In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00480-CV

CHRISTUS HEALTH SOUTHEAST TEXAS D/B/A
CHRISTUS HOSPITAL-ST. ELIZABETH, Appellant

V.

KATHY KEEGAN, INDIVIDUALLY AND AS INDEPENDENT
EXECUTRIX OF THE ESTATE OF DAVID BARROW, Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-186,481

MEMORANDUM OPINION

Christus Health Southeast Texas, d/b/a Christus Hospital-St. Elizabeth, filed a motion to dismiss this healthcare liability claim. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (West 2011). The trial court denied the motion. Christus filed this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9) (West 2008).

Plaintiff provided reports from three qualified physicians explaining the alleged failures of the hospital. We conclude the trial court did not abuse its discretion in denying the motion to dismiss. The order is affirmed.

BACKGROUND

David Barrow was discharged from Christus the day after a cardiac catheterization was performed there. Two days later he was taken by ambulance to Memorial Hermann Baptist Orange Hospital and was treated at the emergency room. Barrow felt light-headed and experienced sharp pain near the catheter site. The emergency room doctor contacted a cardiologist, who was the "cross cover physician" for the physician who had performed the catheterization. The cardiologist agreed to accept the care of Barrow at Christus in Beaumont.

Transported by ambulance, Barrow arrived at Christus at approximately 7:39 p.m. The nurses at Christus noted his pressure was "65/24 mm Hg," and also observed that his "[h]ematoma was small and soft this a.m. [b]ut is large now and hard to [the] touch." A CT scan of the abdomen and pelvis revealed he had "a large, ill-defined hematoma within the anterior thigh and lower groin region[.]" The nursing staff contacted the cardiologist shortly after Barrow's arrival in Christus's emergency room, and then again at 10:40 p.m., and at 1 a.m. The cardiologist did not go to the hospital to evaluate Barrow. Barrow became unresponsive at 11:40 p.m. and was transferred at approximately 1 a.m. from Christus's emergency room to the intensive care unit. He died at 5 a.m.

Dr. Bradley, one of plaintiff's experts, stated that the autopsy report showed a "'large area of blood accumulation within the right thigh and right inguinal area[,]'" and "'there was a large amount of blood within the thigh estimated more than five units.'"

Bradley's report, along with two other physicians' reports, concluded David Barrow bled to death.

CHAPTER 74

Under section 74.351(a), a claimant must serve an expert report on the defendant provider within 120 days of filing suit. *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) (citing Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a)). Section 74.351(r)(6) defines expert report as "a written report by an expert that provides a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered . . . 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 report that provides a "fair summary" must identify the type of care expected but not given. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 880 (Tex. 2001). The expert report "need not marshal all the plaintiff's proof[.]" *Id.*, 46 S.W.3d at 878. The trial court determines whether the report constitutes a good faith effort to comply with the statute's requirement. *See id.* A good faith effort is one that provides information sufficient to "inform the defendant of the specific conduct the plaintiff has called into question," and one that provides "a basis for the trial court to conclude that the claims have merit." *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002).

STANDARD OF REVIEW

An appellate court reviews the trial court's decision on the adequacy of an expert report under an abuse of discretion standard. *Palacios*, 46 S.W.3d at 877. The trial court abuses its discretion if it acts in an unreasonable or arbitrary manner without reference to any guiding rules or principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

EMERGENCY MEDICAL TREATMENT

Keegan alleged in her petition that Christus's staff "failed to exercise the ordinary care and diligence exercised by other medical providers in the same or similar circumstances, and [that Christus] was negligent" in one or more of the following ways:

a) Failing to actively manage Mr. Barrow's medical condition;
b) Failing to assess Mr. Barrow's medical condition;
c) Failing to evaluate Mr. Barrow's condition upon transfer;
d) Failing to ensure that an attending/admitting physician evaluate, examine and provide treatment for Mr. Barrow; and
e) Failing to minimize the risks to Mr. Barrow's health while waiting on examination by attending/admitting physician.

Although the petition does not cite the Emergency Medical Treatment and Active Labor Act (EMTALA), the parties assume the claim is governed by the Act, and the plaintiff's pleadings of specific conduct by Christus implicate stabilization, medical screening, and transfer. Two of the expert reports assert EMTALA violations. *See* 42 U.S.C.A. § 1395dd (West Supp. 2010) ("Emergency Medical Treatment and Active Labor Act").

