Reversed and Rendered in part; Remanded in part and Opinion Filed November 17, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00164-CV

DONNA CAROLE COVEY, FNP, PIERPAOLO R. PALMIERI, M.D., AND CHILDREN'S MEDICAL CENTER OF DALLAS, Appellants
V.
GILBERT ADAM LUCERO AND MARIA GARCIA, BOTH INDIVIDUALLY AND ON BEHALF OF THE ESTATE AND AS NEXT FRIEND OF A.R.G.L., JR., DECEASED MINOR CHILD, Appellees

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-01407

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Whitehill
Opinion by Justice Whitehill

This medical malpractice case arises from the death of A.R.G.L., a child. Appellees sued appellants, who are health care providers who saw A.R.G.L. the day before he died. Appellants challenged appellees' expert report, and the trial court denied appellants' dismissal motions. Appellants timely perfected this interlocutory appeal.

The dispositive issue is whether appellees' report adequately explains how meeting the identified standards of care probably would have saved A.R.G.L.'s life. Concluding that it does not, we reverse the trial court's orders, render judgment dismissing appellees' claims, and remand for determination of appellants' attorneys' fees.

I. BACKGROUND

A. Factual Allegations

Appellees allege the following facts in their live pleading.

A.R.G.L. was appellees' son.

On November 29, 2012, appellee Maria Garcia took six year old A.R.G.L. to appellant CMC's emergency room. A.R.G.L. had a fever, flu-like symptoms, and leg pain. Appellants Donna Carole Covey, FNP and Pierpaolo R. Palmieri, M.D. saw A.R.G.L. He was in the emergency room for several hours, and he was treated with Zofran, ibuprofen, and Benadryl. He was discharged with a prescription for Tamiflu and instructions to follow up with his primary care physician.

A.R.G.L.'s condition did not improve, so Garcia took him to a scheduled appointment with his primary care physician the next morning. Appellees' petition is not specific, but we infer that A.R.G.L. suffered some kind of arrest while waiting to be seen. Appellees allege that staff members at the doctor's office administered CPR until emergency services arrived. A.R.G.L. was taken back to CMC, where resuscitative efforts proved unsuccessful.

B. Procedural History

Appellees sued appellants on wrongful death and survival claims. They alleged negligence and gross negligence against all appellants.

Appellees timely served appellants with a report by Madeline Joseph, M.D. Appellants objected to the report and moved to dismiss pursuant to civil practice and remedies code § 74.351. Appellees filed responses in which they requested a 30-day extension if Joseph's report was insufficient.

The trial court held a hearing and signed an order finding that the objections had merit, denying the dismissal motions, and granting appellees a 30-day extension in which to supplement the Joseph report.

Appellees timely served a supplemental Joseph report, and appellants again objected and moved to dismiss appellees' suit. Appellees responded. The trial court held a hearing and denied the dismissal motions. Appellants then timely appealed those orders denying their dismissal motions. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9).

II. STANDARD OF REVIEW

We review a trial court's ruling on a Chapter 74 report's sufficiency for abuse of discretion. *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015) (per curiam). Thus, we defer to the trial court's factual determinations if they are supported by evidence, but we review its legal determinations de novo. *Id.*

III. ISSUES PRESENTED

Appellants Covey and Palmieri filed a joint brief raising four issues. Each issue argues that the trial court abused its discretion by denying their dismissal motion because: (i) Joseph's causation opinions were conclusory, (ii) Joseph's report shows no more than a lost chance of survival, (iii) as to Palmieri, Joseph's report does not address the specific care he provided to A.R.G.L., and (iv) Joseph was not qualified to render causation opinions in this case.

In a single issue, appellant CMC argues that the trial court abused its discretion because Joseph's causation opinions were speculative and conclusory.

IV. ANALYSIS

Covey and Palmieri's first two issues and CMC's sole issue all raise essentially the same argument, that Joseph's causation opinions do not satisfy Chapter 74's standards. For the reasons discussed below, we hold that Joseph's causation opinions were insufficient and the trial

court abused its discretion by denying appellants' dismissal motions. Accordingly, we need not address Covey and Palmieri's third and fourth issues.

