Opinion issued March 1, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00439-CV

ARTURO ARMENTA, M.D., Appellant

V.

ROBERT JONES, INDIVIDUALLY AS WRONGFUL DEATH BENEFICIARY OF ISONETTA JONES, DECEASED AND ON BEHALF OF THE ESTATE OF ISONETTA JONES, DECEASED; TRISTON JONES-MAXIE, INDIVIDUALLY AS WRONGFUL DEATH BENEFICIARY OF ISONETTA JONES, DECEASED, Appellees

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On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Case No. 16-DCV-235127

MEMORANDUM OPINION

This is an interlocutory appeal from the denial of a motion to dismiss a health care liability claim based on the adequacy of an expert report. Dr. Arturo

Armenta raises three arguments on appeal. First, he argues that the expert report filed by appellees was insufficient because the expert was not qualified. Second, he argues that the report failed to meet the statutory requirements regarding breach and causation. Third, he argues that due to these deficiencies, the report did not qualify as an expert report under the statute, and the trial court should have dismissed the claims against him.

In response, the appellees contend that the expert was qualified and the report was sufficient. They also argue that Dr. Armenta waived his issue about causation.

We affirm.

Background

The expert report at issue in this interlocutory appeal provides the background facts. The medical records are not in the appellate record, and we rely upon the factual statements in the report for the limited purpose of this appeal. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002). Dr. Arturo Armenta performed reconstructive surgery on Isonetta Jones, who previously had undergone a bilateral mastectomy. The day after the reconstructive surgery, complications required Dr. Armenta to perform emergency surgery to restore blood circulation. About ten minutes after completion of the emergency surgery, while Jones was intubated, her oxygen level dropped to 85% and her spontaneous respirations

decreased. Dr. Armenta remained in the operating room until after Jones was extubated. She was extubated and taken to the intensive care unit. She arrived seven minutes after extubation, and she was unresponsive and hypoventilating. She experienced respiratory and cardiac arrest, and although she was resuscitated, she suffered brain damage from prolonged deprivation of oxygen. Based on medical advice that Jones would not recover from her brain injury, mechanical life support was withdrawn, and she passed away.

Jones's estate, her husband, and her children sued the hospital, three anesthesia practices, Dr. Armenta, and Dr. Gary Flores, the anesthesiologist who provided care during the emergency surgery. The petition alleged that Jones was extubated with Dr. Armenta's "approval," despite her shallow and intermittent breathing. It further alleged that Dr. Armenta failed to exercise ordinary care by failing to properly monitor her, prematurely extubating her, and "failing to timely resuscitate" her.

The appellees served Dr. Armenta with an expert report in the form of a letter written by Dr. William James Mazzei, a board-certified anesthesiologist who is licensed in California. The report recited Dr. Mazzei's credentials and summarized relevant medical records. It stated that Dr. Flores and a nurse anesthetist violated the standard of care by extubating Jones before she was able to breathe on her own. The report stated that "Dr. Armenta, who was present and

participating in her care . . . breached and violated the standard of care by failing to immediately ventilate the patient." It further opined that "the anesthesiologist, certified nurse anesthetist, surgeon and any other healthcare professional involved in the extubation of a patient must be able to immediately ventilate the patient if respiratory depression and/or respiratory arrest occurs." Finally Dr. Mazzei opined that the failure of Dr. Armenta and the other defendants "to immediately ventilate the patient" caused oxygen deprivation and brain injury, ultimately resulting in Jones's death.

Dr. Armenta timely filed objections to the report. He argued that Dr. Mazzei's report was insufficient as to the standard of care and breach of the standard of care. In particular, he argued that the report did not demonstrate Dr. Mazzei's expertise on the standards of care applicable to a plastic surgeon. Dr. Armenta asserted that Dr. Mazzei's statements were conclusory regarding the standards of care and insufficient as to breach for failing to distinguish the actions of each defendant.

