

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00488-CV

LARRY BROWN AND NEWTON FAMILY CLINIC, P.A., Appellants

V.

TIMOTHY WINGFIELD, Appellee

**On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 29601**

MEMORANDUM OPINION

Larry Brown and Newton Family Clinic, P.A. appeal the denial of their motion to dismiss pursuant to Section 74.351 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.014(a)(9), 74.351 (Vernon Supp. 2009). In a single issue, appellants contend the amended expert report provided by the appellee, Timothy Wingfield, fails to establish the expert’s qualifications to address causation and fails to

adequately address causation. For the following reasons, we affirm the order of the trial court.

Wingfield’s petition alleges that Wingfield sustained a fractured mandible and received treatment in a hospital emergency room.¹ Wingfield’s petition alleges that as Wingfield’s primary care physician, Brown subsequently examined Wingfield and referred Wingfield to an oral surgeon without prescribing antibiotics or ensuring that Wingfield was seen promptly. Wingfield developed an infection that spread to the bone and required several more surgical procedures. Wingfield sued Brown for negligence and sued Newton Family Clinic on a theory of *respondeat superior*.²

To satisfy the statutory requirements for maintaining a healthcare liability suit, the plaintiff must provide each physician and healthcare provider with 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). As to each defendant sued, the report must “inform the defendant of the specific conduct the plaintiff has called into question” and

¹ The hospital and the emergency room doctor were co-defendants in the trial court but they are not involved in this interlocutory appeal.

² Appellants’ brief recognizes that the plaintiff’s claims against the clinic alleged purely vicarious liability and they do not challenge the adequacy of the expert’s report separately as to the clinic and the doctor.

“provide a basis for the trial court to conclude that the claims have merit.” *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001) (citing predecessor statute). The trial court must dismiss the suit as to a physician or healthcare provider “only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report[.]” TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l). We review the trial court’s decision regarding the adequacy of the expert report for abuse of discretion. *Palacios*, 46 S.W.3d at 878. Because a report that does not set forth the manner in which the care provided failed to meet the applicable standard of care and the causal relationship between that failure and the injuries claimed, a report that omits any of the elements found in Section 74.351(r)(6) is not a good faith effort. *Id.* at 879.

In this case, the appellants contend the expert report and curriculum vitae of Richard Pinon, M.D. fails to establish his qualifications to address causation. Pinon is a board certified family practice physician in active practice since 1998. Pinon’s report states that when he encounters a patient like Wingfield, he refers that patient to an oral surgeon for further care. Thus, appellants argue, Pinon has shown that he is unqualified to provide an expert opinion regarding either mandible fractures or the causal connection between the specific injuries alleged by Wingfield and Brown’s alleged failure to timely prescribe antibiotics and timely refer Wingfield to an oral surgeon. Appellants argue that because Pinon cannot perform oral surgery himself but would refer a patient like Wingfield to an oral

surgeon, Pinon is unqualified to state an opinion regarding whether the particular procedures performed by the oral surgeon were caused by Brown.

The initial procedure performed by the oral surgeon included the extraction of a fractured tooth, wound debridement, fracture site irrigation, fracture immobilization with the placement of arch bars, and institution of intravenous antibiotics, followed by discharge with oral antibiotics. The follow-up visit revealed osteomyelitis at the fracture site, which was treated by four days of hospitalization and intravenous antibiotic therapy and continued intravenous antibiotic therapy at home for several more weeks. A second operation included the extraction of another tooth, bone and tissue debridement, and placement of a reconstructive titanium plate for the nonhealing fracture. Appellants argue that injuries caused by a delay in initiating antibiotic therapy and in referral can only be answered by a person who has the experience and qualifications to surgically treat the injury.

Appellants argue three cases support their argument. *See Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996); *Bogar v. Esparza*, 257 S.W.3d 354, 362 (Tex. App.--Austin 2008, no pet.); and *Thomas v. Alford*, 230 S.W.3d 853, 859-60 (Tex. App.--Houston [14th Dist.] 2007, no pet.).

