



NUMBER 13-16-00520-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

MARY McCOY,

Appellant,

v.

VILMA SANDOVAL,

Appellee.

**On appeal from the 275th District Court
of Hidalgo County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Hinojosa**

This is an interlocutory appeal of the trial court's order denying appellant Mary McCoy's motion to dismiss the health care liability claims of appellee Vilma Sandoval. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.014(a)(9); 74.351(a), (b) (West, Westlaw through 2015 R.S.). In four issues, McCoy contends that the trial court abused its

discretion in overruling her objections to the report of Federico Roman Ng, M.D. and denying dismissal on the grounds that Dr. Ng's report fails to (1) establish that he is qualified to testify regarding the standard of care applicable to McCoy, a nurse practitioner; (2) specify the standard of care applicable to McCoy; (3) establish his qualifications to testify regarding causation; and (4) explain how McCoy's "purported breach of an unidentified standard of care caused" Sandoval's alleged injuries. We reverse and remand.

I. BACKGROUND

The underlying healthcare liability claims were filed by Sandoval against three defendants: McCoy; Cash Medical Clinic of Center Pointe, LLC; and Luis M. Gonzalez, M.D. According to Sandoval's one-hundred-and-fourteen paragraph original petition, she sought treatment from Cash Medical Clinic and Dr. Gonzalez for multiple reasons, including painful urination. As Dr. Gonzalez was unavailable, McCoy, a nurse practitioner, treated Sandoval. Sandoval's petition alleges that McCoy diagnosed Sandoval with a urinary tract infection, a yeast infection, and vaginosis based on urinalysis results. McCoy prescribed two medications.

About five days later, Sandoval returned to the clinic with worsened symptoms. During a pelvic examination at the second office visit, McCoy, according to Dr. Ng's report, exclaimed to "students" who were observing, "That's Gonorrhoea." McCoy then prescribed a different oral medication and two injections. Sandoval's petition alleges that she questioned McCoy about the gonorrhoea diagnosis in light of her being in a "monogamous relationship" for six months and not having had sexual relations with

anyone for several years before her current relationship. McCoy, according to Sandoval's petition, told Sandoval that her boyfriend probably had given her gonorrhea and that "men are like chickens; they poke everything in sight." Sandoval's petition alleges that the diagnosis of gonorrhea was in error, and it pleads claims against McCoy for "failure to disclose risks," "lack of consent," "breach of confidential communication," "intentional infliction of emotional distress," "intrusion on seclusion," "public disclosure of private facts," and "negligent misrepresentation." Sandoval sought damages for, among other things, physical pain and mental anguish.

In an effort to comply with section 74.351 of the Texas Civil Practice and Remedies Code, Sandoval served a report by Dr. Ng but no curriculum vitae. All three defendants objected to Dr. Ng's report, and McCoy also moved for dismissal. Sandoval then served Dr. Ng's curriculum vitae. All three defendants filed supplemental objections, and Dr. Gonzalez and Cash Medical Clinic moved for dismissal. The trial court overruled McCoy's objections to Dr. Ng's report and denied dismissal. This interlocutory appeal followed.¹

II. DISCUSSION

A. General Authority & Standard of Review

An "expert report" is 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,

¹ The trial court granted Dr. Gonzalez's motion to dismiss in his individual capacity. The trial court's order also explained that Sandoval had reached a settlement agreement with Cash Medical Clinic and with Dr. Gonzalez in his capacity as a member of Cash Medical Clinic. The trial court signed a nonsuit and dismissal with prejudice as to those two defendants. Accordingly, only Mary McCoy appeals from the trial court.

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).

