NUMBER 13-15-00362-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

MCALLEN HOSPITALS, L.P., MCALLEN HOSPITALS, L.P. D/B/A MCALLEN MEDICAL CENTER, MCALLEN MEDICAL CENTER, MCALLEN HOSPITALS, L.P. D/B/A SOUTH TEXAS HEALTH SYSTEM, AND SOUTH TEXAS HEALTH SYSTEM, **Appellants,**

v.

MARIO I. RODRIGUEZ AND LUDIVINA IRACHETA, INDIVIDUALLY AND AS NEXT FRIENDS OF XXXXX XXXXXX XXXXXXXXX, XX, A MINOR, **Appellees.**

On appeal from the 389th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Garza and Longoria
Memorandum Opinion by Chief Justice Valdez

Appellants McAllen Hospitals, L.P., McAllen Hospitals, L.P. d/b/a McAllen Medical Center, McAllen Medical Center, McAllen Hospitals, L.P. d/b/a South Texas Health

System, and South Texas Health System appeal from the trial court's denial of their motion to dismiss. By one issue, appellants contend that the trial court abused its discretion in denying their motion to dismiss because appellees, Mario Rodriguez and Ludivina Iracheta, individually and as next friends of XXXXX XXXXXX XXXXXXXXX, XX a minor, failed to timely serve appellants with an expert report. We affirm.

I. BACKGROUND

In August 2012, appellees filed suit alleging medical negligence claims against various health-care providers including RGV Pediatric Care, P.A. ("RGV") for medical care provided to their minor child. On August 7, 2013, appellees amended their petition adding appellants as defendants. RGV filed a motion for summary judgment.

Appellants' insurance provider, Joint Underwriters Association ("JUA"), instructed RGV's attorney to enter a Rule 11 agreement with appellees extending the deadline for appellants to file their answer.[1] RGV's attorney and appellees agreed that appellants could file their answer two weeks after the trial court ruled on RGV's motion for summary judgment. *See* TEX. R. CIV. P. 99(d) (providing that the defendant must "file a written answer with the clerk who issued this citation by 10:00 a.m. on the Monday next following the expiration of twenty days after [the defendant was] served [with] citation and petition, [or] a default judgment may be taken against [the defendant].").

Subsequently, appellees' attorney requested confirmation from RGV's attorneys that appellees could serve the expert reports on RGV's attorneys on behalf of appellants. According to appellees, JUA told RGV's attorney to enter into a Rule 11 agreement with appellees to accept service of the expert reports for appellants. At the motion to dismiss

[1] It appears that at this time, appellants were not represented by any trial counsel in this matter; however, according to appellees, RGV's attorneys were representing appellants in another matter.

hearing, the trial court admitted an email from RGV's attorney acknowledging these instructions and stating, "[W]e can accept service of Plaintiffs' Chapter 74 reports as they pertain to the [appellants]." Appellees state in their brief that the "next day," they served RGV's attorney with the expert reports and they "executed a [purported] Rule 11 agreement confirming RGV's attorney's authority to accept the reports, as well as their actual receipt of the reports." At the motion to dismiss hearing, the trial court admitted an email documenting the agreement.

Appellees state that in December 2013, because the trial court had not ruled on RGV's motion for summary judgment they "advised [RGV's attorney] that it would be necessary for [appellants] to file an answer." Appellants then retained an attorney and filed their answer on January 2, 2014.[2] Appellees state that two weeks later, their trial counsel sent appellants' attorney "copies of the expert reports, along with a copy of the 'executed letter agreement wherein [RGV's attorney] agreed to accept service of these reports on behalf of [appellants] since they had not yet made an appearance.'"