In *Bogar*, a report from a pathologist stated that the patient had toxic levels of oxycodone and lethal levels of propoxyphene which caused her death. *Bogar*, 257 S.W.3d at 362-64. Because the report's statutory compliance must be determined from the

four corners of the report, the appellate court noted that it was precluded from filling gaps or drawing inferences regarding what the expert likely meant or intended. *Id.* at 362. The report in that case was defective because the pathologist gave his opinion regarding the cause of the patient's death without explaining who caused the death or how. *Id.* at 364. In this case, Pinon explains that Wingfield was a diabetic patient, placing him at a greater than average risk for a secondary infection, that Brown bore the ultimate responsibility in seeing that Wingfield was evaluated in the appropriate time frame by the oral surgeon, that Brown failed to prescribe antibiotics and to make arrangements for Wingfield to be seen by an oral surgeon within twenty-four hours of his first visit, and that Wingfield's wound was infected and draining pus when the oral surgeon saw Wingfield eleven days after his injury. Thus, unlike *Bogar*, the report in this case explains that the infection secondary to the mandible fracture was caused by Brown's failure to prescribe antibiotics and see that Wingfield was evaluated promptly.

In *Broders*, the trial court excluded the testimony of an emergency physician in a suit that alleged that the defendant emergency physicians were negligent in failing to diagnose their patient's skull fracture. *Broders*, 924 S.W.2d at 149-50. The plaintiffs' expert testified to the standard of care, the defendants' breach of that standard and that it was foreseeable that an untreated skull fracture could lead to death. *Id.* at 150-51. The trial court excluded the expert's opinion that one cause of the patient's death was that there was no treatment rendered for the head trauma. *Id.* at 151. While the expert knew that neurosurgeons should

be called to treat head injuries and he also knew what treatments neurosurgeons could provide, he never testified that he knew, from either experience or study, the effectiveness of those treatments. *Id.* at 153. Thus, the trial court did not err in excluding the emergency physician's causation testimony from the trial. *Id.* at 154.

In *Thomas*, the plaintiffs alleged that several doctors misdiagnosed cancer until after it became incurable. *Thomas*, 230 S.W.3d at 856. The trial court dismissed their claims and the plaintiffs appealed. *Id.* at 855. Their radiologist submitted a report that stated that the American College of Radiology Guidelines recommended direct communication regarding an unexpected finding, that he felt that faxing the report does not fulfill the recommendation, that the defendant radiologist did not meet that standard, and that his failure to directly communicate the unexpected findings contributed to the delay in the patient's diagnosis. *Id.* at 859. In affirming the trial court's order dismissing the case against the radiologist, the appellate court noted that the report did not state whether the guidelines expressed the standard of care for any ordinarily prudent radiologist or were merely aspirational, did not state whether the guideline actually required telephone communication, and assumed that the faxed report did not come to the attention of the recipient. *Id.* at 859-60. Lastly, the appellate court noted that the report failed to show that the radiologist had knowledge, training, or experience in cancer treatment that would qualify him to express an opinion on the likelihood that an earlier diagnosis would have produced a better outcome. *Id.* at 860.

In this case, Pinon states that he has dealt with open fractures of the oral cavity during his residency and his practice, and Pinon further explains that several studies have shown that there is a decreased incidence of infection if compound fractures are repaired within forty-eight hours. Although Pinon fails to explain how he knows how all of the procedures performed by the oral surgeon were made necessary by Brown's treatment of Wingfield and not Wingfield's initial injury, Pinon did explain how he knows that Brown's treatment of Wingfield caused the infection as a complication of the initial injury. Wingfield's subsequent treatment included treatment of the secondary infection. Accordingly, the trial court could find that the report and curriculum vitae revealed the expert's qualifications to provide the opinion expressed in the report.

Appellants also contend the report fails to adequately address causation. They argue the report merely states conclusions regarding the proximate cause of the injury and fails to link the alleged negligence with the alleged damages claimed. In particular, they argue the report is conclusory because it merely indicates that if Wingfield had been timely prescribed antibiotics and referred to an oral surgeon for immediate treatment, Wingfield would not have had the adverse events of infection and multiple surgeries. Wingfield contends Pinon's report presents a good faith effort to comply with the statutory requirements.

