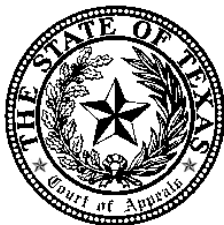


Affirmed and Memorandum Opinion filed March 16, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00532-CV

MICHAEL J. REARDON, M.D., Appellant

V.

ROYCE NELSON, Appellee

On Appeal from the 334th District Court

Harris County, Texas

Trial Court Cause No. 2006-58453

MEMORANDUM OPINION

Appellant, Michael J. Reardon, M.D. (“Dr. Reardon”), appeals the trial court’s order denying his motion to dismiss appellee, Royce Nelson’s (“Nelson”), medical-malpractice suit on the ground that Nelson’s expert, John F. Seaworth, M.D. (“Dr. Seaworth”), provided an inadequate report. In three issues, Dr. Reardon contends the trial court abused its discretion by (1) finding Dr. Seaworth was “qualified to provide opinions on how the alleged breach of the standard of care caused [Nelson’s] damages,”

(2) determining “that the causation opinion of [Nelson’s] cardiology expert was linked to facts in the expert’s report, and not just speculation and assumptions,” and (3) “failing to dismiss all claims regarding the standard of care during the performance of a coronary artery bypass surgery.” Because all dispositive issues are settled in Texas law, we issue this memorandum opinion and affirm the trial court’s order. *See* Tex. R. App. P. 47.4.

I. BACKGROUND

Dr. Reardon performed double bypass surgery on Nelson’s coronary arteries. Apparently, Dr. Reardon did not recognize that Nelson has a ramus artery which is an abnormal physiological presentation in coronary arteries. Dr. Reardon erroneously bypassed the ramus instead of the circumflex artery. After he was discharged from the hospital, Nelson experienced pain and shortness of breath. A subsequent heart catheterization was performed, revealing a lesion and narrowing of the circumflex artery. Subsequently, a stent was inserted into the circumflex artery to restore blood flow.

Nelson filed this medical-malpractice suit, seeking to recover damages for past and future medical expenses, physical impairment, and physical pain and mental anguish. Subsequently, Nelson delivered expert reports authored by Dr. Ihsan Shanti and Dr. Seaworth as required by section 74.351(a) of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (Vernon Supp. 2009). Dr. Reardon filed a motion to dismiss, challenging the qualifications and sufficiency of both reports. The trial court denied Dr. Reardon’s motion. Our court reversed the denial, concluding (1) Dr. Shanti is not qualified to provide an expert opinion sufficient to fulfill Nelson’s obligations under section 74.351 and (2) Dr. Seaworth is qualified, but his report is not sufficient. *Reardon v. Nelson*, No. 14-07-00263-CV, 2008 WL 4390689, at *1, 5, 7 (Tex. App.—Houston [14th Dist.] Sept. 30, 2008, no pet.) (mem. op.). Because Nelson requested an extension to modify his expert reports, this court remanded the case to the trial court for further consideration. *Id.* at *7.

The trial court granted the extension, and Nelson timely delivered Dr. Seaworth's modified report. In his amended report, Dr. Seaworth opined that Dr. Reardon failed to review video images and pre-operative procedure worksheets, resulting in his failure to bypass the correct artery; consequently, Nelson was required to undergo another procedure in which a stent was placed in his circumflex artery; and Nelson will incur damages in the future because he lacks the benefit of a bypass on his circumflex artery.

The trial court denied Dr. Reardon's second motion to dismiss, concluding that Dr. Seaworth's report "specifically identifies what Dr. Reardon should have done differently, how he should have done it, and when as required by the Court of Appeals." However, the trial court granted Dr. Reardon's motion to the extent Dr. Seaworth "purports to criticize Dr [sic] Reardon for failure to perform surgical techniques designed to identify the correct artery" The trial court concluded, "[t]he report fails to identify any surgical procedure that Dr. Reardon failed to perform to identify the correct artery."

II. STANDARD OF REVIEW AND APPLICABLE LAW

Nelson's medical-malpractice claim is governed by Chapter 74 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001 (Vernon 2005). Under section 74.351, a claimant is required to file an expert report within 120 days after a claim is filed. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). An expert report is defined as:

[A] written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Id. § 74.351(r)(6). A defendant may file a motion challenging the sufficiency of an expert report. *See id.* § 74.351(a). The court must grant the motion only if it concludes, after a hearing, the report "does not represent an objective good faith effort to comply with the definition of an expert report" *Id.* § 74.351(l).