The trial court overruled Dr. Armenta's objections, and it later denied his motion to dismiss, which asserted that he had not been served with an expert report that complied with the statute. Dr. Armenta appealed.

Analysis

Dr. Armenta challenges the trial court's denial of his motion to dismiss, raising three issues. First, he asserts that Dr. Mazzei is not a qualified expert. In particular, he asserts that Dr. Mazzei's credentials as an anesthesiologist do not qualify him to offer opinions about the standards of care applicable to a plastic surgeon. Second, Dr. Armenta argues that the expert report fails to meet the statutory standards for showing breach of the standard of care and causation. Third, he contends that the report neither satisfied the statutory requirements nor merits a conclusion that it was a good-faith effort to comply with the statute. Accordingly, Dr. Armenta urges this court to reverse the ruling of the trial court and render a judgment of dismissal.

In response, the appellees contend that Dr. Mazzei is qualified and the report is adequate. They also argue that Dr. Armenta waived any challenge to the adequacy of the report as to causation by failing to make that objection in the trial court.

A plaintiff asserting a health care liability claim must serve each defendant physician or health care provider with one or more expert reports and a curriculum vitae of each expert whose opinion is offered to substantiate the merits of the claims. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a), (i); *TTHR Ltd. P'ship v. Moreno*, 401 S.W.3d 41, 42 (Tex. 2013). An expert report must provide: (1) "a fair

summary of the expert's opinions . . . regarding applicable standards of care," (2) a statement identifying "the manner in which the care rendered by the physician or health care provider failed to meet the standards," and (3) an explanation of "the causal relationship between that failure and the injury, harm, or damages claimed." TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *see TTHR Ltd. P'ship*, 401 S.W.3d at 44. Although the expert report "need not marshal every bit of the plaintiff's evidence," *Jernigan v. Langley*, 195 S.W.3d 91, 93 (Tex. 2006), it must "explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented." *Jelinek v. Casas*, 328 S.W.3d 526, 539–40 (Tex. 2010).

An order denying a motion to dismiss a health care liability claim on the basis that the plaintiff has not filed an expert report is immediately appealable. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9); *see Lewis v. Funderburk*, 253 S.W.3d 204, 207–08 (Tex. 2008). On interlocutory appeal, we review the trial court's ruling for abuse of discretion. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

I. Expert qualifications

Dr. Armenta argues that Dr. Mazzei is not a qualified expert because he lacks knowledge of the accepted standard of care applicable to a plastic surgeon

and because his training and experience as an anesthesiologist do not qualify him to offer an opinion about a plastic surgeon.

To qualify as an expert witness for the purpose of the expert report, a person must be a physician who:

> (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;
>
> (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and
>
> (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

TEX. CIV. PRAC. & REM. CODE § 74.401(a); *see id.* § 74.351(r)(5)(A).

The person offering the expert opinion must do more than show that he is a physician, but he "need not be a specialist in the particular area of the profession for which testimony is offered." *Owens v. Handyside*, 478 S.W.3d 172, 185 (Tex. App.—Houston [1st Dist.] 2015, pet. denied). The critical inquiry is "whether the expert's expertise goes to the very matter on which he or she is to give an opinion." *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996); *see Mangin v. Wendt*, 480 S.W.3d 701, 707 (Tex. App.—Houston [1st Dist.] 2015, no pet.). A physician also may be qualified to provide an expert report even when his specialty differs from that of the defendant "if he has practical knowledge of what is usually and customarily done by other practitioners under circumstances similar to those

confronting the malpractice defendant," or "if the subject matter is common to and equally recognized and developed in *all* fields of practice." *Keo v. Vu*, 76 S.W.3d 725, 732 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

To determine whether a witness is qualified based on his training and experience, *see* TEX. CIV. PRAC. & REM. CODE § 74.401(a)(3), a trial court must consider whether the witness is "board certified or has other substantial training or experience in an area of medical practice relevant to the claim," and whether he "is actively practicing medicine in rendering medical care services relevant to the claim." *Id.* § 74.401(c). When considering whether a person is qualified as an expert, courts are limited to considering only the four corners of the expert report and the accompanying curriculum vitae. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51–52 (Tex. 2002); *Palacios*, 46 S.W.3d at 878; *Mangin*, 480 S.W.3d at 706.

