

Opinioned issued August 31, 2010



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00307-CV

DANIEL DARMADI, M.D., Appellant

V.

GENE HARSHMAN, Appellee

**On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2008-44005**

MEMORANDUM OPINION

The sole issue of this interlocutory appeal is whether the trial court abused its discretion by not dismissing the medical negligence case against appellant, Daniel Darmadi, M.D., because the expert report submitted on behalf of appellee, Gene Harshman, did not satisfy the requirements of Chapter 74 of the Texas Civil

Practice and Remedies Code. We agree that the report was deficient and reverse and remand.

BACKGROUND

Gene Harshman's uvula¹ was lacerated during an endoscopic retrograde cholangiopancreatography (ERCP) performed by Daniel Darmadi, M.D. The laceration, which bled profusely due to blood-thinning medication that Harshman was taking at the time, required subsequent reparative surgery. Harshman asserts that the excessive bleeding created a life-threatening condition that Dr. Darmadi improperly managed.

Following receipt of the expert report and curriculum vitae of Harshman's expert, Lige B. Rushing, Jr., M.D., Dr. Darmadi objected to its sufficiency and subsequently filed a motion to dismiss.² After a hearing, the trial court denied Dr.

¹ The uvula, which is part of the oropharynx, is the small fleshy lobe that hangs from the soft palate above the back of the tongue at the entrance to the throat.

² Section 74.351 of the Texas Civil Practice and Remedies Code sets forth expert report requirements applicable to medical malpractice cases. *See* TEX. CIV. PRAC. & REM. CODE ANN. §74.351 (Vernon Supp. 2009). Pursuant to this section, all health care liability claimants must serve an expert report, accompanied by the expert's curriculum vitae, on each party within 120 days of filing suit. *Id.* at §74.351(a). The defendant must then file and serve any objections to the sufficiency of the report not later than the 21st day after the date report was served, or else its objections are waived. *Id.* The defendant may also file a motion with the trial court requesting attorney's fees and dismissal of the claims. *See id.* at § 74.351(b); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008) (allowing appeal from interlocutory order that denies all or part of relief sought by motion pursuant to section 74.351(b)).

Darmadi's motion to dismiss. On appeal, Dr. Darmadi argues that the trial court abused its discretion by finding that the report satisfied the statutory requirements of Chapter 74.

DR. RUSHING'S EXPERT REPORT

I. Standard of Review

We review a trial court's decision on a motion to dismiss a case for failure to comply with section 74.351 for an abuse of discretion. *See Am. Transitional Care Centers v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(Vernon Supp. 2009). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or without reference to any guiding rules or principles. *See Walker v. Gutierrez*, 111 S.W.3d 56, 63 (Tex. 2003). When reviewing matters committed to the trial court's discretion, we may not substitute our own judgment for that of the trial court. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Although we defer to the trial court's factual determinations, we review questions of law de novo. *Rittmer v. Garza*, 65 S.W.3d 718, 722 (Tex. App.—Houston [14th Dist.] 2001, no pet.). To the extent that resolution of the issue before the trial court requires interpretation of the statute itself, we apply a de novo standard. *Buck v. Blum*, 130 S.W.3d 285, 290 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

II. Chapter 74 Expert Report Requirements

If, after hearing, it appears that the report does not represent a good faith effort to comply with the statutory definition of an expert report the trial court shall grant the motion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(1); *see also id.* at § 74.351(r)(6); *Palacios*, 46 S.W.3d at 877. An “expert report” for the purposes of section 74.351(r)(6), must be rendered by someone qualified to testify as an expert on the relevant medical subject area. *See Hansen v. Starr*, 123 S.W.3d 13, 20 (Tex. App.—Dallas 2003, pet. denied).

Our evaluation requires a determination of whether the report “represents a good-faith effort” to comply with the statute. *Strom v. Mem’l Hermann Hosp. Sys.*, 110 S.W.3d 216, 221 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Although the report need not marshal all of plaintiff’s proof, it must include the expert’s opinions on the three statutory elements—standard of care, breach, and causation. *See Palacios*, 46 S.W.3d at 878, 880; *Spitzer v. Berry*, 247 S.W.3d 747, 750 (Tex. App.—Tyler 2008, pet. denied) (quoting *Palacios*, 46 S.W.3d at 880) (stating “fair summary” is “something less than a full statement” of the applicable standard of care, how it was breached, and how that breach caused the injury).

