

Reversed and Remanded and Memorandum Opinion filed September 23, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00963-CV

ASHISH KAPOOR M.D., Appellant

V.

**THE ESTATE OF MARGARET E. KLOVENSKI, JAKE KLOVENSKI & MARY
HASSLER, INDIVIDUALLY AND AS NEXT FRIENDS, Appellees**

**On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 2009-31943**

M E M O R A N D U M O P I N I O N

This healthcare liability case is governed by chapter 74 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem Code Ann. §§ 74.001–.507 (Vernon 2005 & Supp. 2009). Jake Klovenski, individually and on behalf of the Estate of Margaret Klovenski, and Mary Hassler brought wrongful death and survival claims against Dr. Ashish Kapoor asserting that Dr. Kapoor failed to diagnose cancer in Margaret Klovenski. Dr. Kapoor moved to dismiss all claims based on alleged deficiencies in plaintiffs’ expert report. Dr. Kapoor brought this interlocutory appeal

challenging the trial court's order denying the motion to dismiss. *See* Tex. Civ. Prac. & Rem Code Ann. § 51.014(a)(9) (Vernon 2008). We reverse and remand.

BACKGROUND

The following background is based on allegations in plaintiffs' petition and assertions in the expert report tendered by plaintiffs. Dr. Kapoor treated Margaret Klovenski between December 2006 and March 2007. She sought medical advice from Dr. Kapoor on December 12, 2006, regarding a swollen and painful lump on her left thigh. According to plaintiffs, Dr. Kapoor ordered x-rays of the leg and a venous Doppler exam; instructed her to take Tylenol for her pain; and assured Ms. Klovenski that she should not worry about the lump. The following month, Dr. Kapoor ordered an ultrasound of the veins in her leg but not of the lump. Ms. Klovenski visited Dr. Kapoor five times over three months regarding the growing and increasingly painful lump. However, Dr. Kapoor allegedly ordered no further testing and told Ms. Klovenski not to worry.

Ms. Klovenski sought a second opinion from her urologist, Dr. Pulin Pandya, on March 20, 2007. Dr. Pandya examined Ms. Klovenski and immediately determined that she was suffering from a cancerous growth in her left thigh. Ms. Klovenski was seen later that day by a surgeon, Dr. William Kent Johnson, who ordered a MRI exam and CT scans to verify Dr. Pandya's diagnosis. Ms. Klovenski was treated for cancer by various physicians at the University of Texas M.D. Anderson Cancer Center in Houston, Texas. She died on June 23, 2007. Plaintiffs attribute her death to Dr. Kapoor's alleged failure to diagnose the cancer in her leg between December 12, 2006, and March 20, 2007.

Plaintiffs sued Dr. Kapoor on May 20, 2009, and timely submitted an expert report and curriculum vitae prepared by Dr. Julie Graves Moy. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). Dr. Kapoor moved to dismiss the case, arguing that the expert report was inadequate because Dr. Moy (1) was unqualified to opine about the cause of

Ms. Klovenski's death; (2) offered only vague, speculative, and conclusory causation opinions; and (3) failed to describe applicable standards of care or articulate Dr. Kapoor's breach of those standards. *See id.* § 74.351(b). After a hearing, the trial court denied the motion and ruled that the expert report fully complied with statutory requirements. Dr. Kapoor appeals from the trial court's order denying his motion to dismiss. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9); *Ogletree v. Matthews*, 262 S.W.3d 316, 319 (Tex. 2007).

ANALYSIS

I. Applicable Law and Standard of Review

A trial court must grant a defendant's motion to dismiss a healthcare liability suit with prejudice unless the plaintiff serves a timely expert report within 120 days of filing the original petition. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351(a), (b). To qualify as a timely expert report, the report must represent a good faith effort to comply with the statutory requirements for an expert report. *See id.* § 74.351(l). An expert report is defined as a written report by an expert that provides a fair summary of the expert's opinions regarding (1) the applicable standard of care; (2) the manner in which the care provided failed to meet that standard; and (3) the causal relationship between that failure and the injury, harm, or damages claimed. *See id.* § 74.351(r)(6); *see also Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001).

We review a trial court's denial of a motion to dismiss under section 74.351(b) for abuse of discretion. *Wright*, 79 S.W.3d at 52 (citing *Palacios*, 46 S.W.3d at 878); *Group v. Vicente*, 164 S.W.3d 724, 727 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). To determine whether the trial court abused its discretion, we must decide whether the trial court acted in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Wright*, 79 S.W.3d at 52; *see also Broders v. Heise*, 924 S.W.2d 148,

151 (Tex. 1996). In making such a determination, a court of appeals may not substitute its own judgment for the trial court's judgment. *Wright*, 79 S.W.3d at 52.