We review the trial court’s determination of a physician’s qualifications to render an expert opinion in a health-care liability case under an abuse-of-discretion standard. *Baylor Coll. of Med. v. Pokluda*, 283 S.W.3d 110, 116–17 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing *Larson v. Downing*, 197 S.W.3d 303, 304–05 (Tex. 2006) (per curiam)); *Mem’l Hermann Healthcare Sys. v. Burrell*, 230 S.W.3d 755, 757 (Tex. App.—Houston [14th Dist.] 2007, no pet.). We also review a trial court’s ruling regarding the adequacy of an expert report for abuse of discretion. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner, without reference to guiding rules or principles. *See Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). We may not substitute our judgment for that of the trial court when reviewing matters committed to the trial court’s discretion. *See Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989).

III. ANALYSIS

A. Dr. Seaworth’s Qualifications

In this court’s previous opinion, we described the gravamen of Nelson’s claim as follows: “Nelson’s complaint is that Dr. Reardon performed the admittedly successful bypass on a healthy artery rather than the artery needing the bypass.” *Reardon*, 2008 WL 4390689, at *3. We concluded that Dr. Seaworth is qualified to render opinions regarding Nelson’s claim as described.

Dr. Reardon returns to this court and recasts his complaints about Dr. Seaworth’s qualifications. In his first issue, Dr. Reardon contends the trial court “abuse[d] its discretion in determining that [Nelson’s] cardiologist expert was qualified to provide opinions on how the alleged breach of the standard of care caused [Nelson’s] damages.” Dr. Reardon refers this court to the following language in Dr. Seaworth’s amended report: “Dr. Reardon’s failure to make this review and use the information contained on the worksheet led to Dr. Reardon sewing a bypass graft into the wrong vessel.” Dr.

Reardon then argues that Dr. Seaworth's report and curriculum vitae "fail to show how he is qualified to make this assumption and opinion."

First, we disagree with Dr. Reardon's assessment of our earlier opinion. This court did not narrowly view Dr. Seaworth's qualifications. However, we will briefly address Dr. Reardon's new contention. Dr. Reardon argues Dr. Seaworth's "causation opinion assumes that if a cardiovascular surgeon is aware that a patient has a ramus artery, the surgeon will be able to identify it during the surgery and distinguish it from other arteries." Relying on *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996), Dr. Reardon contends Dr. Seaworth is not qualified to render an opinion regarding causation because he is not a cardiovascular surgeon. However, Dr. Reardon's reliance on *Broders* is misplaced because the court did not conclude that only a doctor practicing in the defendant physician's specialty should be allowed to testify. *See id.* at 152–53 (noting, "[the court's] holding does not mean that only a neurosurgeon [could] testify about the cause in fact of death from an injury to the brain, or even that an emergency room physician could never so testify."). Moreover, in *Roberts v. Williamson*, 111 S.W.3d 113, 121–22 (Tex. 2003), the court concluded that a pediatrician who had experience and expertise regarding the specific causes and effects of neurological injuries could testify regarding causation even though he was not a neurologist. Although Dr. Seaworth is not a cardiovascular surgeon, he may be qualified to render certain opinions regarding causation in this case if he otherwise satisfies the requirements outlined in the Texas Rules of Evidence. *See* Tex. Civ. Prac. & Rem. Code § 74.351(r)(5)(C).

Second, under the Texas Rules of Evidence, an expert must have education, training, and experience relevant to the specific issue before the court. *See* Tex. R. Evid. 702; *Broders*, 924 S.W.2d at 153. Therefore, Nelson must demonstrate to the trial court that Dr. Seaworth has the knowledge, training, and experience sufficient to assist the jury in determining whether Dr. Reardon's misidentification of the ramus artery caused Nelson's damages. *See Broders*, 924 S.W.2d at 153. According to his amended report and curriculum vitae, Dr. Seaworth is board certified in internal medicine and

cardiovascular diseases and currently practices as Chief of Cardiology at Northeast Baptist Hospital in San Antonio, Texas. He has over twenty-five years experience in treating patients before and after coronary bypass surgery. He has reviewed thousands of angiograms and assisted surgeons both before and after bypass surgery.

