

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00289-CV

NESTOR CAGOL PUNAY, Appellant

V.

**IVALYN ANDERSON AND LEE O. ANDERSON, INDIVIDUALLY AND
AS REPRESENTATIVE OF IVALYN ANDRESON, Appellees**

**On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. B-182,642**

MEMORANDUM OPINION

Nestor Cagol Punay appeals from the trial court's denial of a motion to dismiss a health care liability claim. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9) (West 2008). In the prior interlocutory appeal in this case, we found appellees' expert reports inadequate. *See Pangburn v. Anderson*, No. 09-09-00169-CV, 2009 Tex. App. LEXIS 9551, at *18 (Tex. App.—Beaumont Dec. 17, 2009, no pet.). On remand, the trial court granted appellees an extension of time to correct the deficiencies. Appellees complied. Finding no abuse of discretion by the district court, we affirm the court's order. *See* Tex.

Civ. Prac. & Rem. Code Ann. § 74.351 (West Supp. 2010).

BACKGROUND

Ivalyn Anderson suffered from breast cancer. Post-operative chemotherapy was recommended, which required long-term venous access and port-a-cath placement. The port-a-cath for chemotherapy was surgically inserted at Memorial Hermann Hospital in Orange, Texas. After the placement of the port-a-cath was questioned, and an x-ray contrast study was interpreted as “normal,” chemotherapy was begun.

Appellant, Dr. Punay, served as a consulting neurologist after Ivalyn was subsequently admitted to Memorial Hermann Baptist Hospital in Beaumont. A note by an oncologist stated that there were “concerns for placement of her port.” Dr. Punay did not identify any neurological problem associated with the placement.

It was later determined that the port-a-cath had been misplaced. A doctor at Methodist Hospital in Houston removed the misplaced port-a-cath.

Plaintiffs sued Punay and other medical providers. Plaintiffs alleged that the treatment of Ivalyn fell below the standard of care and caused brain damage. Plaintiffs served the defendants with copies of expert reports from Dr. Louis Silverman, Dr. Joel Meyer, and Melanie Paquette.

Punay challenged the experts’ qualifications to render an opinion on the standard care of a neurologist, and argued the reports failed to meet the statutory requirements of section 74.351. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351. In a prior opinion, this

Court held that the reports were not adequate as to the claim against Punay because, among other reasons, the reports did not state the standard of care for a neurologist, state how Punay breached that standard of care, or explain how the breach caused the injuries. *Pangburn*, 2009 Tex. App. LEXIS 9551, at **14-16. We remanded the case for the trial court to consider whether to grant an extension of time to cure the deficiencies. *See id.* at **18-19.

The trial court granted plaintiffs a thirty-day extension of time. Plaintiffs served Punay with an amended report by Dr. Meyer and a new report by Dr. Allan Rubenstein, a board-certified neurologist. Punay filed objections and a second motion to dismiss. The trial court denied the motion.

STANDARD OF REVIEW

In this appeal, we review the trial court's ruling on the motion to dismiss the health care liability claim 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." *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002).

In a case involving a health care liability claim, the claimant must file an expert report that provides a "fair summary" of the expert's opinion as of the date of the report. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). A trial court must look at the reports served by the claimant and determine whether, viewed together, the reports address each of

the required elements. *See id.* § 74.351(i). To constitute a good-faith effort to satisfy the statute, a report “must discuss the standard of care, breach, and causation with 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.” *Palacios*, 46 S.W.3d at 875.

THE REPORTS

We consider whether the trial court could reasonably determine that the reports together represent a good faith effort to inform the defendant of the specific conduct the plaintiffs call into question and provide a basis for the trial court to determine the claims have merit. *See id.* at 879. Punay argues the reports do not state the standard of care applicable to him, how he breached the standard, what additional testing, treatment or procedures should have been conducted, when they should have been conducted, and how the failure to conduct such procedures caused Ivalyn’s injuries. In support of these arguments, Punay cites *Baker v. Gomez*, 276 S.W.3d 1, 6 (Tex. App.—El Paso, 2008, pet. denied); and *Hardy v. Marsh*, 170 S.W.3d 865, 869-70 (Tex. App.—Texarkana 2005, no pet.). Punay argues Rubenstein’s statements that misplacement of the catheter by the surgeon “caused significant neurological damage,” and that a TEE or other imaging technology would have led to the removal of the port “in a timely manner,” are conclusory since they are not linked to the care provided and fail to explain how the neurologist caused the injury. *See Craig v. Dearbonne*, 259 S.W.3d 308, 313 (Tex. App.—Beaumont 2008, no

pet.) (expert report insufficient because it did not adequately describe what different treatment the defendant should have provided to prevent plaintiff's death).

In *Baker*, the El Paso Court of Appeals found an expert report did not sufficiently state the applicable standard of care because, although the report provided specific information regarding what care was expected but not provided, the report failed to address when the defendant should have evaluated the plaintiff. *See Baker*, 276 S.W.3d at 6. In *Hardy*, the Texarkana Court of Appeals held that the statement in the expert report that the defendant's failure to seek consultation with a vascular surgeon and to use "such diagnostic means" did not sufficiently state the applicable standard of care or how it was breached because the report failed to identify the plaintiff's "specific symptoms requiring consultation with a vascular surgeon, when such consultation was required, or what treatment by such surgeon was required." *Hardy*, 170 S.W.3d at 869-70.

Rubenstein's report states that at the time of Punay's evaluation of Ivalyn,

Dr. Punay should have thoroughly investigated this possibility (the misplaced catheter) with TEE or other imaging technology, which would have led to removal of the port in a timely manner and prevention of permanent neurologic damage. Ms. Anderson went on to develop brain damage as a result of embolic infarction from the catheter tip in the aorta.

Meyer's report states,

Recognition of the early areas of infarction on 8-22-0[6] MR scan would have prompted a workup to determine the etiology of the infarctions. An earlier TEE, would have documented the malposition of the porta cath. The TEE which was done on September 20, 2006, confirmed the malposition of the porta cath as the cause of [Ms.] Anderson's brain infarcts. In summary, in reasonable medical probability Ms. Anderson suffered multifocal areas of

brain infarction over time due to a[n] unrecognized malposition of her porta cath caused by the breaches of the standard of care by . . . Punay[.]

The reports read together assert that Punay should have recognized the “early areas of infarction” from the August 22, 2006 MR scan, and then should have ordered a workup and a TEE to determine the cause. The standard of care allegedly was breached by a failure to recognize the “early areas,” failure to evaluate the placement of the port-a-cath, and failure to order a specified test that would have disclosed the port-a-cath’s malposition. The reports assert that had the possibility that the port-a-cath was improperly placed been evaluated in a timely manner through the earlier employment of a TEE, Ivalyn’s permanent brain damage would have been prevented. The trial court could reasonably conclude that the reports represent a good faith effort to inform the defendant of the specific conduct the plaintiff calls into question and provide a basis for the trial court to determine whether the claims have merit. *See Palacios*, 46 S.W.3d at 879; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351.

Appellant’s issue is overruled. The trial court’s order is affirmed.

AFFIRMED.

DAVID GAULTNEY
Justice

Submitted on September 30, 2010
Opinion Delivered November 4, 2010

Before Gaultney, Kreger, and Horton, JJ.