Appellants' attorney then filed objections to the expert reports on February 5, 2014, which included a complaint that the reports were not timely served because he did not receive them until January 2014. In February 2014, JUA representatives "'reviewed their files and sent [appellants' attorney] the email confirming their authorization for [RGV's attorney] to accept service of the Plaintiffs' Chapter 74 reports back in October 2013' and 'asked [appellants' attorney] to withdraw his argument that [appellants were] not timely served with the Chapter 74 expert reports.'" According to appellees, appellants' attorney spoke with their attorney and agreed that RGV's attorney had been authorized to accept

[2] We note that when appellants acquired an attorney, the 120-day deadline for filing the expert reports had already passed. And, RGV's attorneys were no longer providing any assistance to appellants.

service of the expert reports and "advised [appellees' attorney] that [appellants] 'will not proceed' with objection to the timeliness of the reports." Appellants' attorney sent a letter memorializing the conversation stating the same to appellees' attorney. Although appellants' attorney offered to file a signed agreement stating such with the trial court, appellees' attorney declined stating it was unnecessary to do so.

According to appellees, the parties then continued with the litigation, and engaged in eighteen depositions, which included depositions of the experts who wrote the reports. Trial was set for August 17, 2015.

On July 20, 2015, appellants' attorney filed appellants' motion to dismiss arguing that the expert reports were untimely.[3] Appellees filed a response and a supplemental response to appellants' motion to dismiss. Appellees argued that they had timely served their expert reports on RGV's two attorneys who were acting on behalf of appellants pursuant to a Rule 11 agreement. In addition, appellees claimed that appellants' current attorney had affirmatively waived appellants' objection to the timeliness of the expert reports. *See Jernigan v. Langley*, 111 S.W.3d 153, 156–58 (Tex. 2003) (explaining that traditional rules of waiver apply to expert report challenges under section 74.351 of the Texas Civil Practice and Remedies Code and that if the movant of a motion to dismiss due to an untimely expert report shows an intent to waive the right to dismissal, the defendant's silence or inaction must be inconsistent with the intent to rely upon the right to dismissal); *see also Uduma v. Wagner*, No. 01-12-00796-CV, 2014 WL 4259886, at *6 (Tex. App.—Houston [1st Dist. Aug. 27, 2014, pet. denied) (mem. op.) ("[T]he Supreme

[3] On June 30, 2015, appellants filed a motion to disqualify RGV's attorneys "pursuant to Texas Disciplinary Rules of Professional Conduct 1.06, and due to their former and current representation [of appellants] in other legal matters." The trial court granted the motion on July 8, 2015.

Court has recognized that traditional waiver principles apply to Chapter 74 claims and that, while the mere passage of time does not waive a defendant's right to a dismissal under Chapter 74 when there is no statutory deadline for asserting said right, a defendant may still waive its right to a dismissal under Chapter 74 if the defendant's conduct is 'inconsistent with the intent to rely upon the right to dismissal.'"). The trial court denied appellants' motion stating that it had considered "the motion, the responses, the argument of counsel, and the applicable law." This appeal followed.

II. UNCHALLENGED GROUNDS

> When a trial court issues an adverse ruling without specifying its grounds for doing so, the appellant must challenge each independent ground asserted by the appellee that fully supports the adverse ruling since it is presumed that the trial court considered all of the asserted grounds. *U.S. Lawns, Inc. v. Castillo*, 347 S.W.3d 844, 847 (Tex. App.—Corpus Christi 2011, pet. denied)[("If the appellant fails to challenge all possible grounds, we must affirm the judgment on the unchallenged ground."]; *Oliphant Financial L.L.C. v. Hill*, 310 S.W.3d 76, 77–8 (Tex. App.— El Paso 2010, pet. filed); *Fox v. Wardy*, 224 S.W.3d 300, 304 (Tex. App.—El Paso 2005, pet. denied). If the appellant fails to challenge all possible grounds, we must accept the validity of the unchallenged independent grounds and affirm the adverse ruling. *U.S. Lawns, Inc*., 347 S.W.3d at 844; *Oliphant Financial L.L.C*., 310 S.W.3d at 78; *Fox*, 224 S.W.3d at 304. Thus, any error in the grounds challenged on appeal is harmless because the unchallenged independent ground fully supports the adverse ruling. *Oliphant Financial L.L.C*., 310 S.W.3d at 78.

