

Reversed and Remanded and Memorandum Opinion filed June 29, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00705-CV

BAYTOWN RADIOLOGY ASSOCIATION, Appellant

V.

**JAMES E. CARLTON, INDIVIDUALLY AND A/N/F OF ROBERT LEE
CARLTON, JR., A MINOR, Appellee**

**On Appeal from the 270th District Court
Harris County, Texas
Trial Court Cause No. 2008-56529**

MEMORANDUM OPINION

In this health-care liability case, a radiology association challenges the trial court's adverse ruling on the association's objections to an expert medical report and motion to dismiss health-care liability claims for a plaintiff's failure to file an expert report in compliance with section 74.351 of the Texas Civil Practice and Remedies Code. Because the expert report fails to satisfy the statutory requirements as to causation, we reverse the trial court's order and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert Lee Carlton, Jr., a minor, visited a hospital emergency room complaining of knee pain following an injury he sustained in a football game. Appellant Baytown Radiology Association took x-rays of the injury. Radiologist Luis Albuerne, M.D., who is affiliated with Baytown Radiology, interpreted the x-ray series of Robert's right knee. Robert was treated by an emergency room physician. Robert was advised that he had suffered a "sprain strain" in his right knee and was discharged from the hospital with a knee brace and medication.

Several weeks later, Robert visited a pediatrician who referred him to orthopedic specialist Dr. David Howie. Dr. Howie examined Robert several months after the referral. Dr. Howie determined that Robert had suffered a fracture in his right knee, which was not treated at the hospital, and subsequently healed improperly.

Appellee James E. Carlton, individually and as next friend to Robert Lee Carlton, Jr., filed a health-care liability claim against appellant Baytown Radiology Association and other defendants San Jacinto Methodist Hospital, San Jacinto Methodist Hospital Services, and Ashok Gokhale, M.D., seeking to recover damages for the defendants' negligence in failing to properly diagnose Robert's knee injury.¹ Carlton alleges that the defendants' failure was a proximate cause of Robert's injury, which could have been avoided had the defendants met the required standard of care. Specifically, Carlton claims that Baytown Radiology breached the standard of care by failing to correctly interpret the x-ray film and diagnose the fracture in Robert's right knee. Baytown Radiology filed a general denial, an affirmative defense, and special exceptions.

In attempting to comply with section 74.351 of the Texas Civil Practice and Remedies Code, Carlton designated Dr. David Howie as an expert witness who provided a written expert report and his curriculum vitae. Baytown Radiology objected to the

¹ It is unclear from the record whether the claims against the other defendants have been resolved; however, they are not parties on appeal.

report, challenging the expert's qualifications to opine as to the standard of care and the adequacy of the report as to the elements of standard of care and causation. Baytown Radiology moved to dismiss the claims. The trial court sustained Baytown Radiology's objections to the expert report, but denied Baytown Radiology's motion to dismiss. The trial court granted a thirty-day period to remedy deficiencies in the report in accordance with Chapter 74 of the Texas Civil Practice and Remedies Code, also known as the Medical Liability Act.

Carlton filed an amended expert report and curriculum vitae of David I. Howie, M.D. Baytown Radiology objected to the amended expert report, challenging Dr. Howie's qualifications as an expert on the standard of care and the sufficiency of the report in addressing the standard of care and causation. The trial court overruled Baytown Radiology's objections to the amended expert report and denied Baytown Radiology's motion to dismiss. Baytown Radiology now appeals these adverse rulings.

II. STANDARD OF REVIEW

Baytown Radiology brings this interlocutory appeal challenging the trial court's order denying his motion to dismiss Carlton's claims under section 74.351 of the Texas Civil Practice and Remedies Code.² *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008) (providing that a trial court's order denying a party's motion to dismiss under section 74.351(b) of the Medical Liability Act is an appealable interlocutory order). In three issues, Baytown Radiology claims that the trial court abused its discretion in denying its motion to dismiss, challenging Dr. Howie's qualifications as an expert to render an opinion as to the standard of care and the sufficiency of Dr. Howie's expert report in addressing the elements of standard of care and causation.

² Unless otherwise noted, all references to a "section" or "subsection" pertain to the Texas Civil Practice and Remedies Code.

We apply an abuse-of-discretion standard when reviewing a trial court's decision regarding the adequacy of an expert report. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001). We also review a trial court's determination that an expert witness is qualified under an abuse-of-discretion standard. *See Broders v. Heise*, 924 S.W.2d 148, 151–52 (Tex. 1996). Carlton, as the proponent of the expert, had the burden to show that the expert was qualified. *See id.* at 151. The trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). Although this court may not substitute its judgment for that of the trial court, the trial court has no discretion in determining what the law is or applying the law to the facts. *Id.*; *Sanjar v. Turner*, 252 S.W.3d 460, 463 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

III. ANALYSIS

Did the trial court err in denying the motion to dismiss?