A trial court's ruling on the sufficiency of an expert's report is reviewed for an abuse of discretion. *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015). Under this review, we defer to the trial court's factual determinations if they are supported by the evidence, but review its legal determinations *de novo*. *Id.* A trial court abuses its discretion if it acts without reference to guiding rules or principles. *Id.* However, in exercising its discretion, it is incumbent upon the trial court to review the reports, sort out their content, resolve any inconsistencies, and decide whether the reports demonstrated a good faith effort to show that the plaintiff's claims have merit. *See id.* at 144; see TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l) ("A court shall grant a motion challenging the adequacy of an expert report 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").

B. Qualifications Regarding the Standard of Care

In McCoy's first issue, she argues that Dr. Ng's report fails to establish that he is qualified to testify regarding the standard of care applicable to McCoy, a nurse practitioner.² An expert must satisfy section 74.402 to be qualified to provide opinion

² McCoy notes that Sandoval failed to provide Dr. Ng's curriculum vitae within the 120-day deadline, but she does not articulate that such an omission alone mandates sustaining an objection and dismissal. Even if advanced, such an argument would be unavailing. The health care liability claimant in *Scoresby v. Santillan*, 346 S.W.3d 546, 550 (Tex. 2011), neglected to serve a timely curriculum vitae, but the trial court nevertheless granted a thirty-day extension. The defendant appealed the trial court's refusal to dismiss, and the intermediate appellate court dismissed for want of jurisdiction. *Id.* at 551–52. The Texas Supreme Court affirmed. *Id.* at 556. Implicit in *Scoresby* is the notion that a trial court may grant

testimony regarding whether a health care provider departed from the accepted standard of care. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(B). Section 74.402 lists three specific qualifications an expert witness must possess in order to provide opinion testimony on how a health care provider departed from accepted standards of health care.

The expert must:

1. [be] 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. [have] 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. [be] qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.

Id. § 74.402(b) (West, Westlaw through 2015 R.S.). In determining whether a witness is qualified on the basis of training or experience, section 74.402 also requires the court to consider whether 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.

Id. § 74.402(c). A plaintiff offering expert medical testimony must establish that the report's author 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

a thirty-day extension where an expert report but no curriculum vitae is timely served. See *id.*

S.W.2d 148, 153 (Tex. 1996). Our analysis of the proffered expert's qualifications focuses on "the very matter" on which the expert is to give an opinion. *Id.*

Regarding qualifications, Dr. Ng writes,

I have been in practice for over 18 years in San Antonio not including medical school clerkships and residency in Dallas and Houston, Texas. As such I am familiar with the laws and standards that govern the practice of medicine.

Sandoval responds that the "stated qualifications of Dr. Ng actually exceed those found to be sufficient for expert qualification in *Scoresby*." Sandoval's reliance on *Scoresby v. Santillan*, 346 S.W.3d 546, 557 (Tex. 2011), to establish the adequacy of Dr. Ng's stated qualifications is misplaced. The question of whether the expert in *Scoresby* was qualified was not before the Texas Supreme Court. *Id.* (noting that what further relevancy the claimant's expert report had as to the claimant's claim should first be addressed by the trial court).

Instead, *Simonson v. Keppard*, 225 S.W.3d 868, 872 (Tex. App.—Dallas 2007, no pet.), is on point. In *Simonson*, the Fifth Court of Appeals concluded that an expert report was inadequate because the expert doctor did not state that he had any familiarity with the standard of care for a nurse practitioner. *Id.*; see also *McCoy v. Serna*, No. 13-15-00541-CV, 2016 WL 5845923 at *3 (Tex. App.—Corpus Christi Oct. 6, 2016, no pet.) (memo op.) (holding that none of the presentations by an orthopedic surgeon addressed the standard of care applicable to a nurse practitioner in the treatment of a broken hand). In this case, Dr. Ng fails to state that he is familiar with the standard of care applicable to nurse practitioners treating a patient presenting with multiple symptoms, including painful urination, and diagnosing venereal diseases. Accordingly, the trial court abused its

discretion in overruling McCoy's objections to Dr. Ng's stated qualifications regarding the standard of care. McCoy's first issue is sustained.