A. Applicable Law

A plaintiff asserting a health care liability claim must, by a specified deadline, serve each defendant with an expert report that includes "a fair summary of the expert's opinions . . . regarding applicable standards of care, 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." CIV. PRAC. & REM. § 74.351(r)(6); *see also id.* § 74.351(a) (setting expert report deadline). The trial court must sustain a challenge to the report's sufficiency if "the report does not represent an objective good faith effort to comply with the definition of an expert report." *Id.* § 74.351(*l*). A report is sufficient if it informs the defendant of the specific conduct the plaintiff has called into question, provides a basis for the trial court to conclude that the claims have merit, and does not contain a material deficiency. *Van Ness*, 461 S.W.3d at 141–42. A report is not sufficient if it omits a statutory element or states only the expert's conclusions without explanation. *Sanchez v. Martin*, 378 S.W.3d 581, 588 (Tex. App.—Dallas 2012, no pet.).

As to causation, the supreme court has said that the report need not use any particular "magical words" to satisfy the statute. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) (per curiam). Nevertheless, one of an expert report's two essential purposes is to "provide a basis for the trial court to conclude that the claims have merit." *Id.* at 52. In a medical malpractice case, the claimant must prove that the defendant's negligence was, more likely than not, a cause of the injury. *Quinones v. Pin*, 298 S.W.3d 806, 815 (Tex. App.—Dallas 2009, no pet.).

Accordingly, "without some indication of probability, however expressed," an expert report fails to show that the claimant's claims have merit on the essential element of causation. *McMenemy v. Holden*, No. 14-07-00365-CV, 2007 WL 4842452, at *6 (Tex. App.—Houston [14th Dist.] Nov. 1, 2007, pet. denied) (mem. op.); *see also Taylor v. Fossett*, 320 S.W.3d 570, 577 (Tex. App.—Dallas 2010, no pet.) ("A description of only a possibility of causation is not sufficient to satisfy [the] requirements concerning the necessary content of an expert report."); *Walgreen Co. v. Hieger*, 243 S.W.3d 183, 186 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (same).

Moreover, a report fails if its causation opinion is conclusory. "An expert cannot simply opine that the breach caused the injury." *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010). "Instead, the expert must go further and explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented." *Id*. at 539–40. That is, "the expert must explain the basis of his statements to link his conclusions to the facts." *Bowie*, 79 S.W.3d at 52 (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)).

In determining whether a report is sufficient, we are limited to the information contained within the four corners of the report. *Methodist Hosp. of Dallas v. King*, 365 S.W.3d 847, 850 (Tex. App.—Dallas 2012, no pet.). And we may not fill gaps in a report by drawing inferences or guessing what an expert meant or intended. *Hollingsworth v. Springs*, 353 S.W.3d 506, 513 (Tex. App.—Dallas 2011, no pet.).

B. Is Joseph's causation opinion sufficient?

For the reasons discussed below, we conclude that Joseph's supplemental report is conclusory and insufficient because it violates the principle that "[a] description of only a possibility of causation is not sufficient to satisfy [the] requirements concerning the necessary content of an expert report." *Taylor*, 320 S.W.3d at 577.

Joseph's supplemental report first summarizes her credentials as a pediatric emergency medicine specialist. Then it lists the materials she reviewed, including A.R.G.L.'s medical records and his autopsy report. Next it recounts the case's basic facts consistent with appellees' live pleading. Joseph then devotes about two pages to her opinions regarding how appellants breached the applicable standards of care. The report's gist is that appellants breached the standards by not (i) recognizing the seriousness of A.R.G.L.'s condition, (ii) performing all the testing they should have, (iii) commencing more aggressive treatment, and (iv) hospitalizing him.

