



In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00942-CV

**JEFFREY LYNCH, THE MCKINNEY DENTIST AND
MATTHEW MARKHAM, D.D.S., Appellants**

V.

MICHAEL BELL AND LISA ANN BELL, Appellees

**On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-03485-2016**

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

This is a Chapter 74 expert report case. Appellees sued appellants for dental malpractice. Appellants objected to appellees' expert report and moved to dismiss. The trial court overruled the objections and denied the dismissal motions. Appellants appeal from those rulings. Because appellees' expert report is conclusory as to causation, we reverse the trial court's order and remand for further proceedings.

I. BACKGROUND

A. Factual Allegations

Appellees, Michael Bell and his wife Lisa, allege these facts in their live pleading:

In December 2014, Michael visited appellant The McKinney Dentist because Michael's bridge had come out. He was examined by appellant Matthew Markham, D.D.S. X-rays taken during the visit showed that Michael had "severe bone loss." Markham was very concerned about the bone loss and wanted to consult with appellant Jeffrey Lynch, D.D.S. about Michael's condition.

At a follow up consultation, Markham told Michael that he and Lynch had reviewed Michael's x-rays and confirmed that he suffered from degenerative bone disease. Although both Markham and Lynch concluded that Michael had "an infection from periodontitis," they did not tell the Bells this. Nor did they advise him to seek treatment for the infection.

In late March 2015, Michael was suffering from symptoms such as shortness of breath, dizziness, and extreme fatigue. So he went to see his family practitioner. Because that doctor was out of town, Michael saw a different doctor who diagnosed Michael with an inner ear infection and prescribed an antibiotic and Flonase.

Michael's symptoms worsened in early April, and he went to his normal doctor. That doctor immediately sent him to Texas Presbyterian in Allen for chest x-rays. There, Michael went into respiratory arrest. Doctors intubated him, diagnosed him with a tear in his aortic valve, and sent him to Texas Presbyterian in Dallas for open heart surgery. The surgeon removed 40% of Michael's heart and replaced his aortic valve with a bovine valve.

The Bells allege that the infection in Michael's mouth attacked his heart and caused the heart problems that were treated in early April 2015.

B. Procedural History

The Bells sued appellants for negligence in treating Michael. They timely served on appellants Robbie W. Henwood, D.D.S.'s expert report and curriculum vitae.

Lynch and The McKinney Dentist filed a joint objection to and dismissal motion attacking Henwood's report. Markham did so separately. The Bells responded that Henwood's report was adequate but also requested an opportunity to cure any deficiencies.

The trial court held a hearing and later signed an order overruling appellants' objections and denying their dismissal motions.

Appellants perfected this interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9). Lynch and The McKinney Dentist filed a joint notice of appeal and joint appellate briefs. Markham filed a separate notice of appeal and appellate briefs.

II. ISSUES PRESENTED

Lynch and The McKinney Dentist present two issues arguing that the trial court erred by denying their motion to dismiss because (i) Henwood is not qualified to supply causation opinions in this case and (ii) Henwood's causation opinions are conclusory.

Markham in two issues argues that (i) Henwood's report is conclusory as to all three elements a Chapter 74 expert report must address and (ii) Henwood is not qualified to supply causation opinions in this case.

III. ANALYSIS

A. Standard of Review

We review a trial court's ruling on an expert report's sufficiency for abuse of discretion. *Baty v. Futrell*, No. 16-0164, 2018 WL 665456, at *4 n.4 (Tex. Feb. 2, 2018); *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015) (per curiam). Under that standard, we defer to the trial court's factual determinations if evidence supports them but review its legal

determinations de novo.¹ *Van Ness*, 461 S.W.3d at 142. A trial court abuses its discretion if it rules without reference to guiding rules or principles. *Id.*

B. Applicable Law

A plaintiff asserting a health care liability claim must serve each defendant with an expert report. CIV. PRAC. § 74.351(a); *Baty*, 2018 WL 665456, at *3. An expert report must include “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. § 74.351(r)(6); *see also Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 455 n.3 (Tex. 2017). If the plaintiff fails to timely serve an adequate expert report, the defendant can move for dismissal and seek attorneys’ fees and costs. CIV. PRAC. § 74.351(b).