C. The Standard of Care

McCoy's second issue focuses on the standard-of-care element. The entirety of McCoy's argument provides:

In addition to his lack of qualifications, Ng's report is insufficient because it fails to specify the standard of care applicable to McCoy. In fact, there is absolutely no mention of the applicable standard of care in Ng's report. Because the applicable standard of care is an element essential to the sufficiency of an expert report, Ng's omission of that element required the trial court to dismiss Sandoval's claim against McCoy.

As we read McCoy's argument, she complains that Dr. Ng provides "absolutely no mention of the applicable standard of care." As relevant to this issue, Dr. Ng writes,

. . . After reviewing the data I find that the staff at Cash Medical Clinic provided care in such a manner as to violate standards of care set forth by statute. Specifically during her visits the staff at Cash Clinic 1) violated rules of privacy set forth by statute

. . . .

The Texas Health and Safety Code

Interview of Ms. Sandoval reveals that a gynecologic exam was performed during which PA McCoy exclaimed, "That's Gonorrhoea" to the students who were observing the exam. This act was in clear violation of

Dr. Ng then pastes into his report what he calls section 81.046 of the Texas Health and Safety Code,³ emphasizing some of the provisions of section 81.046 in bold-type. The bold-type provisions state:

. . . [H]ealth conditions are confidential and may be used only for the purposes of this chapter.

³ It appears that this version of section 81.046 was current through 2009.

. . . .

Medical or epidemiological information may be released: (1) for statistical purposes if released in a manner that prevents the identification of any person; (2) with the consent of each person identified in the information; (3) to medical personnel treating the individual

In light of McCoy's narrow issue, we cannot say that the trial court abused its discretion in overruling her objection. The law governing section 74.351 reports requires no particular words. *Scoresby*, 346 S.W.3d at 556 (citing *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) (per curiam) ("[A] report's adequacy does not depend on whether the expert uses any particular 'magical words.'")). In this case, Dr. Ng used the phrase "standards of care," linked them as "set forth by statute," and stated that McCoy exclaiming, "That's Gonorrhea" to students was an act that was "in clear violation" of section 81.046. It was incumbent on the trial court to, among other things, review the report and sort out its contents. See *Van Ness*, 461 S.W.3d at 144. The trial court, in its discretion, may have concluded that Dr. Ng's report contained an opinion regarding the standard of care. McCoy fails to assail Dr. Ng's standard-of-care opinion on any other grounds. As such, we express no opinion on what has not been argued. McCoy's second issue is overruled.⁴

⁴ Objections that are not made within twenty-one days of a report's service or the date the defendant's answer is filed are waived. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West, Westlaw through 2015 R.S.). Before this Court, McCoy raised only one ground regarding the standard-of-care element, and we have overruled it. Judicial economy dictates that on remand McCoy is barred from further assailing the standard-of-care element from additional report(s), if any are served.

D. Qualifications Regarding Causation

In McCoy's third issue, she argues that Dr. Ng's report fails to establish his qualifications to testify regarding causation.

1. Applicable Law

Section 74.403 of the Texas Civil Practice and Remedies Code provides as follows:

Except as provided by Subsections (b) [regarding suits against a dentist] and (c) [regarding suits against a podiatrist], in a suit involving a health care liability claim against a physician or health care provider, a person may qualify as an expert witness on the issue of the causal relationship between the alleged departure from accepted standards of care and the injury, harm, or damages claimed only if the person is a physician and is otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.403(a) (West, Westlaw through 2015 R.S.); see *id.* § 74.351(r)(5)(C) (stating that, "with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim," an "expert" is defined as "a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence").

Texas Rule of Evidence 702 provides that a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact issue. TEX. R. EVID. 702; see *Tenet Hosps., Ltd. v. Garcia*, 462 S.W.3d 299, 306 (Tex. App.—El Paso 2015, no pet.) (holding that "[s]ection 74.351(r)(5)(C) incorporates the rules of evidence in the context of the

expert's qualifications, not the substance of the opinion itself").

