



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-15-00306-CV

**MERIDIAN LTC LTD. F/K/A TUMBLEWEED CARE CENTER, THEORA
MANAGEMENT SYSTEMS, INC., SCOTT STEVEN SPORE, ROBERT TIMOTHY RICE,
INDEPENDENT EXECUTOR FOR THE ESTATE OF KENNETH MICHAEL RICE, AND
MARIA STELLA BRIONES, APPELLANTS**

V.

**LOUIS D. BYERS, INDEPENDENT ADMINISTRATOR
OF THE ESTATE OF WILLIE JOE BYERS, APPELLEE**

On Appeal from the 72nd District Court
Lubbock County, Texas
Trial Court No. 2013-505,504; Honorable William C. Sowder, Presiding

July 21, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

By this interlocutory appeal, Appellants, Meridian LTC Ltd., f/k/a Tumbleweed Care Center; Theora Management Systems, Inc.; Scott Steven Spore; Robert Timothy

Rice as Independent Executor for the Estate of Kenneth Michael Rice;¹ and Maria Stella Briones challenge the trial court's *Order Overruling Objections to the Sufficiency of the Plaintiff's Original Expert Report of Mark E. Kunik and Denying Original Motion to Dismiss Under Section 74.351*. By five issues, Appellants question the sufficiency of the expert reports of Dr. Mark E. Kunik. Specifically, they question whether (1) the expert report and amended expert report demonstrate his qualifications or require impermissible inferences, (2) the opinions regarding applicable standards of care are conclusory and insufficient, (3) the opinions on alleged breaches of the standard of care are likewise conclusory and insufficient, (4) the expert reports are conclusory and wholly deficient as to causation, and (5) the expert reports constitute no report at all. We affirm.

BACKGROUND

On February 2, 2011, Willie Joe Byers ("Mr. Byers"), an elderly gentlemen, was transferred from the Children of the Pioneers nursing home facility in Denver City, Texas, to the Tumbleweed Care Center in Brownfield, Texas. Even though Mr. Byers suffered from Alzheimer's disease, his family was not notified of the transfer and did not authorize the move. During the evening hours of February 2nd or the early morning hours of the 3rd, Mr. Byers exited Tumbleweed Care Center unnoticed. At the time, the area was blanketed with snow and was experiencing below average temperatures. Despite never leaving the fenced yard of the facility, Mr. Byers did not re-enter the building, succumbed to the severe weather, and died.

¹ During the proceedings, Dr. Kenneth Michael Rice passed away and a Suggestion of Death and Writ of *Scire Facias* was filed by Robert Timothy Rice as Independent Executor.

Appellee, Louis D. Byers, Independent Administrator of the Estate of Willie Joe Byers, filed suit on January 30, 2013, to recover damages incurred as a result of Mr. Byers's death. By an amended petition, he asserted claims of negligence against ten defendants,² including Maria Stella Briones, an employee of Tumbleweed Care Center who was on duty when Mr. Byers died. He further alleged that Meridian, owner and operator of Tumbleweed Care Center, and Theora Management, Meridian's general partner, together with Kenneth Michael Rice and Scott Steven Spore, shareholders, officers, and directors of Theora Management, were vicariously liable for the actions of their employees under a theory of *respondeat superior*.

On or about May 29, 2013, pursuant to the applicable requirements of the Texas Medical Liability Act,³ Byers served Meridian with Dr. Kunik's expert report and *curriculum vitae*. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West Supp. 2015). On June 11th, Appellants filed objections to the sufficiency of that report. On July 16th, the trial court signed an order granting in part and sustaining in part their objections and granting Byers a thirty-day extension to cure insufficiencies in the report. In particular, the trial court requested that Dr. Kunik segregate out the defendants and be more specific on the elements of an expert report.

On or about September 18th, Byers forwarded to Meridian's counsel the *First Amended Expert Report* of Dr. Kunik, and on September 30th, Appellants again filed

² Only the five named Appellants are parties to this appeal.

³ TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001-.507 (West 2011 and Supp. 2015). The current version of the Texas Medical Liability Act applies to suits filed on or after September 1, 2013. Act of May 24, 2013, 83rd Leg., R.S., ch. 870, § 3(b), 2013 Tex. Gen. Laws 2217. Because this suit was filed before September 1, 2013, the former version of the Act applies to the instant appeal. See Act of May 18, 2005, 79th Leg., R.S., ch. 635, § 2, 2005 Tex. Gen. Laws 1590. Accordingly, all references to "§" or "section" are references to the Code prior to the 2013 amendment.

objections pertaining to the sufficiency of the amended report. On December 20th, the trial court considered Appellants' objections and signed an order overruling the objections to the amended expert report. Neither order ruling on Appellant's objections to the expert report or amended expert report contained a ruling denying any relief pertaining to the dismissal of Byers's health care liability claim pursuant to section 74.351(b)(2).