II. Dr. Moy's Qualifications

An expert first must establish that she is qualified to provide a report addressing accepted standards of care, causation, or both. *See* Tex. Civ. Prac. Rem. Code Ann. §§ 74.351(r)(5)(A), (C). Qualifications must appear in the expert report and cannot be inferred. *See Olveda v. Sepulveda*, 141 S.W.3d 679, 683 (Tex. App.—San Antonio 2004, pet. denied); *Hansen v. Starr*, 123 S.W.3d 13, 19 (Tex. App.—Dallas 2003, pet. denied). Accordingly, analysis of expert qualifications under section 74.351 is limited to the four corners of the expert's report and curriculum vitae. *Mem'l Hermann Healthcare Sys. v. Burrell*, 230 S.W.3d 755, 758 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Palacios*, 46 S.W.3d at 878).

To qualify as an expert capable of providing opinion testimony regarding causation in a healthcare liability claim against a physician, an expert must satisfy section 74.403. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C); *Thomas v. Alford*, 230 S.W.3d 853, 857 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Section 74.403 states in pertinent part:

[A] person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed only if the person is a physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

Tex. Civ. Prac. & Rem. Code Ann. § 74.403(a). Where a physician's failure to diagnose is alleged to have harmed a patient, an expert testifying as to causation must be qualified to opine about the effect of a timely diagnosis and treatment on the outcome. *See Broders*, 924 S.W.2d at 153 (emergency physician was qualified to testify at trial that the standard of care required diagnosis of head injury and referral of patient for neurological

treatment, but not as to potential effectiveness of proposed treatments for the undiagnosed neurological condition); *Thomas*, 230 S.W.3d at 859–60 (radiologist was not qualified to offer expert opinion addressing whether delayed cancer diagnosis affected patient’s prognosis); *cf. Mosely v. Mundine*, 249 S.W.3d 775, 779–80 (Tex. App.—Dallas 2008, no pet.) (emergency room physician was qualified to opine because proffered expert opinion “related to the ability of an emergency room physician to interpret a routine chest x-ray . . . not the diagnosis and treatment for cancer”). Qualifications may be demonstrated by prior experience treating similar patients suffering from the undiagnosed condition at issue. *See, e.g., Estorque v. Schafer*, 302 S.W.3d 19, 26–27 (Tex. App.—Fort Worth 2009, no pet.) (expert was qualified to opine that failure to refer patient for evaluation of ovarian mass caused loss of kidney function because he had treated patients with similar conditions; was familiar with complications arising from the condition in such patients; and had observed those caring for and treating similar patients).

Dr. Moy’s report states that she is a “physician specializing in family medicine and emergency medicine.” The report states that she is “very familiar with the controlling medical standards involving the diagnosis and detection of diseases such as cancer, the need for early and prompt treatment of diseases such as cancer, and the appropriate treatment of cancer by physicians.” However, Dr. Moy identified no experience or credentials to demonstrate that she is qualified to testify about (1) what treatments would have been available to Ms. Klovenski had Dr. Kapoor diagnosed her cancer three months earlier; and (2) whether earlier administration of potential treatments would have resulted in a more favorable prognosis. On this record, we conclude that the trial court acted beyond its discretion in concluding that Dr. Moy meets the statutory qualifications to opine about whether the asserted delay in diagnosis of Ms. Klovenski’s cancer affected her outcome. *See Thomas*, 230 S.W.3d at 860 (“Francis’s report does not show that he has knowledge, training or experience in cancer *treatment* that would

qualify him to give an opinion on the likelihood that an earlier diagnosis could have produced a better outcome.”) (emphasis in original).

III. Dr. Moy’s Causation Opinion

Dr. Kapoor also argues that Dr. Moy’s opinion regarding the causal link between Dr. Kapoor’s failure to diagnose cancer in Ms. Klovenski and her subsequent death is inadequate. Dr. Moy’s report states:

Optimal outcomes in the treatment of malignant diseases such as cancer are based on early diagnosis; a thorough understanding of the likely behavior of the malignant disease process; prompt, comprehensive, and aggressive treatment; and frequent and thorough follow-up for the possibility of recurrence and/or metastases.

. . . .

I find Dr. Kapoor’s failure to timely diagnose the cancer in the left thigh of his patient Margaret Klovenski of a four month period of time . . . directly resulted in the spread of this cancer beyond therapeutic (surgical, radiation, and chemotherapy, as provided) control, leading to Mrs. Klovenski’s ultimate debilitating and painful death, none of which, it is probable, would have occurred had Dr. Kapoor initially diagnosed the cancer in his patient’s leg successfully.

In providing an expert report on causation, a claimant must offer more than a general opinion that timely diagnosis and treatment would have led to “the possibility of a better outcome.” *Wright*, 79 S.W.3d at 52–53. The expert must explain the basis of her statements and link her conclusion to the facts. *Id.* at 52.