An expert's qualifications to opine on the subject matter at issue must be shown within the four corners of the expert's report or its required accompanying curriculum vitae, and cannot be inferred. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 463 (Tex. 2008) (orig. proceeding [mand. granted]); *Salais v. Tex. Dep't of Aging & Disability Servs.*, 323 S.W.3d 527, 536 (Tex. App.—Waco 2010, pet. denied); *Estorque v. Schafer*, 302 S.W.3d 19, 26 (Tex. App.—Fort Worth 2009, no pet.). A professional need not be employed in the particular field about which he is testifying so long as he can demonstrate that he has "knowledge, skill, experience, training, or education" regarding the specific issue before the court that would qualify him to give an opinion on that subject. See *Broders v. Heise*, 924 S.W.2d 148, 153–54 (Tex. 1996); see also *Christus Health Sys. v. Harlien*, No. 13–09–00446–CV, 2011 WL 2394614, at *4 (Tex. App.—Corpus Christi Jun. 9, 2011, pet. denied) (mem. op.). But merely being a physician is insufficient to qualify a witness as a medical expert. *In re Commitment of Bohannon*, 388 S.W.3d 296, 304 (Tex. 2012); see *Broders*, 924 S.W.2d at 152.

2. *Kim v. Hoyt*

McCoy argues that Dr. Ng's report fails to establish his qualifications to opine on the causation element. Sandoval responds that *Kim v. Hoyt*, 399 S.W.3d 714 (Tex. App.—Dallas 2013, pet. denied), supports her position that Dr. Ng's report adequately establishes his qualifications regarding causation. *Kim* is instructive.

In *Kim*, a patient undergoing laparoscopic surgery "bucked" while a trocar, a surgical instrument, was near her abdominal aorta. *Id.* at 716. The trocar severed the

patient's abdominal aorta, and she died in the operating room. *Id.* Days after the surgery and claiming the initial operative report had been lost, the primary surgeon redictated his operative report. *Id.* The patient's spouse sued several defendants alleging claims surrounding the death and a subsequent cover-up regarding the cause of death. *Id.* 716–17. Regarding the primary surgeon, the plaintiff did not allege any acts of negligence that caused the patient's death but complained only of his participation in the cover-up. *Id.* at 717.

In an effort to comply with the expert report requirement, the claimant provided a report from a surgeon. *Id.* The defending surgeon objected; the trial court denied dismissal. *Id.* The Fifth Court of Appeals affirmed. *Id.* It concluded that the expert report demonstrated that its author was a practicing surgeon who had experience with patients' families in the surgical context and as such, he was qualified to opine that creating a false report after a surgical fatality could cause the emotional distress alleged. *Id.* at 721.

McCoy implicitly takes issue with the holding in *Kim* that the claimant's expert did not have to be qualified in diagnosing or treating the emotional distress that followed the alleged breach of the standard of care. *Id.* McCoy argues that "Ng's report does not adequately reflect his qualifications to render opinions with respect to the issues present in this matter, namely psychological care and trauma." We reject McCoy's argument for the reasons stated in *Kim*. Section 74.351(r)(6) speaks in terms of "injury, harm, or damages" claimed, and such language is consistent with the overall legislative intent to include claims involving nonmedical injuries within the purview of the act. TEX. CIV.

PRAC. & REM. CODE ANN. § 74.351(r)(6) (emphasis added). In such cases, the nonmedical injuries flow from the existence of a medical condition that itself resulted from the breach of the applicable standard of care. *Kim*, 399 S.W.3d at 719. As stated in *Kim*, “[b]ecause [the claimant] will not be required to prove a medical injury capable of diagnosis or treatment, [his] expert [] did not have to be qualified in diagnosing or treating such injuries.” *Id.* In this case, the “medical condition” is painful urination and the “nonmedical injury” is the emotional distress that Sandoval allegedly sustained.