Under section 74.351, a claimant, not later than the 120th day after the date a health-care liability claim is filed, must serve on each party one or more expert witness reports addressing liability and causation. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (j) (Vernon 2005); *Lewis v. Funderburk*, 253 S.W.3d 204, 205 (Tex. 2008). 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 the 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.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). A trial court shall grant a motion challenging the adequacy of the expert report if the report is not an objective good-faith effort to comply with the definition of an expert report provided in section 74.351(r)(6).

Id. §§ 74.351(l), (r)(6). The trial court’s inquiry is limited to the four corners of the report. *Palacios*, 46 S.W.3d at 878.

A good-faith effort requires that the report, for each defendant, provide a fair summary of the expert’s opinions about the applicable standard of care, the manner in which the care failed to meet that standard, and causation. The report must provide sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit. *Id.* at 878–79. Omission of any of the statutory elements prevents the report from being a good-faith effort. *Id.* at 879. A report that merely states the expert’s conclusions about the standard of care, breach, and causation does not meet the statutory requirements. *Id.* In providing the expert’s opinions on these elements, the claimant need not marshal evidence as if actually litigating the merits at trial or present sufficient evidence to avoid summary judgment. *Id.* at 878–79; *Patel v. Williams*, 237 S.W.3d 901, 904 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

The expert report is deficient as to the element of causation because it fails to address the causal relationship between any breach of the standard of care and the injuries that Robert allegedly sustained. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). An expert report must show causation beyond mere conjecture and must contain information on causation. *Wright*, 79 S.W.3d at 52. A report that contains merely conclusory insights about the plaintiff’s claims is inadequate. *Id.* Rather, the expert must explain the bases of the statement and link the expert’s conclusions to the facts. *Id.*

In his petition, Carlton alleges that the defendants collectively failed to properly diagnose Robert’s injuries, resulting in a fracture that went untreated and healed improperly, and that the failure was a proximate cause of Robert’s injuries. However, in his report, Dr. Howie makes no attempt to link Baytown Radiology’s failure to diagnose a fracture from an x-ray with any injuries Robert sustained. In fact, the report states that Robert had “essentially full motion of the knee” four months after Dr. Howie’s initial

consultation with Robert, and that Robert sustained a new injury in a football game over one year after the original injury occurred; however, Dr. Howie notes that the fracture remained healed with no recurrent fracture. Dr. Howie states, “With all likelihood, Robert should do well,” although he notes the possibility of “growth arrest.” Dr. Howie does not state in the report how the failure to diagnose a fracture could have caused any damages alleged—particularly when he states, “Robert has had a fairly good outcome, it is difficult to say whether or not this has truly impacted his care, but nevertheless there was a failure to diagnose appropriately in this case.” Dr. Howie simply does not state any facts upon which he relies to conclude that the injuries Robert sustained were somehow caused by the asserted negligence of Baytown Radiology or its employees. The report, in fact, does not contain any information regarding how the conduct of Baytown Radiology or its employees could have contributed to any injuries alleged in Carlton’s petition.

Considering the four corners of Dr. Howie’s expert report, we conclude that the averments and opinions in the expert report contain conclusory statements concerning causation. *See Wright*, 79 S.W.3d at 52–53 (finding inadequate an expert’s statement that “if the x-rays would have been correctly read and the appropriate medical personnel acted upon those findings then Wright would have had the possibility of a better outcome”); *Longino v. Crosswhite ex rel. Crosswhite*, 183 S.W.3d 913, 918 (Tex. App.—Texarkana 2006, no pet.) (concluding expert report was deficient because it lacked specific conduct concerning the defendant and contained only conclusory statements concerning causation); *Davis v. Spring Branch Med. Ctr., Inc.*, 171 S.W.3d 400, 407–10 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (concluding expert report was deficient because four corners of report lacked information linking the expert’s conclusion to the defendant’s breach). Dr. Howie’s expert report did not put Baytown Radiology on notice of the causal relationship, if any, between any asserted negligence by Baytown Radiology and any alleged injuries sustained by Robert. Accordingly, the trial court abused its discretion in denying Baytown Radiology’s motion to dismiss Carlton’s claims against

Baytown Radiology with prejudice under section 74.351. We sustain Carlton's third issue on appeal.³

III. CONCLUSION

We reverse the trial court's order and remand this case to the trial court with instructions to render judgment dismissing Carlton's claims against Baytown Radiology with prejudice.

/s/ **Kem Thompson Frost**
 Justice

Panel consists of Justices Frost, Boyce, and Sullivan.

³ Because we conclude that the expert report did not satisfy the statutory requirement of causation, it is not necessary for this court to determine whether the report is sufficient as to the element of standard of care or whether Dr. Howie was qualified to offer an opinion as to the standard of care, as presented in Baytown Radiology's first and second issues.