Dr. Mazzei is a licensed medical doctor, and he is board certified in anesthesiology. After graduating from medical school in 1981, he completed an internship, a residency, a chief residency, and five fellowships. All of these experiences, except the initial internship, related to anesthesiology. He has held numerous professional appointments including acting as "Medical Director of Perioperative Services," at the University of California—San Diego Medical Center from 1990 to 2008 and in 2017. He also has taught as a clinical professor of

anesthesiology for more than 20 years. He has served on various academic and clinical committees, including a patient-care review committee for a hospital. He has written 26 peer-reviewed articles and book chapters on assessment of patients for anesthesia administration. In addition, he has authored unpublished articles for residents and colleagues, and he has given many lectures. These works have focused on anesthesia administration, care of patients receiving anesthesia, care of patients before, during, and after surgery (i.e., "perioperative services"), and operating room management and utilization. Dr. Mazzei also serves as a peer reviewer for *Anesthesia and Analgesia*, *Journal of Clinical Anesthesia*, and *OR Manager* publications.

At the time of Jones's surgery and at the time he wrote the report, Dr. Mazzei was actively engaged in providing anesthesia services to patients who had the same or similar conditions to Jones and who were undergoing surgery. According to Dr. Mazzei's report, his services included "consulting with the surgeon, evaluating the patient and providing anesthesia care to the patient which includes, but is not limited to, intubating the patient, providing anesthesia during surgery, monitoring the patient post-operatively and extubating the patient." Dr. Mazzei stated that he has had an "active practice as a physician providing care to patients" who were like Jones, and based on education, training, knowledge, and experience, he asserted that he was "familiar with the standards of care for

anesthesiologists, certified nurse anesthetists, and other healthcare providers involved in the postoperative care of patients receiving general anesthesia."

Dr. Mazzei was asked to give his opinion about the injury alleged in this case, which occurred just after the second surgery and implicated actions taken or not taken during post-operative monitoring, extubation, transport, and resuscitation. He stated that he has knowledge of accepted standards of medical care relevant to the care Jones received after the second operation. He wrote:

> I know the standards of care for the:
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> (1) proper pre-administration assessment of patients receiving anesthesia,
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> (2) administration of anesthesia to a patient;
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> (3) the proper monitoring of patients while receiving anesthesia;
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> (4) extubation of patients following the administration of anesthesia; and
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> (5) the timely, appropriate, and necessary, response of healthcare providers to a patient having a respiratory arrest.
>
> These standards are national standards and are the same in all communities in the United States.

He also wrote:

> I am familiar with the accepted standards of care for the postoperative monitoring and extubation of such patients [like Jones]. I am familiar with the standards of care as they apply to the physicians and nurses involved in the care of Isonetta Jones. The accepted and applicable standards of care are national standards of care and do not differ from

> community to community. I know the accepted standards of care, the breaches and violations of the standards of care, and the causation links between the breaches and the violations of the standards of care and the death of Isonetta Jones on the basis of my education, training, knowledge and experience . . . .

Dr. Armenta contends that Dr. Mazzei is unqualified to opine about what standard of care applies to a plastic surgeon "after the plastic surgeon has successfully completed plastic surgery and the anesthesiologist and certified nurse anesthetist are caring for that same patient after surgery." Nothing in the record of this interlocutory appeal suggests that the claimed injury implicated the performance of plastic surgery. Rather, the injury related to what happened immediately after Dr. Armenta completed surgery to restore blood flow to the surgical area. In his report and CV, Dr. Mazzei has asserted expertise in postoperative monitoring and care of patients who have received anesthesia. To the extent that Dr. Mazzei has stated standards of care regarding matters common to and equally recognized and developed in all fields of practice, the fact that he specializes in anesthesiology and not plastic surgery does not disqualify him from rendering the required opinion. *See Keo*, 76 S.W.3d at 732.