EMTALA is a federal law that addresses the practice of refusing to treat patients who are unable to pay. *Tenet Hosps. Ltd. v. Boada*, 304 S.W.3d 528, 533 (Tex. App.—El

Paso 2009, pet. denied). EMTALA "places obligations of screening and stabilization upon hospitals and emergency rooms [that] receive patients suffering from an 'emergency medical condition.'" *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 250, 119 S.Ct. 685, 142 L.Ed.2d 648 (1999). If the hospital has actual knowledge of the emergency medical condition, the hospital "must then provide either 'within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or for transfer of the individual to another medical facility . . . .'" *Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 558-59 (5th Cir. 2000) (quoting 42 U.S.C. § 1395dd(b)(1)(A)&(B)). Section 1395dd references section 1395cc, which, with certain exceptions, requires hospital providers to do the following:

> (a) . . . .
> (1). . . . .
> (I) in the case of a hospital or critical access hospital—
> (i) to adopt and enforce a policy to ensure compliance with the requirements of section 1395dd of this title and to meet the requirements of such section,
> . . . .
> (iii) to maintain a list of physicians who are on call for duty after the initial examination to provide treatment necessary to stabilize an individual with an emergency medical condition[.]

42 U.S.C.A. § 1395cc(a)(1)(I)(i), (iii) (West Supp. 2010). Section 1395dd(d)(2)(A) of the Act provides patients with a private cause of action for any personal harm that a patient suffers as a direct result of a hospital's EMTALA violation. *See* 42 U.S.C.A. § 1395dd(d)(2)(A).

The plaintiff questions the medical screening and stabilization of a known emergency medical condition and the transfer of an unstabilized individual to another medical facility. *Battle*, 228 F.3d at 557-58 (citing 42 U.S.C. § 1395dd(a)-(c)). An inappropriate medical screening "'is one that has a disparate impact on the plaintiff.'" *Guzman v. Mem'l Hermann Hosp. Sys.*, No. 09-20780, 2011 WL 303260, at *3 (5th Cir. Feb. 1, 2011) (unpublished opinion) (quoting *Summers v. Baptist Med. Ctr. Arkdelphia*, 91 F.3d 1132, 1138 (4th Cir. 1996)). A plaintiff proves disparate impact by showing that the hospital did not follow its own standard screening procedures, or by pointing to differences between the screening examination that the patient received and examinations that other patients with similar symptoms received at the same hospital. *Battle*, 228 F.3d at 557-58. "A patient can also prove an EMTALA violation by showing that the hospital provided such a cursory screening that it amounted to no screening at all." *Guzman*, 2011 WL 303260, at *3 (citing *Correa v. Hosp. S.F.*, 69 F.3d 1184, 1192-93 (1st Cir. 1995)).

The plaintiff's expert reports focus on the failure to have the "accepting" physician evaluate and treat Barrow. Also in focus is an alleged inappropriate transfer of an unstable patient from one hospital to another, along with an alleged failure to stabilize the patient despite a known emergency medical condition.

Christus argues that the reports from Drs. Bradley, Gaskill, and Meissner do not meet the requirements of section 74.351(r)(6). Christus asserts that Dr. Gaskill's report merely mentions that Barrow was a patient at Christus, and the requisite elements of the

standard of care, breach, and causation as to Christus are wholly absent. As to Dr. Bradley's and Dr. Meissner's reports, Christus contends that these reports are directed solely at Christus's inadequate policies and procedures, and argues the reports fail to properly describe the standard of care, breach of that standard, and causation. Christus also argues the plaintiff's experts lack the necessary qualifications to express their opinions.

Dr. Bradley's Report

Dr. Bradley's report states that the standard of care for Christus was to have the accepting physician respond and make an in-person appearance to evaluate and treat Mr. Barrow. Explaining that this standard of care is established by federal law, Bradley references the Code of Federal Regulations associated with EMTALA, and states that 42 C.F.R. 489.20(r)(2) requires hospitals to maintain a list of physicians who are on call for duty after the initial examination to stabilize an individual with an emergency medical condition. Because Christus did not have the accepting physician respond and make an in-person evaluation, Bradley states the standard of care was breached. In Dr. Bradley's opinion, had Christus met that requirement, Dr. Sooudi, the accepting physician, would have attended Barrow at the hospital, recognized that "Barrow was bleeding to death[,]" controlled the bleeding himself, or "recognized the immediate need to consult a surgeon who could have obtained definitive control of the hemorrhage." The report relates the standard of care and its breach to EMTALA and a C.F.R. regulation relating to the Act.