Dr. Reardon seems to ignore the fact that cardiovascular surgeons and cardiologists regularly employ the same techniques to identify the arteries in order to make their diagnosis and recommend proper treatment. He argues that every licensed medical doctor is not automatically qualified to provide expert testimony on every medical question, and an expert must truly have specialized knowledge as to the very matter on which he proposes to provide an opinion. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 719 (Tex. 1998); *see also Broders*, 924 S.W. 2d at 152–53. We agree, but our reasoning in this case is not inconsistent with the analysis in *Gammill* and *Broders*. We have previously held that a physician may be qualified to provide opinions although he is not a specialist in the particular branch of medicine at issue. *Blan v. Ali*, 7 S.W.3d 741, 745 (Tex. App.—Houston [14th Dist.] 1999, no pet.). A physician may testify regarding the standard of care for physicians engaged in another specialty if the specialties are intertwined and he works closely with other specialists in that same field. *Id.* Moreover, a physician may provide expert testimony if he has practical knowledge regarding the usual and customary practice under circumstances similar to those confronted by the defendant physician. *Id.* In *Kelly v. Rendon*, 255 S.W.3d 665, 672–74 (Tex. App.—Houston [14th Dist.] 2008, no pet.), we rejected the contention that only a plastic surgeon could opine regarding the standard of care for a plastic surgeon. 255 S.W.3d at 672–74. Instead, we focused on whether the physician was practicing medicine and rendering medical care relevant to the claim. *Id.* at 674.

Third, citing *Thomas v. Alford*, 230 S.W.3d 853, 860 (Tex. App.—Houston [14th Dist.] 2007, no pet.), Dr. Reardon contends Dr. Seaworth is not qualified to provide an expert opinion regarding causation because he does not have knowledge or experience sufficient to determine whether a different treatment would have prevented the damages.

However, *Thomas* is distinguishable because the court concluded that a radiologist was disqualified because he did not have the requisite education, training or experience to provide an expert opinion regarding cancer treatment. *Id.* Here, Dr. Seaworth has demonstrated he has the education, training, and experience sufficient to provide expert opinions regarding misidentification of coronary arteries.

In sum, based on the information in Dr. Seaworth's report and curriculum vitae, we hold the trial court did not abuse its discretion by concluding that Dr. Seaworth has the education, training, and experience to assist the jury in determining whether Dr. Reardon's misidentification of the ramus artery caused Nelson's damages. Accordingly, we overrule Dr. Reardon's first issue.

B. Dr. Seaworth's Opinion

In support of his second issue, Dr. Reardon argues Dr. Seaworth's opinion is "conclusory and based on assumptions regarding the practice of cardiovascular surgery." We determine the adequacy of an expert report by reviewing relevant information within the four corners of the report. *Palacios*, 46 S.W.3d at 878. A claimant is not required to marshal all of the evidence supporting his claims in an expert report; however, an expert must address each element prescribed under the statute. *Id.* He must include a factual narrative sufficient to inform the defendant of the specific conduct plaintiff has called into question and provide a reasonable basis for a trial court to conclude the claims have merit. *Id.* at 879. A report containing only conclusions regarding the standard of care, breach, and causation does not fulfill these two purposes. *Id.* The expert must explain the basis for his statements and link his conclusions to facts. *Sanjar v. Turner*, 252 S.W.3d 460, 465 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (citing *Wright*, 79 S.W.3d at 52).

Dr. Reardon argues that Dr. Seaworth's report is inadequate because his opinions are based on conjecture and speculation that (1) Dr. Reardon was not aware of the ramus artery before surgery and (2) a cardiovascular surgeon would not misidentify the