Dr. Armenta's argument, repeated throughout his brief, asserts that he is not responsible for the injury that Jones suffered because his part of the surgery had been completed. This assertion is not dispositive of whether the witness is qualified to offer an opinion about the standard of care governing all healthcare

professionals involved in the post-surgery treatment of a patient who has had anesthesia.

We conclude that Dr. Mazzei's expertise goes to the very matter on which he was asked to give an opinion: the immediate postoperative care of Jones, who had been given anesthesia. *See Broders*, 924 S.W.2d at 153. We conclude that the trial court did not abuse its discretion by ruling that Dr. Mazzei was qualified to offer his opinions in the form of an expert report in this case.

We overrule the first issue.

II. Breach of the standard of care

In his second issue, Dr. Armenta argues that Dr. Mazzei's report fails to meet the statutory requirement to set forth an opinion about the alleged breach of the standard of care. The appellees argue that the report explains that "all healthcare providers involved in the care of Isonetta Jones when she was prematurely extubated" were required to "ventilate the patient." They further argue that Dr. Armenta did not ventilate her, and he allowed two minutes to pass before she was transported to the ICU. Nevertheless, Dr. Armenta contends that he remains "puzzled as to what specific acts he did that breached the standard of care."

An expert report is sufficient when it provides a "fair summary" of the expert's opinions about the applicable standards of care, how the physician failed

to meet those standards, and how that failure caused the injury, harm, or damages claimed. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). To be adequate, an expert report "must inform the defendant of the specific conduct the plaintiff has called into question," and it "must provide a basis for the trial court to conclude that the claims have merit." *Palacios*, 46 S.W.3d at 879; *accord Baty v. Futrell*, No. 16-0164, 2018 WL 665456, at *4 (Tex. Feb. 2, 2018). The report must include enough information to demonstrate "what care was expected, but not given." *Palacios*, 46 S.W.3d at 880. In considering a challenge to the adequacy of an expert report, we "must view the report in its entirety, rather than isolating specific portions or sections." *Baty*, 2018 WL 665456, at *4.

In his report, Dr. Mazzei set forth opinions about Dr. Armenta, as well as Dr. Flores and the nurse anesthetist who worked for the hospital. After summarizing his objectives and expertise, he summarized the medical history of Jones's injury. In the "history" section, Dr. Mazzei identified the actions taken by Dr. Armenta as recorded in the medical records. As stated in the expert report, Dr. Armenta admitted Jones to the hospital for surgery that was performed on June 19, 2014. The following day, he performed a bedside examination and took her "emergently" for exploratory surgery due to lack of blood flow. While in surgery, Dr. Armenta "identified a large clot in the artery and vein that had interrupted blood flow to the flap." He performed a "thrombectomy" which was followed by

"thrombolysis." Dr. Mazzei's report recited that "surgery ended at 1747" and "at 1758, Mrs. Jones was extubated by anesthesia." Dr. Mazzei also noted that "[p]er the operative report, Dr. Armenta remained in the operating room until after Mrs. Jones was extubated." Dr. Mazzei discussed the roles played by Dr. Flores and the nurse anesthetist before, during, and after surgery, as well as what happened to Jones after she was taken from the operating room from two minutes after extubation until she died.

In a section entitled, "Standard of Care and Breach," Dr. Mazzei initially set forth a standard of care applicable to Dr. Flores. The report opined that Dr. Flores was required to "keep Isonetta Jones intubated following her June 20, 2014 surgery until she was able to adequately oxygenate and ventilate herself." After summarizing the medical history and providing some explanation, the report stated:

> Dr. Flores and the certified nurse anesthetist breached the standard of care by extubating Isonetta Jones. In reasonable medical probability, if Isonetta Jones had remained intubated until she was able to breathe on her own, she would not have experienced the respiratory arrest which caused reduced blood flow and, therefore, reduced oxygen, to her brain. Isonetta Jones would not have suffered the hypoxic ischemic encephalopathy. In reasonable medical probability, the breach and violation of the standard of care of failing to ventilate Isonetta Jones' caused her brain to be deprived of oxygen for such a length of time that she suffered an anoxic encephalopathy that ultimately [led] to her death.