In re Elamex, S.A. de C.V., 367 S.W.3d 879, 888 (Tex. App.—El Paso 2012, orig. proceeding) (applying these principles to analyze whether the trial court abused its discretion by denying the appellant's motion to dismiss). Moreover, "Rule 38.3 of the Texas Rules of Appellate Procedure does not allow an appellant to include in a reply brief a new issue in response to a matter pointed out in appellee's brief but not raised by the appellant's original brief." *U.S. Lawns*, 347 S.W.3d at 849.

Here, in their brief, appellants challenge the trial court's denial of their motion to dismiss on the sole basis that appellees did not timely file their expert reports and curricula vitae on appellants or their current counsel of record within 120 days of filing their petition. Specifically, appellants argue that RGV's attorneys could not accept service of the expert reports on behalf of appellants.[4] However, in the trial court, as another basis for denying appellants' motion, appellees argued that appellants' attorney affirmatively waived his arguments by withdrawing appellants' objections to the timeliness of the expert reports.

In their brief, appellants have not challenged the denial of their motion to dismiss on that basis. And, as set out above, "[w]hen a trial court issues an adverse ruling without specifying its grounds for doing so, the appellant must challenge each independent ground asserted by the appellee that fully supports the adverse ruling since it is presumed that the trial court considered all of the asserted grounds." *In re Elamex, S.A. de C.V.*, 367 S.W.3d at 888. Here, when it denied the motion, the trial court did not state its basis and stated that it had considered, among other things, the appellees' responses. Thus, appellants must have challenged each independent ground asserted by appellee that fully supported the trial court's adverse ruling. *See id.* Appellants have not done so.

[4] At the motion to dismiss hearing, RGV's attorney, Steven Gonzalez testified. When asked who he represented at the time this case was initiated, Gonzalez replied:

> We were representing RGV . . . and McAllen Medical Center for the purposes of obtaining a Rule 11 agreement on behalf of McAllen Medical Center to extend the answer date that they would be required to file an answer in this case; and for the purpose of receiving service of the plaintiffs Chapter 74 reports. For those two purposes, we were representing the hospital entities. We were also representing the RGV Group, which I referenced earlier.

Therefore, we must accept the validity of the unchallenged independent ground and affirm the adverse ruling in this case.[5] *See id.* Accordingly, we overrule appellants' sole issue.[6]

III. CONCLUSION

We affirm the trial court's judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
16th day of June, 2016.

[5] Moreover, although appellants state that the 120-day deadline to timely serve the expert reports was on December 5, 2013, in *Gardner v. U.S. Imaging, Inc*., 274 S.W.3d 669, 671–72 (Tex. 2008) (per curiam), the Texas Supreme Court held that "when [a facility] failed to timely answer the [plaintiffs'] [medical negligence] suit by the Monday following the expiration of twenty days after it was served, the statutory period for serving [the facility] with an expert report was tolled until such time as [the facility] made an appearance." So, in this case, it appears that the time to file the expert report was tolled because appellants did not timely file their answer. *See id.*; *Garza v. Carlson*, 398 S.W.3d 848, 850–51 (Tex. App.—Corpus Christi 2012, pet. denied) ("The *Gardner* Court made clear that the tolling of the expert report timeline commences at the time the defendant's answer was due to be filed.").

[6] In their reply brief, appellants argue that appellees' supplemental response to their motion to dismiss was untimely because it was not filed at least three days prior to the hearing. However, appellants did not make this argument in their original brief. Therefore, we may not consider it. *See* TEX. R. APP. P. 38.3. Moreover, at the motion to dismiss hearing, appellees presented evidence supporting its contention that appellants' attorney waived their objections to the timeliness of the expert reports. Appellants made no objections to this evidence.