Joseph's causation statements were as follows:

> Causal Relationship
>
> If Donna Carole Covey, FNP and Dr. Pierpaolo Palmieri and the hospital staff had recognized the abnormal vital signs throughout [A.R.G.L.'s] emergency department stay from persistent elevated heart rate and fever progressing to persistent tachycardia and low temperature, then [A.R.G.L.] would have undergone laboratory testing for sepsis (associated with Influenza) and dehydration, electrolyte disturbances and possibly given Intravenous fluid and antibiotics. At a minimum, [A.R.G.L.] should have not been discharged from the hospital with abnormal vital signs and should have been hospitalized for further evaluation and management. Unexplained persistent tachycardia (no fever or documented pain or anxiety) and decrease[d] urine output (no documentation of last urine output prior to ED visit or documentation of urination in the ED) should raise concern for dehydration and require IV fluid rehydration if patient is not tolerating oral intake (no documentation of successful PO intake in ED after Zofran). In addition, if tachycardia persists after appropriate IVF rehydration, then sepsis/myocarditis should be considered and further testing should be done. In addition, hospitalization should be considered if patient's vital signs continue to be abnormal for his age after fluid management for clinical observation and further testing. If the patient was admitted, aggressive fluids and antibiotics administration would have been administered upon patient's clinical deterioration. *In my opinion and based on a reasonable medical probability, had such treatment been administered the overall outcome of [A.R.G.L.'s] medical condition would have potentially improved.* Despite the fact that severe myositis and rhabdomyolysis is rare with influenza, checking urine for blood (myoglobinuria), Creatinine Kinase and electrolytes is warranted in light of severe leg pain requiring [A.R.G.L.] to use the wheelchair to come into the ED and the presence of eyelids edema. According to the autopsy report findings included influenza type B virus infection (tracheitis, bronchitis, bronchiolitis, pneumonia, bilateral pleural infusions) and positive blood culture for Viridans streptococcus group.

> *Failure of Donna Carole Covey, FNP, Dr. Pierpaolo Palmieri and the hospital staff to recognize early sepsis manifesting as persistent tachycardia, poor appetite, and low temperature, and failure to initiate aggressive fluids and antibiotics and admit patient for further evaluation and treatment were in all reasonable medical probability major contributing factors that led to [A.R.G.L.'s] death.*
>
> Conclusion
>
> I am familiar with the terms "negligence", "ordinary care", and "proximate cause." Based upon my review of these records and the foregoing analysis it [is] my opinion that Donna Carole Covey, FNP and Dr. Pierpaolo Palmieri, along with the nurses and staff at Children's Medical Center of Dallas, were negligent in their care and treatment of [A.R.G.L.] and *it [is] my further opinion that their negligence as outlined above was a proximate cause of [A.R.G.L.'s] death on 11/30/2012*.

(Emphases added.)

The first half of the "Causal Relationship" paragraph further explains how appellants breached the standards of care, such as not causing more tests to be run, not hospitalizing A.R.G.L., and not treating A.R.G.L. aggressively with fluids and antibiotics. It does not, however, address the causal connection between these omissions and A.R.G.L.'s death.

The rest of the "Causal Relationship" paragraph attempts to address the causal nexus:

> In my opinion and based on a reasonable medical probability, *had such treatment [aggressive fluids and antibiotics] been administered the overall outcome of [A.R.G.L.'s] medical condition would have potentially improved*. Despite the fact that severe myositis and rhabdomyolysis is rare with influenza, checking urine for blood (myoglobinuria), Creatinine Kinase and electrolytes is warranted in light of severe leg pain requiring [A.R.G.L.] to use the wheelchair to come into the ED and the presence of eyelids edema. According to the autopsy report findings included influenza type B virus infection (tracheitis, bronchitis, bronchiolitis, pneumonia, bilateral pleural infusions) and positive blood culture for Viridans streptococcus group. *Failure of Donna Carole Covey, FNP, Dr. Pierpaolo Palmieri and the hospital staff to recognize early sepsis manifesting as persistent tachycardia, poor appetite, and low temperature, and failure to initiate aggressive fluids and antibiotics and admit patient for further evaluation and treatment were in all reasonable medical probability major contributing factors that led to [A.R.G.L.'s] death.*

(Emphases added.)