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.

On the other hand, a report is not sufficient if it omits a statutory element or states only the expert’s conclusions without explanation. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001). For example, “[a]n 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. And “[i]n showing how and why a breach of the standard of

¹ Precedent requires us to apply an abuse of discretion standard of review. But, because we conduct our review based solely on the contested report’s four corners, there are no disputed facts or credibility determinations for the trial court to resolve and one could suggest that a de novo standard of review would be more appropriate. Appellate courts are in as good a position to assess a Chapter 74 report’s sufficiency as are trial courts. *See Hightower v. Baylor Univ. Med. Ctr.*, 251 S.W.3d 218, 221 (Tex. App.—Dallas 2008, pet. struck) (“Because summary judgment is a question of law, we review a trial court’s summary judgment decision de novo.”).

care caused injury, the expert report must make a good-faith effort to explain, factually, how proximate cause is going to be proven.”² *Zamarripa*, 526 S.W.3d at 460.

In determining whether a report is sufficient, we are limited to the information contained within the report’s four corners. *Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam). Thus, 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.).

C. Are Henwood’s causation opinions conclusory?

Because they are dispositive, we first address Lynch and The McKinney Dentist’s second issue and the causation aspect of Markham’s first issue. In so doing, we hold that Henwood’s report is conclusory regarding the causation element. A statement is conclusory if no basis for the statement is offered or the basis offered provides no support. *See Jelinek*, 328 S.W.3d at 536. Stated differently, “[a]n expert’s simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts.” *Zamarripa*, 526 S.W.3d at 460 (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)).

In sum, Henwood’s causation opinions are conclusory because they provide no explanation as how a mouth infection in fact causes heart valve failure or how different conduct by appellants would have prevented Michael’s injuries. Rather, the report treats these features as obvious and therefore not needing to be explained.

1. Henwood’s Report

Henwood’s report contains a factual recitation about the case that concludes with two paragraphs possibly relevant to the causation issue in this case:

² The supreme court in *Zamarripa* held that the expert reports must address both the cause in fact and foreseeability prongs of proximate cause to be sufficient. 526 S.W.3d at 460. Here, however, the appellants’ causation arguments addressed only the cause in fact component of proximate cause. Therefore, we do not address whether the reports sufficiently addressed the foreseeability component.

The clinical records from the Legacy Heart Center include visits from 04/28/2015 when Mr. Bell was admitted in severe cardiac failure until discharge on 12/29/2015. The note “There is suspicion that the endocarditis was caused by dental infection/degenerative bone disease.” was entered in the notes on 06/10/2015. Additionally, Dr. Ouyang-Latimer, the infectious care doctor, noted that the bacteria that caused Mr. Bell’s infection was strep mitis, which is found in the human mouth. She further noted that upon further evaluation of his teeth, there was evidence of dental decay, which is believed to be the source of his infection.

The clinical records from the hospital care were read for informational purposes but no opinions are presented regarding the in-hospital records.

Next, Henwood’s report contains three sections that each discuss a particular breach or set of breaches of the standard of care by Lynch and Markham. Each section ends with a causation opinion. We quote each paragraph:

Drs. Lynch and Markham breached the acceptable standard of care for a reasonable and prudent dentist under the same or similar circumstances by failing to obtain, document, review Michael Bell’s medical and dental history, and incorporate the same into their treatment plan. It is my opinion, based on medical probability, as well as my education, training, and experience, that such breaches were the cause of Mr. Bell’s injuries, including but not limited to the bacterial endocarditis development and advancement, which ultimately required emergent care, as well as Mrs. Bell’s damages for the time caring for her husband, as well as her loss of consortium claim.