In detailing these elements, the report must provide enough information to fulfill two purposes if it is to constitute a good faith effort. *Palacios*, 46 S.W.3d at

879. First, the report must inform the defendant of the specific conduct the plaintiff has called into question. *Id.* Second, the report must provide a basis for the trial court to conclude that the claims have merit. *Id.* A report that merely states the expert's conclusions as to the standard of care, breach, and causation does not fulfill these two purposes. *Id.* The expert must explain the basis for his statements and link his conclusions to the facts. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (citing *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). Further, in assessing the report's sufficiency, the trial court may not draw any inferences, and instead must rely exclusively on the information contained within the four corners of the report. *See Palacios*, 46 S.W.3d at 878.

III. Adequacy of Dr. Rushing's Expert Report

Dr. Darmadi argues that the proffered expert report is insufficient because it does not provide a "fair summary" of Dr. Rushing's opinions regarding standard of care, breach and causation, and to the extent that Dr. Rushing addresses these elements, those portions of the report are conclusory.³ The only conduct Dr.

³ In his petition, Harshman alleges multiples theories of negligence on the part of Dr. Darmadi. Specifically, Harshman appears to argue that Dr. Darmadi was negligent in (1) his performance of the ERCP procedure, (2) his decision to perform the procedure on a patient who was taking blood-thinning medication and had been pain-free for sixteen hours, and (3) his management of Harshman's post-ERCP care, particularly with regard to the excessive bleeding. Although he appears to argue on appeal that Dr. Rushing's report does not provide a "fair summary" of his opinions regarding standard of care, breach and causation with

Rushing appears to take issue with is Dr. Darmadi's management of Harshman's post-ERCP care. Specifically, in his report, Dr. Rushing states in pertinent part:

In my opinion, Dr. Darmadi should have returned to the hospital and examined [Harshman] to determine the site of the bleeding. He should have attended [Harshman] during this time and personally contacted the surgeon and made sure that appropriate consultation and treatment was obtained. He has an obligation to follow-up when there is a complication for a procedure, which he performed. Even though he was not qualified/able to do [sic] to perform the reparative surgery, he should have been available and facilitated this procedure and provide supportive care.

...

It is my opinion that Dr. Daniel Darmadi did breach the standard of care when he failed to return to the hospital to follow-up a post-procedure complication from the procedure that he performed.

Having done so, the report provided Dr. Darmadi with a fair summary of Dr.

respect to any of any of these theories, Dr. Darmadi does not argue nor does he direct us to any authority requiring us to evaluate the sufficiency of the report with respect to each separate negligence theory. Accordingly, we will limit our evaluation of the sufficiency of the report to the only conduct that Dr. Rushing appears to take issue with—Dr. Darmadi's management of Harshman's post-ERCP care. In doing so, we are mindful of the fact that section 74.351 is a "gate-keeping" provision designed to prevent frivolous or premature lawsuits from proceeding until a good-faith effort has been made to demonstrate that at least one expert believes that a breach of the applicable standard of care caused the claimed injury. *See Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(k), (t) (section 74.351 expert reports are inadmissible in evidence, except under very limited circumstances).

Rushing’s opinions concerning the applicable standard of care and how Dr. Darmadi failed to meet that standard of care. *See Palacios*, 46 S.W.3d at 880. The report also informed Dr. Darmadi of the specific conduct Harshman has called into question—Dr. Darmadi’s departure from the hospital and his alleged failure to properly manage Harshman’s post-procedure complications. *See id.* at 879. Thus, pursuant to *Palacios* and its progeny, Dr. Rushing’s report is sufficient with regard to standard of care and breach.

Dr. Rushing’s report, however, is insufficient with regard to the element of causation because he does not link Dr. Darmadi’s alleged conduct with Harshman’s injuries. Although Harshman attempts to read such causal links into Dr. Rushing’s report, we are neither allowed to draw such inferences nor may we rely upon Harshman’s brief to supplement his expert’s report on this issue. *See id.* at 878 (requiring that court rely exclusively on information contained within four corners of expert report). Dr. Rushing’s report, on its face, is completely devoid of any discussion of the required element of causation. *See id.* at 879 (report that omits any required statutory element—standard of care, breach, and causation—cannot represent “good-faith effort” to comply with statute). In light of this omission, it is apparent that the trial court acted without reference to any guiding rules or principles when it found that Dr. Rushing’s report constituted a “good-

faith effort” to comply with the statute. Accordingly, the trial court abused its discretion when it found Dr. Rushing’s report satisfied the requirements of Chapter 74 with regard to the element of causation.