Appellants sought review of the trial court's orders. The appeal was found to be premature and was dismissed for want of jurisdiction. *Meridian Ltc, Ltd. v. Byers*, No. 07-13-00343-CV, 2015 Tex. App. LEXIS 1228, at *7 (Tex. App.—Amarillo Feb. 9, 2015, no pet.).

After this court issued its opinion, Appellants requested reconsideration from the trial court of their motion to dismiss. The underlying suit was transferred from the 99th District Court to the 72nd District Court of Lubbock. After holding a status hearing, the trial court entered two new orders overruling Appellants' objections to Dr. Kunik's original expert report as well as his amended expert report and denying Appellants' request for dismissal and attorney's fees. Appellants now challenge the trial court's denial of their motion to dismiss asserting inadequate expert reports.

EXPERT QUALIFICATIONS—APPLICABLE LAW

Regarding physicians, the Act provides that a person qualifies as an expert if the person is a physician who (1) is practicing medicine at the time such testimony is given or was practicing at the time the claim arose; (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the injury; and (3) is qualified on

the basis of training or experience to offer an expert opinion. § 74.401(a) (West 2011). With respect to a health care provider, the Act provides that a person may qualify as an expert 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 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 the diagnosis, care, or treatment of the injury; and (3) is qualified on the basis of training or experience. § 74.402(b). A person offering a medical expert report must establish he has expertise regarding “the specific issue before the court which would qualify the expert to give an opinion on that particular subject.” *In re Windisch*, 138 S.W.3d 507, 512 (Tex. App.—Amarillo 2004, orig. proceeding) (citing *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996)). The analysis focuses on “the very matter” on which the expert is to give an opinion. *Broders*, 924 S.W.2d at 153.

ANALYSIS

By their first issue, Appellants challenge Dr. Kunik’s qualifications as an expert.⁴ During the hearing on Appellants’ objections to the expert reports, the trial court announced, “I don’t have a real big problem . . . about his qualifications.” Dr. Kunik’s rather extensive *curriculum vitae* establishes that he is a medical doctor and has served as director of a veteran’s hospital where he was familiar with hospital administration. He also has extensive training and experience in geriatric medicine and has participated

⁴ Byers asserts that Appellants’ complaints on appeal were not preserved in the trial court for lack of specificity in their written objections. He further asserts that “Appellants raise for the first time that the expert reports fail to demonstrate Dr. Kunik’s qualifications and requires [sic] impermissible inferences.” However, both sets of objections challenge Dr. Kunik’s qualifications. The written objections together with arguments presented at the November 15, 2013 hearing challenging his qualifications of nursing home administration were sufficient to call the trial court’s attention to Appellants’ complaints. Thus, we will review those complaints.

in numerous studies concerning dementia and mental illness in elderly patients. Dr. Kunik has the expertise to offer an opinion on nursing home administration and the standards of proper care for dementia patients. That is the specific issue before the trial court in the underlying case. *In re Windisch*, 138 S.W.3d at 512. Issue one is overruled.

EXPERT REPORTS—APPLICABLE LAW

A trial court's ruling on the sufficiency of an expert's report is reviewed for abuse of discretion. *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015) (*per curiam*) (citing *Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 766 (Tex. 2011)). Under that standard, we defer to the trial court's factual determinations if they are supported by the evidence but review its legal determinations *de novo*. *Stockton v. Offenbach*, 336 S.W.3d 610, 615 (Tex. 2011).