....

Drs. Lynch and Markham breached the acceptable standard of care for a reasonable and prudent dentist under the same or similar circumstances by failing to use radiographs to properly examine, evaluate, and diagnose Mr. Bell’s condition. It is my opinion, based on medical probability, as well as my education, training, and experience, that such breaches were the cause of Mr. Bell’s injuries, including but not limited to the bacterial endocarditis development and advancement, which ultimately required emergent care, as well as Mrs. Bell’s damages for the time caring for her husband, as well as her loss of consortium claim.

....

Drs. Lynch and Markham breached the acceptable standard of care by failing to diagnose Mr. Bell, treat Mr. Bell, advise Mr. Bell, and/or refer Mr. Bell to a periodontist who would be able to provide more advanced care to Mr. Bell and treat his condition. As evidenced by the clinical records from the McKinney Dentist, the complaints from Mr. Bell were ignored and not adequately addressed by Drs. Lynch and/or Markham. The clinical records from the McKinney Dentist are devoid of any treatment plan outlining a course of treatment for Mr. Bell’s infection from the periodontium. The clinical records from the McKinney Dentist are also

devoid of any evidence documenting that Mr. Bell was adequately advised that he suffered from an infection from the periodontium and that treatment of such infection was time-sensitive. It is my opinion, based on medical probability, as well as my education, training and expertise, that Drs. Lynch and Markham's failure to diagnose Mr. Bell, treat Mr. Bell, advise Mr. Bell, and/or refer Mr. Bell to a periodontist caused Mr. Bell's injuries, including but not limited to the bacterial endocarditis development and advancement, which ultimately required emergent care, as well as Mrs. Bell's damages for the time caring for her husband, as well as her loss of consortium claim.

The next report section is entitled "Liability of McKinney Dentist," and it concludes with the following paragraph:

The failure of Drs. Lynch and Markham, as well as the McKinney Dentist, to follow-up on this patient's care is a breach of such standards and such negligence is a proximate cause of the injuries and damages sustained by Mr. and Mrs. Bell, as described in the paragraphs above. Clearly Mr. Bell would not have intended to bring severe life-threatening damage upon himself and consequentially on his wife.

The antecedent of "such standards" is not clear in this context, but the phrase seems to refer to the duty to ensure that patients understand their conditions and the importance of follow-up care.

The report's penultimate paragraph summarizes Henwood's opinions:

In evaluating the care that Drs. Lynch and Markham and the McKinney Dentist provided to Mr. Bell, it is my opinion, based upon medical probability, my medical education, graduate and post-graduate training, research, clinical practice, lecturing, reading, knowledge and experience, that (1) Drs. Lynch and Markham and the McKinney Dentist were negligent, (2) such negligence exposed Mr. Bell to extreme and unnecessary risks, and (3) such negligence was the proximate cause, in reasonable medical probability, of the injuries to Mr. Bell, all as set forth above in this review (specifically bacterial endocarditis development and advancement requiring emergent care), as well as Mrs. Bell's damages for the time caring for her husband, as well as her loss of consortium claim.

2. Application of Law to Facts

The question is whether the trial court could reasonably conclude—based solely on the report's contents, that is, without inferring facts not stated in the report (or engaging in the post hoc ergo propter hoc fallacy, which inherently requires one to infer a former event caused a latter result)—that Henwood supplies the factual "how and why" of a causal relationship between

appellants' alleged negligence and the heart injury for which Michael was treated in April 2013. *See Jelinek*, 328 S.W.3d at 539–40. We conclude that on this record the answer is no.

Broadly speaking, Henwood's report is conclusory because it implies, but does not say, that periodontal infections can spread to the heart and cause heart disease if not timely and properly treated. That is, he does not explain how the defendants' improper care of Michael's mouth condition in fact caused his heart valves to deteriorate. He instead left this point for the trial court to infer from his report, even though that cause and effect relationship is essential to the Bells' case.