The first sentence of this excerpt says only that A.R.G.L.'s condition would have "potentially" improved if fluids and antibiotics had been aggressively administered. This is akin to the opinions that we held were insufficient in *Taylor v. Fossett*. In that case, a report opined that a patient "might" have avoided certain surgeries, pain, and permanent scarring if the defendant doctor had not been negligent. 320 S.W.3d at 577. We concluded that these opinions showed only a possibility of causation, and we held that the trial court had abused its discretion by denying the defendant's dismissal motion. *Id*. at 577–78. Similarly, the trial court in this case could not have reasonably concluded that the first sentence quoted above constituted a sufficient causation opinion.

The report's next sentence does not discuss causation at all. The sentence after that recites some autopsy findings, but it does not say what caused A.R.G.L.'s death or explain how different actions probably would have altered those causes and saved his life. That sentence therefore does not provide the required link between the alleged breaches and the ultimate adverse result. *See id*. at 577.

Furthermore, the "Causal Relationship" paragraph's last sentence opines that appellants' negligent failure to (i) recognize the seriousness of A.R.G.L.'s illness, (ii) start aggressively administering fluids and antibiotics, and (iii) admit A.R.G.L. to the hospital for further testing and treatment "were in all reasonable medical probability major contributing factors that led to [A.R.G.L.'s] death." But like other negligence claims, health care liability claims require proof that the defendant's negligence was "a substantial factor in bringing about the harm and without which the harm would not have occurred." *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993). Joseph's report does not explain what she meant by the term "major contributing factors," and we cannot infer that she intended to opine that appellants' negligence

was a but-for cause of A.R.G.L.'s death. *See Hollingsworth*, 353 S.W.3d at 513 (appellate court cannot draw inferences from expert's report).

Specifically, what Joseph's report does not explain is how the standard of care breaches were "major contributing factors" that caused the end consequence, A.R.G.L.'s death.[1] In contrast, the expert's report in *Mitchell v. Satyu* is a good example of an adequate expert report regarding causation. In that case, the report identified the specific cause of death, identified the standard of care breaches, and methodically explained how the proper actions would have probably led to the deceased's life being saved. No. 05-14-00479-CV, 2015 WL 3765771, at *8–9 (Tex. App.—Dallas June 17, 2015, no pet.) (mem. op.).

It follows from the applicable standards and the *Mitchell* analysis that Joseph's opinion that appellants' negligent acts and omissions were "major contributing factors" to A.R.G.L.'s death—without explaining the link between the breach in standards of care and the subsequent consequence, that is, how one caused the other in this patient—again presents only a speculative and conclusory possibility of causation, which is insufficient under Chapter 74. *See Taylor*, 320 S.W.3d at 577; *McMenemy*, 2007 WL 4842452, at *6.[2]

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[1] Stated differently, Joseph's report reflects the *post hoc ergo propter hoc* logical fallacy, which the supreme court cautions against:

> Care must be taken to avoid the *post hoc ergo propter hoc* fallacy, that is, finding an earlier event caused a later event merely because it occurred first. Stated simply, correlation does not necessarily imply causation. As we noted in *Guevara*, "[e]vidence of an event followed closely by manifestation of or treatment for conditions which did not appear before the event raises suspicion that the event at issue caused the conditions. But suspicion has not been and is not legally sufficient to support a finding of legal causation."

Jelinek, 328 S.W.3d at 533 (quoting *Guevara v. Ferrer*, 247 S.W.3d 662, 668 (Tex. 2007)).

The requirement that an expert report in a medical malpractice case must make a good faith explanation that links how the standard of care breaches probably caused the end result helps ensure that the analysis is not victim to this logical flaw. Thus, what is needed to overcome this logical fallacy in these cases, and what is missing here, is an explanation of how the predicate events produced the resulting consequence. Absent that explanation, there is only a conclusion that may or may not have substance. This is the explanation the supreme court held was necessary when it held that, "the expert must explain the basis of his statements to link his conclusions to the facts." *Bowie*, 79 S.W.3d at 52 (quoting *Earle*, 998 S.W.2d at 890).

[2] Not only does Joseph's report not meet what we found sufficient in *Mitchell*, but it does not meet what we found sufficient in *Patterson v. Ortiz*, where the expert report identified the cause of death, identified the applicable standard of care breaches, and stated that had those steps been properly taken, the deceased "could have then received 'early, aggressive treatment [that], more than likely than not, would have saved his life.'" 412 S.W.3d 833, 838–39 (Tex. App.—Dallas 2013, no pet).