McCoy further argues that *Kim* is distinguishable because Dr. Ng’s report is not as robust as the one in *Kim*. On this point, we agree. Dr. Ng does not state that he has “knowledge, skill, experience, training, or education” telling patients the diagnosis of a venereal disease and whether an indelicate conveyance of such information may cause emotional distress. The trial court erred in overruling McCoy’s objection to Dr. Ng’s failure to demonstrate that he is qualified to opine as to causation. McCoy’s third issue is sustained.

E. Causation of Alleged Injuries

In her fourth issue, McCoy complains that Dr. Ng’s report fails to explain how McCoy’s “purported breach of an unidentified standard of care caused” Sandoval’s alleged injuries. We agree.

As we read Dr. Ng’s report, the portion that deals with causation provides:

[Sandoval] was treated in a manner that did not meet the standard of care as mandated by Texas State Law and as a result suffered severe embarrassment, anxiety, and anger. Not only did the effects of [sic] interfere with her life but the actions of the practitioner caused the break-up of her relationship that to date has not been reconciled. During my visit with Ms. Sandoval she was found to have signs and symptoms consistent

with Post-Traumatic Stress Disorder, Depression, Anxiety, and Insomnia. These symptoms were not present prior to her encounters at Cash Medical Clinic and were of such severity Ms. Sandoval was prescribed medications to treat these conditions.

In *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010), the Texas Supreme Court found conclusory an expert's statement that the physician-defendant's "breach of the appropriate standard of care in 'reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering being experienced by'" the patient. The court faulted the report for offering no explanation of how the breach caused the injury. *Id.* at 540. Like the report in *Jelinek*, Dr. Ng's report fails to explain how McCoy's breach of the standard of care caused her post-traumatic stress disorder, depression, anxiety, and insomnia. Accordingly, the trial court abused its discretion in overruling McCoy's objection regarding the causation element. McCoy's fourth issue is sustained.

F. Dismissal

Lastly, McCoy argues that the trial court erred in denying her motion to dismiss because Dr. Ng's reports constitutes "no report."⁵ McCoy cites *Lewis v. Funderburk*, 253 S.W.3d 204, 207–08 (Tex. 2008), in support of outright dismissal. However, the Texas Supreme Court has articulated a more current test. In *Scoresby v. Santillan*, 346 S.W.3d 546, 557 (Tex. 2011), the Court wrote,

We conclude 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. We recognize that this is a minimal standard, but we think it is necessary if multiple interlocutory appeals are to be avoided, and appropriate to give a claimant the opportunity provided by the Act's thirty-day extension to show that a claim

⁵ The issues presented section of McCoy's brief makes no mention of a "no report" issue. See TEX. R. APP. P. 38.1(f).

has merit. All deficiencies, whether in the expert's opinions or qualifications, are subject to being cured before an appeal may be taken from the trial court's refusal to dismiss the case.

Id. Dr. Ng, a licensed physician, has expertise, he has opined that Sandoval's claims have merit, and he has implicated McCoy's conduct in exclaiming "That's Gonorrhoea." Under *Scoresby*, we cannot say that Dr. Ng's report constitutes "no report." *Id.* at 557. Assuming, without deciding, that McCoy has raised an issue regarding the trial court's denial of her motion to dismiss on the basis that Dr. Ng's report constitutes "no report," we overrule the issue.

III. CONCLUSION

We reverse the trial court's order and remand to the trial court to determine whether to grant Sandoval a thirty-day extension to cure the deficiencies addressed in issues one, three, and four in accordance with this opinion. See *Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (holding that an appellate court has discretion to remand a case for consideration of a thirty-day extension to cure the deficiency found by the appellate court).

LETICIA HINOJOSA
Justice

Delivered and filed the
30th day of March, 2017.