The purpose of the Act is to eliminate frivolous claims expeditiously while preserving potentially meritorious ones. *Hebner v. Reddy*, No. 14-0593, 2016 Tex. LEXIS 412, at *6 (Tex. May 27, 2016) (citing *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011)). The purpose of an expert report is to inform the defendant of the specific conduct the plaintiff has called into question and provide a basis for the trial court to conclude the claims have merit. *Hebner*, 2016 Tex. LEXIS 412, at *10. A valid expert report under the Act must provide: (1) a fair summary of the applicable standards of care; (2) the manner in which the physician or health care provider failed to meet those standards; and (3) the causal relationship between that failure and the harm alleged. § 74.351(r)(6); *TTHR Ltd. P'ship v. Moreno*, 401 S.W.3d 41, 44 (Tex. 2013). A challenge to the sufficiency of an expert's report must be sustained if "the report does

not represent an objective good faith effort to comply with the definition of an expert report” as required by subsection (r)(6) of the Act. *Van Ness*, 461 S.W.3d at 141. A report is a good faith effort if it provides adequate information to “inform the defendant of the specific conduct the plaintiff has called into question, provides a basis for the trial court to conclude the claims have merit, *Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (*per curiam*), and does not contain a material deficiency. *Samlowski*, 332 S.W.3d at 410.

An expert report need not meet the same requirement as the evidence offered in a summary judgment proceeding or at trial. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001). However, it must, within its four corners, provide some explanation as to the applicable standards of care, a breach of those standards, and causation. *Wright*, 79 S.W.3d at 52.

ANALYSIS

By issues two, three, four, and five, Appellants assert the expert reports are conclusory on all the required elements and therefore constitute no report at all. We disagree.

In his reports, Dr. Kunik recites that he reviewed Byers’s pleadings, a lengthy report from the Texas Department of Aging and Disability detailing the incident, weather information for the relevant dates, and a news story of the incident. Based on his information gathering, he opined, to a reasonable degree of medical probability, that Appellants failed to meet the standards in Texas for caring for patients suffering from

dementia and that failure ultimately resulted in Mr. Byers's death. Specifically, the reports provide the following standards of care which were not met:

- (i) a facility caring for patients with dementia owes a duty to professionally supervise, monitor, and protect patients, and exercise reasonable care for their safety based upon their known mental and physical condition;
- (ii) a facility caring for patients with dementia owes a duty to select and train staff to care for patients suffering from this illness;
- (iii) a facility caring for patients with dementia owes a duty to provide adequate facilities to care for them; and
- (iv) a facility caring for patients with dementia owes a duty to provide adequate policies, procedures, and supervision of staff to accommodate their care.

Based on these standards, Dr. Kunik then reported how the standards were breached as follows:

- (1) In unusually cold weather, Appellants transferred Mr. Byers—a patient known to have dementia—late at night to a new facility in a different town unknown to Mr. Byers without his family's consent. Appellants failed to supervise, monitor, or protect Mr. Byers allowing him to leave the facility unnoticed, become disoriented, and go missing for four hours which caused him to freeze to death.
- (2) Appellants failed to either select staff capable of caring for dementia patients or failed to train staff to care for them. The staff failed to recognize that Mr. Byers was known to wander and would have become more disoriented at night after being transferred to an unsecured and unfamiliar facility. Failure to recognize and anticipate his behavior as being consistent with patients suffering from dementia demonstrated a lack of capability or training which contributed to Mr. Byers's death.
- (3) Appellants transferred Mr. Byers from a secured facility to an unsecured facility ill-equipped to handle patients suffering from dementia which caused his death.
- (4) Appellants failed to provide adequate policies, procedures, and supervision of staff to care for patients suffering from dementia. The staff's failure to exercise good discretion and judgment contributed to Mr. Byers's death.

Both reports, reviewed within their respective four corners, served as a good faith effort to advise Appellants of the specific conduct attributable to them and a basis for the trial court to conclude that Byers's claim has merit. *Wright*, 79 S.W.3d at 52. The reports establish the standards of care, a breach of those standards, and the nexus between the breach and the resulting harm—Mr. Byers's death. Dr. Kunik's opinions regarding the standards of care are not conclusory. Neither are the alleged breaches of those standards, nor his opinion on causation. Accordingly, we disagree with Appellants' assessment of the reports as constituting "no report at all." The reports were not required to rise to the level offered in a summary judgment proceeding. *Palacios*, 46 S.W.3d at 879.

The reports establish that Appellants knew Mr. Byers suffered from dementia and elected to transfer him late at night, in extremely cold weather, from a secured facility to which he was accustomed, to an unfamiliar, unsecured facility with unknown staff in a different town, all without his family's consent. Appellants' actions resulted in a patient who was known to wander being left unsupervised in unfamiliar surroundings which resulted in his being missed for four hours and freezing to death outside the facility. We conclude the trial court did not abuse its discretion in overruling Appellants' objections to the sufficiency of Dr. Kunik's expert reports and in denying their motion to dismiss. Issues two, three, four, and five are overruled.

CONCLUSION

The trial court's order is affirmed.

Per Curiam