Addressing causation, Bradley's report indicates that the lack of this evaluation, screening, or stabilization caused Barrow's bleeding to go undetected and ultimately caused his death.

Dr. Meissner's Report

Dr. Meissner's report provides background information on EMTALA. He explains that EMTALA sets out "a private cause of action which permits 'any individual who suffers personal harm as a direct result of a participating hospital's violation of [EMTALA]' to bring a suit against the hospital[.]" Meissner states that, under EMTALA, hospitals are required to provide a medical screening examination to determine whether an emergency medical condition exists, and he states that the "emergency room . . . must treat an individual with an [emergency medical condition] until the condition is resolved or stabilized and the patient is able to provide self-care following discharge, or if unable, can receive needed continual care."

Dr. Meissner's report focuses on Christus's transfer policies and procedures. Although Meissner's list of reviewed records does not include a specific reference to these documents, Meissner's report expressly states that there was no memorandum of transfer in this case. The comment suggests that Meissner reviewed Christus's records, including a record search for the transfer document. His report also states that "[l]ack of a memorandum of transfer in this case, at the time of discovery of the facts of this case, is de facto evidence of EMTALA violation involving both the transferring as well as the

receiving hospitals." "Furthermore, . . . transfer of an unstable patient may be de facto evidence of EMTLA violation." Meissner stated that Christus's failure to have "in place transfer policies and procedures that allowed for transfer of an unstable and unstabilized patient without assurances of the direct benefit of the transfer for the patient" breached the standard of care. Regarding causation, Meissner states that Barrow's death was related to an "unrecognized and non-treated rupture of a femoral artery pseudoaneurysm." "Timely discovery and recognition of [Barrow's] exsanguinating hemorrhage would have resulted in all likelihood in both his survival . . . with good quality of life after repair of the pseudonaneurysm." Finally, Meissner stated that "[f]ailure to recognize this lethal complication of a common problem in therapeutic catheterization . . . resulted in a direct linear causal chain to the death of Mr. Barrow."

Dr. Gaskill's Report

Dr. Gaskill does not specifically refer to EMTALA in his report. He states that the standard of care, "when a patient is found to have life-threatening bleeding from a punctured blood vessel[,]" is for a physician with education, training, and experience appropriate to stopping this bleeding be consulted in a timely fashion. "Depending on the resources available and the existing referral patterns, this could be a general surgeon, a vascular surgeon, or possibly a cardiologist with special expertise in this field." Gaskill indicated Christus breached the standard of care because "there is no evidence that this was ever contemplated or accomplished." Gaskill stated that had the perforation in

Barrow's femoral artery been identified and repaired in a timely fashion, Barrow would not have bled to death. The reports link Barrow's bleeding to death and Christus's failure to screen and stabilize Barrow.

SECTION 74.351 AND EXPERT REPORTS

The issue presented is whether the reports, considered together, satisfy the requirements of section 74.351. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(i); *Packard v. Guerra*, 252 S.W.3d 511, 527 (Tex. App.—Houston [14th] 2008, pet. denied) (Reports may be read in conjunction with each other.). Christus argues the reports focus solely on Christus's policies and procedures, which Christus asserts the experts did not review. Bradley and Meissner reference policies and procedures, but their reports are not predicated solely on those. Bradley's report states that Christus violated EMTALA by failing to have the accepting physician attend Barrow in the emergency room to stabilize him, diagnose his problem, and repair the problem.

Christus argues the reports fail to state what Christus should have done differently. The reports state Christus should have had a policy and procedure concerning patient transfer that satisfied EMTALA, should not have breached that policy, and should have had a physician with appropriate education, training, and experience to timely consult and to stop the bleeding.

Christus contends the reports do not adequately link the alleged breach in the standard of care to Barrow's death. Dr. Bradley's report states that Christus breached the

standard of care because Christus did not have the accepting physician respond and make an in-person appearance to evaluate and treat Barrow, and further states that Barrow suffered personal harm as a direct result of the violation of EMTALA. Dr. Gaskill's report indicates that had a timely consult been made with a physician having the appropriate qualifications for treatment of this condition, the perforation of Barrow's femoral artery would have been identified and repaired in a timely fashion, and Barrow would not have bled to death.

