

Opinion issued June 19, 2008



In The
Court of Appeals
For The
First District of Texas

NO. 01-06-01123-CV

**AARON LEE WOOFER, M.D.; DANNY CHU, M.D.; JONATHAN
CHARLES DANIEL, M.D.; AND FRED MILTON SUTTON, JR., M.D.,
Appellants**

V.

**MOLLY BENITEZ, INDIVIDUALLY AND AS REPRESENTATIVE OF
THE ESTATE OF ANDREA JIMENEZ ISLAM, DECEASED, AND KAZI
M. ISLAM, Appellees**

**On Appeal from Probate Court No. 1
Harris County, Texas
Trial Court Cause No. 362,807-401**

MEMORANDUM OPINION

Appellants Aaron Lee Woofter, M.D., Danny Chu, M.D., Jonathan Charles Daniel, M.D., and Fred Milton Sutton, Jr. M.D. bring this statutory interlocutory appeal from the probate court's denial of their challenge to the expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon Supp. 2007) (authorizing interlocutory appeal if trial court denies relief sought under TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b) (Vernon Supp. 2007)); *see also* *Lewis v. Funderburk*, 51 Tex. Sup. Ct. J. 747 (Apr. 11, 2008). The doctors asked the probate court to dismiss the wrongful death and survival claims of appellees (1) Molly Benitez, individually and as the representative of the estate of Andrea Jimenez Islam, deceased, and (2) Kazi M. Islam. We reverse.

Background

Benitez and Kazi Islam sued the doctors, claiming they negligently caused the death of Andrea Islam, who was a cancer patient. While Andrea was being treated for cancer with chemotherapy, she had difficulty eating. Woofter and Sutton inserted a feeding tube into Andrea's stomach, and her esophagus was torn during the insertion of the tube. Chu and Daniel performed surgery to repair the tear. A barium swallow revealed a leak, and further surgery was performed to repair it. Andrea later died of respiratory failure, which Benitez and Kazi claim was caused by pneumonia that developed after barium leaked out of Andrea's esophagus into adjacent tissue.

Benitez and Kazi timely served the doctors with an expert report and curriculum vitae of their expert, Mark S. Sanders, M.D., as required by Civil Practice and Remedies Code section 74.351(a). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2007). The doctors objected to the sufficiency of the expert report and filed a motion to dismiss pursuant to Civil Practice and Remedies Code section 74.351(b), (l). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b), (l) (Vernon Supp. 2007). After Benitez and Kazi filed a response and a request for a 30-day extension to cure any deficiency, the probate court denied the doctors' motion to dismiss.

Discussion

The doctors bring three issues, all challenging the inadequacy of Sanders's expert report. Benitez and Kazi do not defend the adequacy of Sanders's expert report in this Court, but instead they initially argued that this Court had no subject-matter jurisdiction to hear this interlocutory appeal. Benitez and Kazi now concede the Texas Supreme Court resolved the jurisdictional issue in *Lewis v. Funderburk*, and this Court has jurisdiction over the appeal. *See Lewis*, 51 Tex. Sup. Ct. J. at 748–49.

In issue 1, the doctors contend Sanders's expert report is inadequate because the report does not provide a sufficient basis for the trial court to find that Sanders

was qualified to render an expert opinion on the appropriate standards of care. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 71.351(r)(6) (Vernon Supp. 2007) (defining “expert report”), § 74.401 (Vernon 2005) (specifying qualifications of expert witness). Woofter and Sutton are gastroenterologists and Daniel and Cho are cardiothoracic surgeons. In contrast, the report states that Sanders is board certified in orthopaedic surgery and has practiced medicine for 25 years with a specialization in orthopaedic surgery. The report does not state that Sanders has any substantial training or experience necessary to offer an opinion about the procedures performed by the doctors sued in this case, who are not orthopaedic surgeons.

Civil Practice and Remedies Code section 74.401 provides in part that a person may qualify as an expert in a suit involving a health care liability claim against a physician if the person is a physician who is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.401(a)(3) (Vernon 2005). Section 74.401 additionally provides that, in determining qualification based on training or experience, the court shall consider whether the physician (1) was board certified or had other substantial training or experience in an area of medical practice relevant to the claim and (2) was actively practicing medicine in rendering medical care services relevant to the claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. §

74.401(c) (Vernon 2005). Sanders’s report is silent on both of the criteria mentioned above, and does not otherwise demonstrate Sanders’s qualifications, as required by section 74.401(a), on the basis of training or experience to offer an expert opinion regarding the accepted standards of medical care in gastroenterology and cardiothoracic surgery. *See Forrest v. Danielson*, 77 S.W.3d 842, 847–48 (Tex. App.—Tyler 2002, no pet.). Further, Benitez and Kazi do not argue on appeal that Sanders was qualified. Because Benitez and Kazi have not met their burden to show that Sanders is qualified as an expert, we hold that the trial court abused its discretion in denying the challenge to the expert report. *See Am. Transitional Care Ctrs., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001) (adopting abuse-of-discretion test).

We sustain issue 1.

Conclusion

Because we sustain issue 1, we need not reach issues 2 and 3. We reverse the trial court’s order denying the doctors’ challenge to the expert report. The Clerk of this Court is directed to issue the mandate immediately to allow further proceedings in the trial court, including consideration of Benitez’s and Kazi Islam’s request for a 30-day extension to cure the deficient expert report. *See* TEX. R. APP. P. 18.6 (expediting issuance of mandate in accelerated appeals); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c) (Vernon Supp. 2007) (allowing trial court to grant 30-day

extension); *Leland v. Brandal*, No. 06-1028, slip op. at 5–8 (Tex. June 13, 2008) (discussing 30-day extension); *Ogletree v. Matthews*, 51 Tex. Sup. Ct. J. 165, 168 (Nov. 30, 2007) (discussing 30-day extension).

Sam Nuchia
Justice

Panel consists of Justices Nuchia, Hanks, and Bland.