Finally, the "Conclusion" paragraph is nothing more than a legal conclusion that appellants' negligence proximately caused A.R.G.L.'s death. *See Jelinek*, 328 S.W.3d at 539 ("An expert cannot simply opine that the breach caused the injury."). The report in *Taylor* contained a similar concluding paragraph, 320 S.W.3d at 573, but we still concluded that the report was insufficient as to causation, based on its conclusoriness and its description of possibilities of causation rather than probabilities, *id*. at 577–78.

Appellees direct our attention to one other sentence in the report, a sentence from the standard of care section that says, "Aggressive fluid resuscitation and administering the appropriate antibiotics could be lifesaving if given early in the course of the illness before progressing to shock and hypotension." But Joseph does not opine that A.R.G.L.'s illness was in an early stage when appellants treated him, and we cannot make such an inference. *See Hollingsworth*, 353 S.W.3d at 513 (appellate court cannot draw inferences from expert's report). Moreover, the sentence is couched in terms of possibility ("could") instead of probability. *See McMenemy*, 2007 WL 4842452, at *6 (use of the word "could" made report insufficient as to causation). Accordingly, appellees' argument does not persuade us that Joseph's supplemental report is sufficient.

We conclude that the trial court abused its discretion by denying appellants' dismissal motions based on inadequacies in Joseph's supplemental report. Accordingly, we sustain Covey and Palmieri's first two issues and CMC's sole issue. We need not discuss Covey and Palmieri's other issues.

C. What relief follows from our holding?

The trial court granted appellees an extension to supplement and amend their report, which they used. The statute provides that only one extension may be granted. CIV. PRAC & REM. § 74.351(c). Accordingly, we render judgment dismissing appellees' claims with

prejudice. *See id*. § 74.351(b)(2); *see also Nexion Health at Lancaster, Inc. v. Wells*, No. 05-16-00018-CV, 2016 WL 4010834, at *1 (Tex. App.—Dallas July 25, 2016, no pet. h.) (mem. op.) (granting such relief on similar facts). We remand the case for determination of appellants' fees and costs. *See* CIV. PRAC. & REM. § 74.351(b)(1).

V. CONCLUSION

For the foregoing reasons, we reverse the trial court's orders denying appellants' dismissal motions, render judgment dismissing appellees' claims against appellants, and remand this case to the trial court to determine the reasonable attorneys' fees and costs to be awarded to appellants under civil practice and remedies code § 74.351(b)(1).

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DONNA CAROLE COVEY, FNP, PIERPAOLO R. PALMIERI, M.D., AND CHILDREN'S MEDICAL CENTER OF DALLAS, Appellants

No. 05-16-00164-CV V.

GILBERT ADAM LUCERO AND MARIA GARCIA, BOTH INDIVIDUALLY AND ON BEHALF OF THE ESTATE AND AS NEXT FRIEND OF A.R.G.L., JR., DECEASED MINOR CHILD, Appellees

On Appeal from the 192nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-01407.
Opinion delivered by Justice Whitehill.
Justices Bridges and Lang-Miers participating.

In accordance with this Court's opinion of this date, the trial court's orders denying appellants Donna Carole Covey, FNP, Pierpaolo R. Palmieri, M.D., and Children's Medical Center of Dallas's motions to dismiss are **REVERSED** and judgment is **RENDERED** that appellees' claims against appellants are dismissed with prejudice. We **REMAND** this case to the trial court for determination of the reasonable attorney's fees and costs to be awarded to appellants pursuant to civil practice and remedies code section 74.351(b)(1).

It is **ORDERED** that appellants Donna Carole Covey, FNP, Pierpaolo R. Palmieri, M.D., and Children's Medical Center of Dallas recover their costs of this appeal from appellees Gilbert Adam Lucero and Maria Garcia, Both Individually and on Behalf of the Estate and as Next Friend of A.R.G.L., Jr., Deceased Minor Child.

Judgment entered November 17, 2016.