Christus contends that the criticisms by Drs. Bradley and Meissner are barred under Texas case law, because the decisions complained of are doctors' decisions which cannot be made by a hospital. Christus argues that the reports are not adequate because although the reports refer to Christus they fail to identify a name, job title, or department at the hospital. At the report stage, the plaintiff need not "marshal all the plaintiff's proof[.]" *Palacios*, 46 S.W.3d at 878. Because the trial court is limited to the four corners of the report, the issue is not whether plaintiff's claim will ultimately survive summary judgment or a jury trial. The trial court could reasonably conclude that the reports provide sufficient information to inform the hospital of the conduct called into question, and that the claim has sufficient merit to proceed beyond the report stage. We overrule issues one and two.

QUALIFICATIONS OF EXPERTS

Christus challenges the experts' qualifications to provide opinions on the standard of care for hospital employees and the standard of care relating to hospital policies and practices. Relying in part on *Reed v. Granbury Hospital Corporation*, 117 S.W.3d 404, 409 (Tex. App.—Fort Worth 2003, no pet.), Christus contends that neither Bradley nor Meissner discusses Christus's policies and procedures as applied to plaintiff's claim.

The alleged violations involve appropriate medical screening and patient stabilization when a person presents to the emergency room with an emergency medical condition. Section 74.402(b) of the Civil Practice and Remedies Code states in part as follows:

> (b) In a suit involving a health care liability claim against a health care provider, a person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person:
>
> (1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;
>
> (2) has knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and
>
> (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.
>
> (c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:
>
> (1) is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other

> substantial training or experience, in the area of health care relevant to the claim; and
>
> (2) is actively practicing health care in rendering health care services relevant to the claim.

Tex. Civ. Prac. & Rem. Code Ann. § 74.402 (West 2011). A plaintiff who offers expert medical testimony must show that the expert has expertise regarding "the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996); *see also Boada*, 304 S.W.3d at 541 (Although doctor did not include specific information as to his knowledge of EMTALA and his expertise in identifying violations, he qualified as an expert on EMTALA; he had some thirty years of experience in the practice of emergency medicine and had a master's degree in health administration.).

Dr. Bradley is residency-trained in emergency medicine, is a diplomat of the American Board of Emergency Medicine, and is involved in the active clinical practice of emergency medicine. His experience includes five years as the Medical Director of the Emergency Center at Memorial Hermann Hospital, a Level I Trauma Center, and he "regularly care[s] for patients who are bleeding and have complications of invasive procedures." Bradley is an associate professor of emergency medicine with UTHealth, and previously was Chief of Emergency Medicine at Lyndon B. Johnson General Hospital, a Level III Trauma Center. His experience includes regular care of patients with complications similar to those of Barrow.

Dr. Gaskill practices general surgery in Texas and is certified by the American Board of Surgery. He has been a full-time faculty member in the Department of Surgery at the University of Texas Medical School at San Antonio. His current practice includes evaluation and treatment of patients in Barrow's condition. Gaskill's publications include co-authorship of the peer-reviewed scientific paper, "Iatrogenic Vascular Injury: A Reducible Problem[,]" an article which, as explained by Gaskill, "addresses the precise procedural complication that resulted in Mr. Barrow's untimely and entirely unnecessary death[.]"

Dr. Meissner has been a practitioner for twenty-five years in critical care medicine, twenty years in emergency medicine, and eighteen years in cardiology and cardiology-specific critical care medicine. His report indicates he is board certified in internal medicine, cardiovascular diseases, critical care medicine, forensic medicine, nuclear cardiology, echocardiography, and cardiovascular computed tomography. At the time of Barrow's death, Meissner was a consulting cardiologist and critical care medicine physician.

Each of the experts practiced the type of care or treatment relevant to that delivered to David Barrow; their areas of expertise overlap in addressing the relevant issues. The trial court could reasonably conclude plaintiff provided reports from experts qualified to give expert opinions applicable in this case. We overrule issue three.

The trial court did not abuse its discretion. The order denying the motion to dismiss is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on March 3, 2011
Opinion Delivered May 19, 2011

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