Medical Histories and Radiography

More specifically, Henwood's report is conclusory as to causation regarding his medical history opinions because he does not explain what was wrong with the medical history the appellants obtained and how a different medical history would have prevented Michael's heart valve problem. For example, he says that Lynch and Markham breached the standard of care by not obtaining or reviewing an initial medical or dental history from Michael and by not incorporating that history into their treatment plan. Although Henwood's report acknowledges that appellants had an updated medical history, that history was not in the medical records he reviewed. Furthermore, Henwood says that these breaches caused Michael's injuries, but he does not explain factually how that causal relationship is so. For example, he does not explain what new information proper medical or dental histories would have revealed and how having that new information would have led to a different result.

Henwood's report is similarly conclusory as to causation regarding his opinion that appellants were negligent by not using radiographs to *properly* examine, evaluate, and diagnose Michael's condition. Henwood says that an x-ray report was generated while Michael was appellants' patient and the report said that Michael had "infection from the periodontium." But he

does not explain what was wrong with those x-rays or how appellants misinterpreted them. Nor does he say what additional information would have resulted had appellants used proper radiography or more properly interpreted the x-rays they had. Finally, he does not explain how having that additional information would have prevented the Bells' injuries.

Therefore, to deem Henwood's medical history and radiography related causation opinions sufficient, we would have to infer that (i) obtaining more medical history from Michael or (ii) taking or reading radiographs differently would have told appellants something that they did not already know and led them to act differently in a way that would have prevented the Bells' injuries. Because of those omissions, Henwood failed to explain without inferences how these standard of care breaches probably caused the end result. And, we may not fill gaps in a report by drawing inferences. *Hollingsworth*, 353 S.W.3d at 513.

Diagnosis, Disclosure, and Referral

Next, Henwood says that Lynch and Markham breached the standard of care by failing to (i) diagnose or treat Michael, (ii) advise him that he had a time-sensitive infection, or (iii) refer him to a periodontist who could have given Michael more advanced care and treated his condition. Although Henwood goes on to say that these breaches caused Michael's injuries, he again does not provide any facts to explain medically "how and why" the breaches caused Michael's injuries such as endocarditis. Assuming those causal connections are well-known to dentists, the trial court would have had to draw forbidden inferences to make those connections.

As we held in *Hendricks v. Perales*, it is not enough for an expert to summarize the defendant's breaches of the standard of care, list the injuries, and assert that the former caused the latter. No. 05-16-01258-CV, 2017 WL 1075637, at *5-6 (Tex. App.—Dallas Mar. 21, 2017, no pet.) (mem. op.). Someone reading Henwood's report might infer that Henwood believes that (i) Michael's dental infection in December 2012 caused his heart problems diagnosed in April 2013

and (ii) treatment of the dental infection soon after Lynch and Markham saw him would have prevented that infection from causing his heart problems. But again, we cannot fill gaps in a report by drawing inferences or guessing what the expert meant. *See Nexion Health at Lancaster, Inc. v. Wells*, No. 05-16-00018-CV, 2016 WL 4010834, at *5 (Tex. App.—Dallas July 25, 2016, no pet.) (mem. op.) (causation opinion was conclusory because expert did not explain why earlier evaluation and treatment would have led to a better outcome).

Moreover, Henwood’s report does not explain factually “how and why” the above-described inferred links in the causal chain are correct. *See Jelinek*, 328 S.W.3d at 539–40 (“[T]he expert must . . . explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented.”). Henwood’s report says that (i) Legacy Heart Center and Dr. Ouyang-Latimer suspected or believed that Michael’s endocarditis was caused by dental infection or decay and (ii) Dr. Ouyang-Latimer said the bacteria that caused Michael’s infection was strep mitis, which is found in the mouth. But Henwood disavows reliance on these records in the next paragraph of his report. Moreover, the causation opinions appearing in Legacy Heart Center’s and Dr. Ouyang-Latimer’s records are at least as conclusory as Henwood’s opinions. And finally, the records described by Henwood provide no factual support for his conclusion that treatment of Michael’s dental infection when or soon after he saw Markham in December 2014 would have resulted in a different outcome regarding his endocarditis.