In a failure-to-diagnose case, the expert report must explain how the complained-of harm would not have occurred if the diagnosis had been made in a timely fashion. *See, e.g., Foster v. Richardson*, 303 S.W.3d 833, 842 (Tex. App.—Fort Worth 2009, no pet.) (report insufficient because it failed to explain how delay in diagnosing six-month-old ankle injury caused more exhaustive care than if injury had been diagnosed a month earlier); *Craig v. Dearbonne*, 259 S.W.3d 308, 312–13 (Tex. App.—Beaumont 2008, no

pet.) (report insufficient because expert stated only that plaintiff “more likely than not” could have been “successfully treated and would not have died when she did” if lung condition had been diagnosed sooner); *Jones v. King*, 255 S.W.3d 156, 159–60 (Tex. App.—San Antonio 2008, pet. denied) (mem. op.) (report insufficient because expert failed to explain how diagnosis of meningitis 48 hours earlier would have prevented injuries).

In similar healthcare liability cases predicated on the progression of undiagnosed and untreated cancer, courts scrutinize reports to determine whether they contain information regarding (1) the effect of cancer development over time on the patient’s prognosis, and (2) the potential effectiveness of treatments for the patient’s type of cancer. *See, e.g., Thomas*, 230 S.W.3d at 858–59 (oncologist’s report sufficient because it explained that 47-month delay in diagnosis meant that surgically resectable and curable nodule in liver (stage I cancer) developed into a “metastatic well-differentiated adenocarcinoma” (stage IV), which was completely untreatable); *see also House v. Jones*, 275 S.W.3d 926, 932–33 (Tex. App.—Dallas 2009, pet. denied) (report sufficient because it explained that positive response to belated treatment supported opinion that earlier treatment following prompt diagnosis would have cured patient); *Polone v. Shearer*, 287 S.W.3d 229, 236–37 (Tex. App.—Fort Worth 2009, no pet.) (reports sufficiently explained that 22-month delay in diagnosis increased risk of metastatic breast cancer, morbidity, and mortality; prompt diagnosis would have led to treatment that obviated need for mastectomy); *Harris County Hosp. Dist. v. Garrett*, 232 S.W.3d 170, 179–181 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (report sufficient because it explained that progression of “possibly malignant” breast mass developed into “advanced disease . . . with metastasis” that could have been prevented if not for delay in communication of diagnosis and treatment); *Mosely*, 249 S.W.3d at 780–81 (report sufficient because expert explained that undiagnosed cancerous nodule in lung grew 5cm, requiring more invasive treatment with lower chance of success).

In her report, Dr. Moy failed to connect her conclusion to any specific facts regarding whether Ms. Klovenski's type of cancer was treatable, either before or after its eventual diagnosis. Dr. Moy did not state what kind of cancer was diagnosed in Ms. Klovenski's leg. Based on Dr. Moy's general knowledge about "the need for early and prompt treatment of diseases such as cancer, and the appropriate treatment of cancer," she summarily concluded that the delay in diagnosis between December 2006 and March 2007 resulted in the general "spread" of the cancer beyond therapeutic control and caused Ms. Klovenski's death six months after her first visit to Dr. Kapoor. This conclusion requires the court to infer that (1) different, more effective treatment would have been available for Ms. Klovenski's unidentified type of cancer three months earlier, or (2) earlier treatment would have been more likely to improve Ms. Klovenski's prognosis. Such inferences are not permitted. *Wright*, 79 S.W.3d at 53. Accordingly, we determine that Dr. Moy's statements are conclusory, and we hold that the trial court exceeded its discretion in denying Dr. Kapoor's motion to dismiss on this ground.

IV. Remand is Appropriate

If an expert report has not been timely served because the elements of the report are found deficient, the court may grant one 30-day extension to the plaintiff to cure the defect. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(c). If a court of appeals determines that a report deemed sufficient by the trial court is in fact deficient, the court of appeals may remand the case so the trial court can decide whether to grant a 30-day extension to cure the deficiency. *Leland v. Brandal*, 257 S.W.3d 204, 207 (Tex. 2008); *Gannon v. Wyche*, No. 14-09-00624-CV, 2010 WL 3409449, at *16 (Tex. App.—Houston [14th Dist.] Aug. 31, 2010, no pet. h.). In authorizing this practice, "the Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones." *Leland*, 257 S.W.3d at 208.

Because the available 30-day extension was neither sought nor granted in this case, the trial court should consider for the first time on remand whether Dr. Moy's

attempt to satisfy the statutory requirements for expert qualifications and causation constitutes a good-faith effort warranting a 30-day extension. *Id.* at 207 (“The statute does not allow for an extension unless, and until, elements of a report are found deficient, and that did not occur in this case until the court of appeals so held.”).

CONCLUSION

We reverse the trial court’s order of October 23, 2009, and remand for proceedings consistent with this opinion.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.