Appellants argue six cases support their position that Pinon's report fails to adequately explain causation. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002);

Johnson v. Willens, 286 S.W.3d 560, 565 (Tex. App.--Beaumont 2009, pet. filed); *Cayton v. Moore*, 224 S.W.3d 440, 447 (Tex. App.--Dallas 2007, no pet.); *Lo v. Higgs*, No. 09-05-00528-CV, 2006 WL 800823, at *3 (Tex. App.--Beaumont Mar. 30, 2006, no pet.) (mem. op.); *Longino v. Crosswhite*, 183 S.W.3d 913, 918 (Tex. App.--Texarkana 2006, no pet.); *Barko v. Genzel*, 123 S.W.3d 457, 460 (Tex. App.--Eastland 2003, no pet.).

In *Longino*, the expert stated that the delay in diagnosis of bacterial meningitis caused significant and permanent neurological injuries but failed to explain the basis for the expert's conclusory statement. *Longino*, 183 S.W.3d at 917-18. Thus, the opinion merely stated a conclusion.

In *Wright*, a hospital employee diagnosed a fractured patella sustained in an automobile accident but missed a fracture to the foot. *Wright*, 79 S.W.3d at 50. The employee's supervisor referred the patient to an orthopedic surgeon without noting the fractured foot. *Id.* The orthopedic surgeon did not discover the fractured foot until after the knee had been operated on. *Id.* The expert's report stated that if the x-rays had been correctly read and the appropriate medical personnel acted on the findings, the patient would have had a possibility of a better outcome, but the expert's report failed to identify the specific injuries caused by the failure to correctly read the x-rays and also failed to explain how the failure to properly read the x-ray caused an injury. *Wright*, 79 S.W.3d at 52-53.

In *Johnson*, the expert report stated that the amount of a beta-blocker prescribed for the patient substantially exceeded the normal dose, and that within reasonable medical probability caused the patient to suffer from lethargy and depression to such an extent that he was incapable of functioning on a daily basis; however, it failed to explain what a normal dose would be and why the prescribed dose was excessive. *Johnson*, 286 S.W.3d at 565. The report also failed to describe what the patient's condition was and what the proper treatment of the patient should have been. *Id.*

In *Lo*, the patient alleged a neurosurgeon negligently performed his back surgery. *Lo*, 2006 WL 800823 at *1. The patient developed low back pain after surgery and another surgeon removed pedicle screws in a subsequent surgery. *Id.* The expert's report stated that the standard of care required proper placement of the screws, but failed to specify how the defendant's placement of the pedicle screws was incorrect, how the placement of the screws caused harm, and failed to identify the post-operative complications that the expert claimed would have been prevented if corrective surgery had not been required. *Id.* at *3. Thus, the report neither fairly summarized the manner in which the treatment rendered breached the standard of care nor explained the causal relationship between the alleged breach and the injury to the patient. *Id.*

In *Cayton*, a patient who underwent a cervical discectomy sued her physiatrist, among others. *Cayton*, 224 S.W.3d at 442-43. The part of the expert report that addressed causation

stated that the plaintiff would have suffered only mild to no permanent injury if she had received surgery “within a day or so” of her evaluation at a hospital, and did not mention the physiatrist at all. *Id.* at 447. Because the physiatrist did not see the patient until four days after the hospital evaluation, the appellate court held that the report failed to adequately address the causal relationship between the physiatrist’s alleged breach of the standard of care and the alleged injury. *Id.*

In *Barko*, the patient sued an emergency room physician doctor for failing to timely diagnose and treat her large disc re-herniation, during emergency room visits on October 26 and 27, 1999. *Barko*, 123 S.W.3d at 458. The emergency room doctor referred the patient to a neurosurgeon who examined the patient on October 28 and repaired the injury on October 29, the same day the patient suffered a miscarriage. *Id.* In affirming the dismissal of the malpractice suit against the emergency room doctor, the appellate court reasoned that the report failed to link the miscarriage to the doctor’s care and also failed to indicate whether the patient would have satisfactorily recovered from the back injury but for the doctor’s alleged negligence. *Id.* at 460-61. Thus, the report failed to establish a causal link between the failure to timely diagnose and either the miscarriage or the permanent neurological damage. *Id.*

Here, Pinon’s report stated that Wingfield’s underlying diagnosis of diabetes placed him at greater than average risk for a secondary infection. According to Pinon’s report,