IV. Dr. Rushing’s Qualifications

In his second argument, Dr. Darmadi contends that the proffered expert report is insufficient because it fails to establish that Dr. Rushing is qualified to opine on the issue of standard of care.⁴ Specifically, Dr. Darmadi argues that Dr. Rushing, a specialist in geriatrics and rheumatology, is unqualified to opine as to the applicable standard of care for a gastroenterologist’s post-ERCP care of a patient who sustained a laceration of his uvula.

A person opining as to whether a physician departed from accepted standards of medical care is considered an “expert” so long as he or she is qualified to give such testimony under section 74.401. TEX. CIV. PRAC. & REM. CODE ANN.

⁴ In his motion objecting to Dr. Rushing’s report and requesting dismissal pursuant to section 74.351, Dr. Darmadi also challenged Dr. Rushing’s qualifications to opine on the element of causation. Although he employs language in his brief which suggests that he is attempting to appeal the trial court’s finding on this issue, Dr. Darmadi does not present any argument or cite any authority in his brief regarding an expert’s qualifications to opine with respect to causation in a Chapter 74 report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(c) (setting forth qualification for expert opining on causation). Thus, to the extent that Dr. Darmadi intended to appeal the trial court’s implicit finding that Dr. Rushing is qualified to opine on causation, the issue was inadequately briefed, and therefore waived. *See* TEX. R. APP. P. 38.1(i) (requiring that appellant’s brief contain “a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record”).

§ 74.351(r)(5)(A); *see also id.* at § 74.401 (Vernon 2005). Section 74.401(a) provides that a person may qualify to opine on whether a physician departed from accepted standards of medical care if that person (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose; (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care. *Id.* at § 74.401(a); *see also McKowen v. Ragston*, 263 S.W.3d 157, 161 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

To determine whether an expert’s training or experience yields sufficient qualifications to offer an expert opinion regarding those accepted standards of medical care, we consider whether the expert is (1) board certified or has other substantial training or experience in the area of medical practice relevant to the claim and (2) actively practicing medicine in rendering medical care services relevant to the claim. TEX. CIV. PRAC. & REM. CODE ANN. § 74.401(c); *see Kelly v. Rendon*, 255 S.W.3d 665, 674 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (recognizing that section 74.401 “does not require a medical expert be practicing in the exact same field as the defendant physician, but instead must only be actively

practicing medicine in rendering medical care services *relevant* to the claim”) (emphasis added); *see, e.g., McKowen*, 263 S.W.3d at 162, 167 (permitting infectious disease physician to opine on defendant cardiothoracic surgeon’s standard of care with respect to treatment of infection stemming from arteriovenous access graft).

Dr. Rushing, who is board certified in Internal Medicine, Geriatrics, and Rheumatology and an attending physician at Presbyterian Hospital in Dallas, does not profess to have any experience with regard to the relevant medical claim—post-procedure care and treatment of ERCP-related complications, including excessive bleeding. Although he acknowledges in his report that “laceration[s] of the oropharynx. . .and hemorrhage” are known complications associated with endoscopic procedures, Dr. Rushing never states that he has experience treating such complications.⁵ Rather than addressing this omission on the part of his expert, Harshman simply argues that the treatment of post-ERCP complications, including excessive bleeding, is “clearly within the purview of an Internist/Geriatician such as Dr. Rushing.”

Although it might be reasonable to infer from the contents of his expert

⁵ The oropharynx is the part of the throat at the back of the mouth behind the oral cavity. It includes the back third of the tongue, the soft palate, the side and back walls of the throat, and the tonsils. The uvula is part of the soft palate.

report and curriculum vitae that Dr. Rushing *might* have acquired experience in the treatment and care of post-ERCP complications including excessive bleeding, during his years of practice, or that he *might* have knowledge of the standard of care applicable to the care or treatment of such conditions, neither we nor the trial court are allowed to make any such inferences regarding Dr. Rushing's qualifications. *See Wright*, 79 S.W.3d at 53; *Hansen*, 123 S.W.3d at 20 (stating that expert must show qualifications in report). In light of the fact that Dr. Rushing never professed to have any knowledge of or experience in the treatment of post-ERCP complications, such as excessive bleeding, we conclude that the trial court acted without reference to guiding rules or principles when determining that Dr. Rushing was qualified to opine on the issue of standard of care, and so abused its discretion in finding the report to be sufficient. *See Moore v. Gatica*, 269 S.W.3d 134, 140 (Tex. App.—Fort Worth 2008, pet. denied) (stating that expert report authored by person not qualified to testify regarding standard of care is “cannot constitute an adequate report”).

