time the case was active and the amount of time the no-evidence motion was on file. Busby filed suit on May 7, 2021. Appellees filed their no-evidence motion for summary judgment on April 27, 2022, but it was not heard until July 28, 2022, almost four months later and more than a year after the lawsuit was initiated. In addition, the discovery deadline set by the agreed docket control order was August 1, 2022, the same deadline for all dispositive motions to be heard.

Ordinarily, an "adequate time for discovery" may be gauged by the period designated by the pretrial docket control order. *See McInnis*, 261 S.W.3d at 203. On appeal, Busby's only argument that she had an inadequate time for discovery was her belief that the discovery stay remained in place until March 18, 2022, the deadline for appellees to object to her supplemental expert report. We have already rejected this argument. Here, the stay ended when Busby served her supplemental expert report. This was three weeks before the expert witness designation deadline. In addition, appellees did not file their no-evidence motion until April 27, 2022, more than a month later. The hearing on appellees' motion was eventually moved back until July 28, 2022, days before the agreed docket control order's dispositive motion deadline. Busby conducted no discovery during this time-period, nor did she identify any specific discovery that she needed but was unable to obtain during that time-period. The third and fourth factors do not support Busby's argument on appeal.

The final factors ask whether the movant requested stricter discovery deadlines, the amount of discovery that has already taken place, and whether the discovery deadlines in place were specific or vague. Here, there was an agreed docket control order providing a specific deadline for Busby to designate her expert witnesses and to complete discovery. The expert witness designation

deadline was crucial here because, for a trial court to consider a plaintiff's expert witness's testimony as summary judgment evidence, the plaintiff must have timely designated the expert as a testifying witness. *See* Tex. R. Civ. P. 193.6 (providing for exclusion of evidence from untimely designated expert). Because the deadlines were agreed, we conclude they were specific and that appellees did not request a stricter deadline for expert witnesses to be designated. This conclusion is reinforced by the fact that the summary judgment motion was not heard until days before the discovery and dispositive motion deadlines found in the agreed docket control order.

With respect to how much discovery had already taken place, Busby had conducted pre-suit investigation and she had obtained medical records from The Woman's Hospital of Texas, Dr. Cathey, and the Women's Pelvic Health Center sufficient to prepare the required Chapter 74 preliminary expert report. Busby elected not to conduct additional discovery after she had served her supplemental expert report. Busby offered no explanation why the discovery she had obtained was insufficient to designate an expert witness and then respond to appellees' no-evidence motion for summary judgment, and if it was insufficient, why she did not conduct additional discovery once the stay ended. We conclude these factors do not weigh in Busby's favor. Based on the record before us, we conclude that the trial court could have reasonably decided that Busby had an adequate time for discovery, and it did not abuse its discretion when it denied her motion for continuance.

Having addressed each of the arguments Busby raised within her first issue, we overrule that issue.

III. The summary judgment was not an improper sanction.

Busby argues in her second issue on appeal that the trial court abused its

discretion when it granted appellees' no-evidence motion for summary judgment because it was "tantamount to a death penalty sanction." We disagree.

Here it is undisputed that Busby did not timely designate any expert witnesses. In addition, Busby did not file a motion asking for leave of court to late-designate expert witnesses. Further, the record does not reflect that the trial court signed an order striking any of Busby's proposed witnesses, their testimony, or her pleadings. After the expert witness deadline had passed, appellees filed their no-evidence motion arguing that, because Busby had not timely-designated any expert-medical-witnesses, she had no evidence that appellees breached any applicable standard of care, nor that any alleged breach proximately caused her injury. Busby did not attach any expert witness evidence to her summary judgment response. In that situation, the trial court was required to grant appellees' no-evidence motion. *See* Tex. R. Civ. P. 166a(i) ("The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact."). To the extent that Busby complains about Rule 193.6's automatic exclusion of evidence, "appellate courts do not consider decisions imposing the automatic penalty called for by Rule 193.6 as death-penalty sanctions."[1] *In re Barsh Auto, LLC*, No. 09-21-00085-CV, 2021 WL 2149822, at *1 (Tex. App.—Beaumont May 27, 2021, orig. proceeding) (per curiam) (mem. op.); *see also Alphamar Group, Inc. v. M & M Protection, LLC*, No. 14-20-00350-

[1] To the extent Busby relies on *In re First Transit, Inc.* to support her argument that the trial court imposed death penalty sanctions, we conclude that it does not control the outcome here because it is factually distinguishable. 499 S.W.3d 584, 591 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding). In *First Transit*, unlike here, a party filed a motion to exclude an expert witness's testimony pursuant to Rules 215.2, 215.3, and 193.6, which the trial court granted. *Id.* The appellate court held that the trial court abused its discretion when it struck the expert's testimony because the party did not have notice of the grounds for sanctions nor an opportunity to show good cause or the lack of unfair surprise or unfair prejudice. *Id.* at 596. In the present case, Busby had an opportunity to show good cause, or the lack of unfair surprise, or unfair prejudice, she simply failed to meet her burden to do so.

CV, 2022 WL 1463658, at *3 (Tex. App.—Houston [14th Dist.] May 10, 2022, no pet.) (mem. op.) ("The exclusion of evidence in Rule 193.6 is automatic; thus, no motion for sanctions or motion to compel is required to trigger it, and death penalty sanctions are beyond its scope."). Finally, we have already determined that the trial court did not abuse its discretion when it denied Busby's request to modify the agreed docket control order. We conclude that the trial court's final summary judgment order is not tantamount to a death-penalty sanction. *See Fort Brown Villas III Condominium Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009) ("Because Rule 193.6 provides for the exclusion of an untimely expert affidavit, we hold that the trial court did not abuse its discretion in striking it. We also hold that Gillenwater failed to satisfy his burden of establishing good cause or a lack of unfair surprise or prejudice against Fort Brown."). We overrule Busby's second issue on appeal.

CONCLUSION

Having overruled Busby's issues on appeal, we affirm the trial court's final judgment.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Wise, Zimmerer, and Poissant.