

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-11-00169-CV

DERRICK M. MYERS, 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

This interlocutory appeal concerns the adequacy of an expert report under standards that apply to health care liability claims. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(10) (West 2008); § 74.351 (West 2011). Dr. Derrick Myers requested that the trial court dismiss the health care liability claim filed against him by Kathy Keegan, individually and as independent executrix of the estate of David Barrow. Because the trial court did not abuse its discretion in granting Keegan's request for an

extension to serve supplemental reports, we conclude the trial court did not err in denying Dr. Myers's motion to dismiss.

Background

The day after David Barrow had a cardiac catheterization, the hospital discharged him. Two days later, based on his symptoms, he went to the emergency room where he was seen by Dr. Myers. After seeing Barrow, Dr. Myers contacted a cardiologist, who agreed to see Barrow at another hospital. Barrow died the morning after being transferred to the other hospital.

According to the initial report submitted by the plaintiff's expert, Dr. Frank Meissner, Barrow was in a state of circulatory shock when he was seen by Dr. Myers at the emergency room. When transferred to the other hospital, according to Dr. Meissner's report, Barrow was in "an advanced hemorrhagic shock state[.]" Dr. Meissner's report identifies several standards of care that Dr. Meyers breached, and Dr. Meissner then concludes that "Barrow died of the direct consequences of the misdiagnosis of his shock state as septic rather than hemorrhagic shock."

Keegan served Dr. Myers with Dr. Meissner's report in a timely manner. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (requiring claimant to serve expert report not later than the 120th day after the date the claim was filed). Dr. Myers objected to Dr. Meissner's qualifications, and he objected, on several grounds, that Dr. Meissner's report failed to meet the standards required of expert reports under the Texas Civil Practice and

Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351, § 74.401 (West 2011). When the trial court granted Dr. Myers's motion to dismiss, Keegan filed a motion for rehearing and reconsideration. Keegan's motion to reconsider argues that she made a good faith effort to comply with the requirements of the Texas Civil Practice and Remedies Code, and she requested that the trial court allow her a thirty-day period to cure any deficiencies. The trial court granted Keegan's motion, gave her a thirty-day extension, and rescinded its order granting Dr. Myers's motion to dismiss. In its order, the trial court specified that Keegan had "made an objective good faith effort to comply with the statutory requirements of Chapter 74." Within the additional period given Keegan to comply with the requirements of Chapter 74, Keegan served Dr. Myers with a report authored by Dr. Harold Gaskill and a report authored by Dr. Richard Bradley.

After the additional medical reports were served on Dr. Myers, he filed another motion to dismiss, arguing that the reports did not comply with the requirements of Chapter 74. After a hearing, the trial court denied Dr. Myers's second motion to dismiss. On appeal, Dr. Myers argues that Dr. Meissner's report "was not curable by way of extension, and the trial court therefore erred in granting one[.]" Although Dr. Myers questions the adequacy of Dr. Meissner's report, he does not criticize the report of Dr. Gaskill or the report of Dr. Bradley; instead, his complaint concerns solely whether the filing of Dr. Meissner's report constituted a good faith effort to justify the trial court's decision to allow Keegan to serve supplemental expert reports.

Applicable Law and Standard of Review

To resolve the sole issue presented in this interlocutory appeal, we first determine whether Dr. Meissner's report constitutes an objective good faith effort to comply with Chapter 74. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(l). We apply an abuse-of-discretion standard to review the trial court's decision on the adequacy of Dr. Meissner's report. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001) (applying abuse-of-discretion standard to the trial court's decision on adequacy of an expert report filed under Chapter 74). 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).

Under Chapter 74 of the Texas Civil Practice and Remedies Code, a health care liability claimant is required to serve an expert report with a curriculum vitae by the 120th day after the original petition is filed for each physician named in the suit. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). 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 . . . failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Id. § 74.351(r)(6). If a report has not been served by the 120-day deadline that satisfies Chapter 74's requirements, on the affected physician's motion, the trial court is generally required to dismiss the suit; however, when a report is served within the deadline but has

been found to be deficient, Chapter 74 allows the trial court to grant one thirty-day extension to allow the claimant to cure any deficiencies. *Id.* § 74.351(c).

Recently, the Texas Supreme Court discussed whether an inadequate expert report contained deficiencies to such an extent that it constituted no report in the first instance. *See Scoresby v. Santillan*, No. 09-0497, 2011 Tex. LEXIS 516 (Tex. July 1, 2011). After considering the Act's text and purpose, the Court held that "a document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit." *Id.* at *3. The Court concluded that "a thirty-day extension to cure deficiencies in an expert report may be granted if the report is served by the statutory deadline, if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated." *Id.* at *23. The Court recognized that its "individual with expertise that the claim has merit" is a "minimal standard." *Id.*

Analysis

It is undisputed that Keegan timely served Dr. Myers with Dr. Meissner's report. Based on the minimal standard identified by the Texas Supreme Court in *Scoresby*, the remaining inquiry is whether Dr. Meissner's report contains an opinion "by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit." *Id.* at *3.