Brown delayed Wingfield's treatment by failing to see him until a full forty-eight hours from the time of the injury, then failed to prescribe antibiotics although Brown knew Wingfield was a diabetic patient. The report states that Brown delayed the referral for definitive management of the compound fracture for eleven days. According to Pinon, the standard of care requires examination and assessment within twenty-four hours, and in the case of a diabetic patient like Wingfield, requires a broad spectrum antibiotic be prescribed. Pinon's report states that the standard of care requires Brown to consult directly with an oral surgeon and to make arrangements for the oral surgeon to see the patient within twenty-four hours of the first visit to Brown. Pinon states that the delay in definitive treatment led to the complications from the initial injury. The complication described in the report is a secondary infection that included the bone. According to Pinon, had antibiotics been provided and had there not been a delay in definitive treatment, the adverse event of infection would not have occurred. Wingfield received intravenous antibiotics in the surgery of June 15, 2007, followed by oral antibiotics until a follow-up visit on July 5, followed by intravenous antibiotics from July 6 until August 8, 2007, followed by oral antibiotic therapy which continued through and after August 30, 2007.

Pinon also attributes "multiple surgeries" to Brown's failure to prescribe antibiotics and the delay in definitive treatment. The report describes a surgery performed on June 15, 2007, in which a tooth was removed, the wound was surgically debrided, the fracture site was irrigated with normal saline, intravenous antibiotics were instituted, and the fracture was

immobilized with arch bars. The report describes a second surgery performed August 8, 2007, which involved bone and tissue debridement, placement of a reconstruction titanium plate, and removal of a second tooth. Thus, the surgeries are described in the report and the report explains that the site had to be surgically debrided. The report does not state that the purpose of the surgical debridement was to treat the infection and not to treat the initial fracture. We agree that Pinon did not link the cause of this surgery to Brown's failure to meet the standard of care. Nevertheless, the treatment with antibiotics was attributed to the secondary infection, which Pinon explained occurred because Brown failed to prescribe an antibiotic for the open fracture of the mandible and failed to ensure that Wingfield received definitive treatment within twenty-four hours of his first visit.

The issue in this case is whether the trial court could, within its discretion, rule that Pinon's report represents a good faith effort by the plaintiff to provide an expert report that informs the defendant of the specific conduct the plaintiff calls into question and provides a basis for the trial court to determine that the claims have merit. *See Palacios*, 46 S.W.3d at 879. Such a good faith effort is not shown by providing a report that states a mere conclusion regarding causation. *Id.*; *see also Longino*, 183 S.W.3d at 918. Although the report in this case does not explain that the surgical debridement was required to treat the secondary infection and not the initial injury, the report does explain how the treatment with intravenous antibiotics was required to treat the secondary infection that could have been

prevented if Brown had prescribed an antibiotic for the open fracture of the mandible and arranged for Wingfield to receive definitive treatment within twenty-four hours of his first visit.

The report at issue in this case does not suffer from the deficiencies in the reports at issue in the cases cited by the appellants. Pinon's report describes the condition being treated and the treatment necessary to meet the standard of care. *See Johnson*, 286 S.W.3d at 565. The report identifies the specific injury--infection--caused by the defendant. *See Wright*, 79 S.W.3d at 53. The report identifies the particular complications resulting from the doctor's failure to meet the standard of care. *See Lo*, 2006 WL 800823 at *3. Although more than one doctor was sued, the report describes the injury caused by each doctor separately. *See Cayton*, 224 S.W.3d at 447. Pinon's report identifies two injuries: secondary infection as a complication of open fracture of the mandible and multiple surgeries. Although the report does not clearly link the surgical debridement to the infection, the report does describe how the infection was caused by Brown's failure to meet the standard of care and explains Wingfield's secondary infection. This case is distinguishable from a case where none of the injuries are causally linked to the defendant's failure to meet the standard of care. *See Barko*, 123 S.W.3d at 461. Here, the expert report contains sufficiently specific information to show that the expert's opinion is not based upon mere conjecture.

On this record, the trial court could determine the expert report provided by Wingfield represented a good faith effort to comply with the statutory requirement to provide an expert's report on causation. Thus, the appellants have not shown that the trial court abused its discretion when it denied their motion to dismiss them from the suit. Accordingly, we overrule the appellants' issue and affirm the trial court's order denying the appellants' motion to dismiss.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on January 28, 2010
Opinion Delivered March 25, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.