circumflex and ramus arteries during bypass surgery if the surgeon had seen a drawing showing the presence of a ramus artery. Dr. Reardon further argues there is no basis to conclude that a claim has merit if the expert relies on unsupportable assumptions. *See Murphy v. Mendoza*, 234 S.W.3d 23, 28 (Tex. App.—El Paso 2007, no pet.). Dr. Reardon argues the assumptions purportedly entertained in this case are analogous to the opinions in *Murphy* and *Cooper v. Arizpe*, No. 04-07-00734-CV, 2008 WL 940490 (Tex. App.—San Antonio April 9, 2008, pet. denied) (mem. op.). In *Murphy*, the claimant’s experts assumed the defendant surgeon chose to perform surgery based solely on a faulty pathology report and that recuts of a biopsy accurately represented the original cuts. 234 S.W.3d at 27–28. The assumptions in *Murphy* were not substantiated by any facts in the expert report. *Id.* at 28. In *Cooper*, the claimant’s expert assumed there was information in a medical chart which was available for review by the defendant doctors. *Cooper*, 2008 WL 940490, at *4. However, there was no evidence in the report demonstrating that the information was available for review. *Id.*

Unlike the facts in *Murphy* and *Cooper*, there is substantiation in Dr. Seaworth’s report for his conclusion that video images and procedure worksheets were not reviewed by Dr. Reardon. Apparently, the trial court concluded that Dr. Seaworth’s opinion was not speculation but reasonably derived from averments in Nelson’s medical records. Dr. Seaworth noted that a cardiac-catheterization worksheet generated before surgery showed the ramus branch. Moreover, pre-operative video images revealed the presence of a ramus artery. Dr. Seaworth explained that a notation of a ramus artery should appear in two places: the pre-operative notes and the operative or surgical notes. Dr. Seaworth concluded the pre-operative notes reflected Dr. Reardon was not aware of the ramus artery, resulting in the conclusion that he did not review the cardiac-catheterization worksheet before commencing surgery. Accordingly, we agree with the trial court’s implicit finding that Dr. Seaworth fairly summarized the causal relationship between misidentification of the ramus artery and Nelson’s injuries. *See Palacios*, 46 S.W.3d at 879.

For all the reasons stated above, we conclude Dr. Seaworth provided sufficient facts in his report and linked his causation opinions to those facts and the standard of care for identification of a ramus artery. *See Kelly*, 255 S.W.3d at 679. Accordingly, we hold the trial court did not abuse its discretion by denying Dr. Reardon’s motion to dismiss based on his contention that Dr. Seaworth’s opinions are conclusory and based on factually-unsupportable assumptions. We overrule Dr. Reardon’s second issue.

In his third issue, Dr. Reardon complains that the trial court erred by “failing to dismiss all claims regarding the standard of care during the performance of a coronary artery bypass surgery.” Here, Dr. Reardon repeats his arguments regarding Dr. Seaworth’s qualifications, which we have already rejected.

Our focus for determining whether Dr. Seaworth should be allowed to provide expert testimony in this case remains the same as iterated in our first opinion: “Nelson’s complaint is that Dr. Reardon performed the admittedly successful bypass on a healthy artery rather than the artery needing the bypass.” *Reardon*, 2008 WL 4390689, at *3. After reviewing all of the information in Dr. Seaworth’s report and curriculum vitae, we cannot conclude that the trial court abused its discretion by denying Dr. Reardon’s motion to dismiss all claims regarding breach of the standard of care during Nelson’s surgery. The trial court’s order appropriately precludes Dr. Seaworth from providing testimony regarding Dr. Reardon’s failure to perform surgical techniques designed to identify the correct artery.¹ We interpret the order as precluding any testimony regarding such surgical techniques, including standards of care and causation of damages resulting from failure to perform surgical procedures calculated to identify the ramus artery. We

¹ Dr. Reardon raises multiple concerns about Dr. Seaworth’s qualifications to opine regarding standards of care for a cardiovascular surgeon “during the surgery.” We agree with Dr. Reardon’s contention that Dr. Seaworth is not qualified to render opinions regarding standards of care for a cardiovascular surgeon relative to failure to perform or negligent performance of surgical procedures calculated to identify the ramus artery. However, we see no reason to modify the trial court’s order because the same testimony is excluded, based on the trial court’s conclusion that Dr. Seaworth failed to identify any surgical procedure that Dr. Reardon failed to perform.

do not interpret the trial court's order to preclude Dr. Seaworth from providing testimony regarding non-surgical methods for identifying the ramus artery whether before or during cardiovascular surgery. Accordingly, we overrule Dr. Reardon's third issue.

We affirm the trial court's order.

/s/ Charles W. Seymore
Justice

Panel consists of Chief Justice Hedges and Justices Seymore and Sullivan.