Dr. Meissner's report and curriculum vitae detail his background as a licensed physician who is board certified in internal medicine, cardiovascular diseases, critical care medicine, forensic medicine, nuclear cardiology, echocardiography, and cardiovascular computed tomography. Dr. Meissner's background reflects that he has practiced for twenty-five years in critical care medicine, practiced for a period of twenty years in emergency medicine, and that he has practiced eighteen years in cardiology and cardiology-specific critical care medicine. At the time of Barrow's death, Dr. Meissner was a consulting cardiologist and a critical care medicine physician. We hold that Dr. Meissner's report contains an opinion of an individual with relevant expertise. *See id.* at **23-25 (requiring that a report only needs to be authored by an individual with relevant expertise and does not have to be authored by statutorily qualified experts before the trial court has discretion to grant an extension).

In his report, Dr. Meissner asserts that Dr. Myers breached four separate standards of care that relate to Dr. Myers's diagnosis and treatment of Barrow. Dr. Meissner opined that "[s]uch deviations of care for the physician defendants in this case . . . rise to the standard of proof required in cases involving emergency medical care[.]" Furthermore, Dr. Meissner states that "Mr. Barrow died of the direct consequences of the misdiagnosis of his shock state as septic rather than hemorrhagic shock[.]" and Dr. Meissner then explains that had Barrow been properly diagnosed, he would have, in all likelihood, survived.

A case Dr. Myers relies heavily on in his appeal, *Gingrich v. Scarborough*, is distinguishable from the case before us. *Gingrich v. Scarborough*, No. 09-09-00211-CV, 2010 Tex. App. LEXIS 3139 (Tex. App.—Beaumont Apr. 29, 2010, no pet.). In *Gingrich*, we held that, with respect to the Pharmacy Defendants, “the causation analysis that does appear in the report [although deficient] regarding the Prescribing Defendants cannot be imputed to the Pharmacy Defendants[,]” and thus, “the actions of the Pharmacy Defendants are *not implicated at all* in [the expert’s] report.” *Id.* at *12 (emphasis added). We reversed the trial court’s denial of the Pharmacy Defendants’ motion to dismiss and remanded the case to the trial court directing that it dismiss the claims against the Pharmacy Defendants. *Id.* at *15. However, we reached a different conclusion with respect to the physician in *Gingrich*, who prescribed the medication on which the patient overdosed. *Id.* at *2. Regarding the expert report in *Gingrich* as to the doctor, we considered the expert report to represent a good faith effort to comply with the requirements of Chapter 74. *Id.* at **11, 13. Consequently, in *Gingrich*, we remanded the case to the trial court to allow it to consider the plaintiffs’ request for an extension to amend regarding the physician’s conduct because we concluded that the report attempted to describe causation as it related to the physician. *Id.* at **12-13, *15; *see also Scoresby*, 2011 Tex. LEXIS 516, at *23.

In this case, Dr. Meissner’s report provides an explanation of how, in his opinion, Dr. Myers’s alleged breaches of care caused Barrow’s death. *See Gingrich*, 2010 Tex.

App. LEXIS 3139, at *13. Although Dr. Meissner's report is deficient due to its lack of adequate detail, the trial judge could, nevertheless, have reasonably concluded that it was sufficient to implicate Dr. Myers's conduct as a contributing factor in causing Barrow's death. *See id.* Because the trial court could reasonably have concluded that Dr. Meissner's report constituted a good faith effort to comply with Chapter 74, the trial court did not abuse its discretion in granting Keegan's request for an extension to serve additional reports. *See id.* at *13; *see also Scoresby*, 2011 Tex. LEXIS 516, at *23.

Dr. Myers also argues that Dr. Meissner's report was not intended to address the standards of care that applied to Dr. Myers or the breaches of those standards by him. Dr. Myers's argument relies on a statement in Dr. Meissner's report that he was "not a testifying expert in this case in Emergency Medicine or Surgery[.]" Following this statement, Dr. Meissner's report describes several standards of care and the breaches of those standards by Dr. Myers.

Nevertheless, the fact that an expert does not intend to testify at trial does not disqualify a physician from providing a report criticizing another physician that meets the requirements of Chapter 74. The statement can be reasonably interpreted to mean that Dr. Meissner did not intend to testify as an expert on the subject of emergency medicine at trial and that he, instead, considered himself to be a consulting expert being used to provide the trial court with the threshold medical opinions on emergency medicine for the purpose of satisfying the requirements of Chapter 74. While Chapter 74 requires the

filing of an expert report, it does not require that the report be filed by an expert who will testify at trial. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351; 74.401; *see generally* Tex. R. Civ. P. 192.3(e) (distinguishing between the roles of testifying and consulting witnesses for purposes of discovery). In light of Dr. Meissner's experience and training, we conclude that Dr. Meissner's statement that he was not a testifying expert in emergency medicine did not make his opinions about Dr. Myers either irrelevant or incompetent.

We hold that the trial court did not abuse its discretion by granting Keegan a thirty-day extension. *See Scoresby*, 2011 Tex. LEXIS 516 at *23. Because Dr. Myers does not contend that the supplemental reports served on him do not satisfy Chapter 74's statutory requirements, and because we have concluded that the trial court did not abuse its discretion in granting Keegan's requested extension to serve supplemental reports, we overrule the sole issue raised by Dr. Myers in this appeal. We affirm the trial court's order denying the motion to dismiss filed by Dr. Myers.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on August 24, 2011
Opinion Delivered August 31, 2011
Before McKeithen, C.J., Gaultney and Horton, JJ.