In addition, the report recited that Dr. Armenta was "present and participating in" the care of Jones when she was "prematurely extubated." The report identified Dr. Armenta as the surgeon and stated a standard of care that applied to the surgeon, that he "be able to immediately ventilate the patient if respiratory depression and/or respiratory arrest occurs." It stated that Dr. Armenta "failed to immediately ventilate" Jones, and he made no "attempt to ventilate" her after the extubation. Finally, the report stated that the failure of Dr. Armenta and others to "immediately ventilate" Jones led to anoxic brain injury and caused her death.

Dr. Mazzei's report showed that the care that was expected from but not given by Dr. Armenta was the ventilation of Jones immediately after extubation, which was performed prematurely by others. *See Palacios*, 46 S.W.3d at 880. Considering the report as a whole, it states that Dr. Armenta breached the standard of care by failing to immediately ventilate his patient after others prematurely extubated her. *See Baty*, 2018 WL 665456, at *4.

Dr. Armenta's appellate arguments center on the notion that intubation, ventilation, and extubation were exclusively the responsibility of the anesthesiologist. He repeatedly asserts that that the alleged injury occurred at a time after his care of Jones had concluded, and he contends that Dr. Mazzei's statement of the standard of care which required him to ventilate Jones was

incorrect. In addition, he raises fact questions, such as by arguing that Dr. Mazzei's report "fails to state or explain how [he] was caring for the patient" when the injury allegedly occurred.

"[T]he expert report's assertion that the standard of care requires or prohibits a particular action does not conclusively establish that fact." *Baty*, 2018 WL 665456, at *4. "The expert report requirement is a threshold mechanism to dispose of claims lacking merit, but reports are not the only means to address weak subsets of those claims." *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 631 (Tex. 2013). This is particularly true in light of the structure of the statute, which permits only limited discovery until expert reports have been served. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(s); *Certified EMS*, 392 S.W.3d at 632. "The parties to a medical-malpractice case may—and often do—disagree over what the standard of care in fact requires." *Baty*, 2018 WL 665456, at *7.

The question before us is not whether Dr. Mazzei's statements about the standard of care and its breach are accurate. Rather, at this stage of the proceeding, we assume that the statements are accurate and ask whether the report is specific and sufficient to enable the trial court determine whether the claims lack merit. We conclude that the report was adequate, and we hold that the trial court did not abuse its discretion by denying the motion to dismiss based on the statements of standard of care and breach.

As part of his second issue, Dr. Armenta challenges the adequacy of the element of causation in the expert report. In the trial court, Dr. Armenta objected to Dr. Mazzei's report on the basis that it failed to meet the statutory requirements for stating the standard of care and identifying the breach of that standard, but he did not object on the basis of inadequacy of the report as to causation. Dr. Armenta's argument about causation is waived because it was not raised in the trial court. *See* TEX. CIV. PRAC. & REM. CODE § 74.351; TEX. R. APP. P. 33.1; *see, e.g., Whisenant v. Arnett*, 339 S.W.3d 920, 926 (Tex. App.—Dallas 2011, no pet.).

Because the report is sufficient as to standard of care and breach, and because Dr. Armenta waived his challenge to the adequacy of the causation element, we hold that the trial court did not abuse its discretion by denying the motion to dismiss. In light of this holding, it is not necessary to the disposition of the appeal to address Dr. Armenta's remaining issue, in which he argues for rendition of a judgment of dismissal as opposed to allowing the appellees an opportunity to file a new report. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the order of the trial court.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.