We sustain Dr. Darmadi's sole issue.

V. 30-Day Extension

Having determined that the trial court abused its discretion in finding the expert report to be sufficient, we must now determine the proper disposition of this

case. In his reply brief, Dr. Darmadi argues that if we determine that the trial court abused its discretion in finding Dr. Rushing's report sufficient that we must either (1) reverse and remand for entry of judgment dismissing the claims and awarding attorney's fees and costs or (2) reverse and render suit dismissed with prejudice because the report is actually "no report at all" as to Dr. Darmadi and therefore remand for consideration of a 30-day extension is inappropriate.

Two of the cases that Dr. Darmadi cites for this proposition are distinguishable from the present case because those cases involve reports that are not merely deficient, but rather non-existent, with respect to particular defendants. *See Jernigan v. Langley*, 195 S.W.3d 91, 93–94 (Tex. 2006) (stating that report that only mentioned defendant physician in passing was no report as to that defendant); *Garcia v. Marichalar*, 185 S.W.3d 70, 73–74 (Tex. App.—San Antonio 2006, no pet.) (stating that report that failed to mention defendant physician was no report as to that defendant); *see, e.g., Olgetree v. Matthews*, 262 S.W.3d 316, 320–21 (Tex. 2007) ("Indeed, the Legislature recognized that not all initial timely served reports would satisfy each of the statutory criteria. As a result, the amendments explicitly give trial courts discretion to grant a thirty-day extension so that parties may, where possible, cure deficient reports. *In this important respect, a deficient report differs from an absent report.*") (emphasis

added) (internal citation omitted). The third case Dr. Darmadi relies upon does not even support the proposition. *See Austin Heart, P.A. v. Webb*, 228 S.W.3d 276, 283–84 (Tex. App.—Austin 2007, no pet.) (distinguishing *Jernigan* and *Garcia* and finding report that failed to expressly articulate link between defendant physician’s conduct and expert’s conclusions deficient, but potentially curable, and remanding to trial court for consideration of whether 30-day extension was warranted).

Contrary to Dr. Darmadi’s contention, when a report is deficient—as opposed to absent—the proper disposition is to remand the case to the trial court for consideration of whether a 30-day extension to cure the deficiency is warranted. *See Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (holding court of appeals has discretion to remand case for consideration of thirty-day extension to cure deficient expert report); *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671 (Tex. 2008) (relying upon *Leland*; expressly rejecting defendants’ contention that expert report which was conclusory as to causation was so deficient as to constitute no report at all and vacating judgment and remanding for consideration of thirty-day extension); *cf. Scoresby v. Santillan*, 287 S.W.3d 319, 324 (Tex. App.—Fort Worth 2009, pet. granted) (stating that no Texas Supreme Court opinion has held that timely served expert report which contains narrative

that fails to include any expert opinion on standard of care, breach, or causation is tantamount to no report at all and thus ineligible for 30-day extension.) Having determined that Dr. Rushing's report was sufficient, the trial court did not consider whether Harshman was entitled to a 30-day extension. Accordingly, we remand to the trial court for it to determine whether such an extension is warranted.

IV. Harshman's Request for Sanctions

In his response to Dr. Darmadi's appellate brief, Harshman requested that this Court impose sanctions against Dr. Darmadi, presumably for not acting in good faith, in the amount of \$1,000 in attorney's fees. *See* TEX. R. APP. PROC. 52.11 (authorizing imposition of sanctions when party or attorney is not acting in good faith as indicated by filing clearly groundless petition, "bringing petition solely for delay of an underlying proceeding," "grossly misstating or omitting obviously important and material fact in petition or response," or "filing appendix or record that is clearly misleading because of omission of obviously important and material evidence or documents"). It is not apparent from the record before us that either Dr. Darmadi or his counsel has engaged in any such conduct. Harshman's request for sanctions is denied.

CONCLUSION

We reverse the trial court's ruling denying Dr. Darmadi's Motion to Dismiss

and remand the case for the trial court's consideration of whether to grant a 30-day extension. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c). We also deny Harshman's request for sanctions.

Jim Sharp
Justice

Panel consists of Justices Jennings, Higley, and Sharp.