3. Conclusion

Because Henwood’s causation opinions are conclusory and insufficient, we sustain Lynch and The McKinney Dentist’s second issue and sustain in part Markham’s first issue. We are not saying that Henwood must provide detailed, technical explanations for these missing parts of his causation opinions. We also recognize that he is not required to provide the same level of thoroughness as would be needed on summary judgment or at trial. *See Palacios*, 46 S.W.3d at

879. But, he must provide some basis beyond his “say-so” to show the trial court that the claims have merit.

Furthermore, we do not address appellants’ arguments that Henwood’s report is deficient in other respects and express no opinion on those matters. *See Sanchez v. Martin*, 378 S.W.3d 581, 590 n.2 (Tex. App.—Dallas 2012, no pet.).

D. Opportunity to Cure

Although appellants ask us to reverse and render a judgment of dismissal, the Bells have asked, in both the trial court and this Court, for an opportunity to cure any defects in the report. Section 74.351(c) allows the trial court to grant one thirty-day extension for the claimant to cure deficiencies as long as the defective report (i) is timely, (ii) contains the opinion of an individual with expertise that the claim has merit, and (iii) implicates the defendant’s conduct. *Id.* at 595–96. “An individual’s lack of relevant qualifications and an opinion’s inadequacies are deficiencies the plaintiff should be given an opportunity to cure if it is possible to do so.” *Scoresby v. Santillan*, 346 S.W.3d 546, 549 (Tex. 2011); *see also Nexion Health at Garland, Inc. v. Treybig*, No. 05-14-00498-CV, 2014 WL 7499373, at *7 (Tex. App.—Dallas Dec. 31, 2014, no pet.) (mem. op.) (noting that expert can be an “individual with expertise” and still lack the relevant qualifications to offer particular opinions). The trial court should be lenient in granting extensions, and it must grant an extension if the report’s deficiencies can be cured within the thirty-day period. *See Hendricks*, 2017 WL 1075637, at *7.

Because the Bells have not been given an opportunity to cure deficiencies in Henwood’s report, we remand the case to the trial court for its determination of whether to grant a thirty-day extension. *See Leland v. Brandal*, 257 S.W.3d 204, 207 (Tex. 2008); *Hendricks*, 2017 WL 1075637, at *7.

IV. CONCLUSION

The trial court abused its discretion by overruling appellants' objections to Henwood's causation opinions. Accordingly, we reverse the trial court's order overruling appellants' objections to Henwood's report and denying their dismissal motions, and we remand the case to the trial court to consider whether to grant the Bells a thirty-day extension to cure the deficiencies in Henwood's report.

/Bill Whitehill/

BILL WHITEHILL
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JEFFREY LYNCH, THE MCKINNEY
DENTIST AND MATTHEW
MARKHAM, D.D.S., Appellants

No. 05-17-00942-CV V.

MICHAEL BELL AND LISA ANN BELL,
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Court, Collin County, Texas
Trial Court Cause No. 199-03485-2016.
Opinion delivered by Justice Whitehill.
Justices Lang and Brown participating.

In accordance with this Court's opinion of this date, we **REVERSE** the trial court's July 24, 2017 order overruling appellants' objections to appellees' Chapter 74 expert report and denying appellants' motions to dismiss. We **REMAND** this case to the trial court for further proceedings consistent with the opinion.

It is **ORDERED** that appellants Jeffrey Lynch, The McKinney Dentist and Matthew Markham, D.D.S. recover their costs of this appeal from appellees Michael Bell and Lisa Ann Bell.

Judgment entered March 30, 2018.