Opinion issued March 17, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00143-CV

PETER LOTZE, M.D., Appellant

V.

AMANDA HOWTON AND JOHN HOWTON, Appellees

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 2009-47341

MEMORANDUM OPINION

The issue in this interlocutory appeal is whether the trial court abused its discretion by denying a motion to dismiss health-care-liability claims. Appellant Peter Lotze, M.D. moved to dismiss appellees Amanda Howton and John

Howton's medical-malpractice claims on the ground that the Howtons filed a deficient expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (*l*) (West Supp. 2010). The trial court denied the motion to dismiss. We affirm.

I. Background

For the purposes of reviewing the sufficiency of the challenged expert report, the relevant facts as stated in the report are that Amanda suffered from long-standing pelvic and urinary problems, including endometriosis that first occurred when she was a teenager, causing pelvic pain. After her third child was born, Amanda began suffering from urinary incontinence. Her gynecologist implanted a prosthetic urethral sling, which relieved her stress incontinence. Unfortunately, the sling caused multiple urinary-tract infections that increased urinary frequency and caused new bladder-related pelvic pain. Amanda was referred to urogynecologist Dr. Peter Lotze to determine the cause of her new pain and urinary-tract infections. Surgery resolved her pelvic pain related to endometriosis. But she still suffered from recurring urinary-tract infections and bladder pain. Dr. Lotze recommended to Amanda implanting a spinal neurostimulator, the Medtronic InterStim, to treat her bladder-related pain. Although a unilateral device was initially discussed with Amanda, Dr. Lotze implanted bilateral Medtronic InterStim neurostimulator devices.

Afterwards, Dr. Lotze conducted at least seven adjustments to the left InterStim device for various reasons: it was not working; it shocked Amanda; it needed repositioning; and it needed generator replacement. The urethral sling was eventually removed, which resolved Amanda's recurring urinary-tract infections and bladder and pelvic pain. Later, the left InterStim device was removed because it was not working and was no longer necessary. Amanda developed severe and constant back pain on her left side radiating from her spine, causing "foot drop" and sensory-deficit numbness in her left lower extremity.

The Howtons filed suit against Dr. Lotze, Medtronic, Inc., and Stuart Ison, a Medtronic representative, for fraud, negligence, and the unauthorized practice of medicine. The day after the Howtons filed the original petition, they filed the original expert report and curriculum vitae from Dr. J. Antonio Aldrete. In the expert report submitted in support of the Howtons' claims, Dr. Aldrete opined that when the bilateral Medtronic InterStim neurostimulator devices were implanted, "Dr. Lotze did not make the association between the urethral sling and these recurrent infections at this time, but instead focused on 'interstitial cystitis' or some other form of noninfectious bladder hyperactivity." Dr. Aldrete stated that his review indicated that the devices "seem to have been placed to manage her recurrent bladder pain (which ultimately was found to be due to her recurrent urinary tract infections from the sling)." According to Dr. Aldrete, Dr. Lotze failed

to discuss with Amanda the possible side effect of nerve damage as a risk of implanting the devices. Dr. Aldrete also stated that bilateral InterStim placement was not approved by the Food and Drug Administration at the time of the surgery. He attributes Amanda's back pain to damage to the sacral nerve roots, which prevents her from walking significant distances, climbing stairs, driving, and sitting for extended periods of time. Dr. Aldrete concluded that Amanda developed chronic inflammation in the spinal cord and arachnoiditis due to "repeated instrumentation and manipulation of the InterStim devices" around her nerve roots.

Dr. Lotze filed an objection to the expert report, challenging Dr. Aldrete's qualifications to render an expert report regarding urology, gynecology, treatment of urine frequency problems, or treatment with the InterStim device. Dr. Lotze's objection also disagreed with the suggestion that it was improper to continue using the left InterStim device. Attached to Dr. Lotze's objection were exhibits, including portions of Amanda's medical records. Dr. Aldrete supplied a supplemental report responding to the objection. This was followed by another objection from Dr. Lotze, which disagreed with Dr. Aldrete's report, in part based on the underlying medical records. Dr. Aldrete prepared yet another supplemental report in response, and Dr. Lotze again objected.

Ultimately Dr. Lotze filed a motion to dismiss the claims against him, contending Dr. Aldrete's expert report was based on factual mistakes in examining Amanda's medical records. The motion to dismiss was accompanied by 36 exhibits, which for the most part are Amanda's medical records. The Howtons responded and objected that the motion was "an attempt to cross-examine Plaintiffs' expert witness, rather than to properly challenge a preliminary witness report." Dr. Lotze filed a reply in which he reinterated his factual disagreement with the expert report by stating, "Plaintiffs ignore the fact that Dr. Lotze's argument is that Dr. Aldrete did not understand the records he already had reviewed."

The trial court denied the motion to dismiss, and this interlocutory appeal ensued.

II. Analysis

In two issues, Dr. Lotze argues that the trial court erred in denying his motion to dismiss the Howtons' health-care-liability claims. First, he contends that the expert report failed to establish that as an anesthesiologist, Dr. Aldrete "is familiar with the standards of a urogynecologist in the diagnosis or treatment of complex urological conditions or is qualified to render such opinions." Dr. Lotze also complains that the expert report is contradicted by Amanda's medical records.

a. Standard of review

Ordinarily, we review a trial court's decision on a section 74.351 motion to dismiss for abuse of discretion. *Am. Transitional Care Ctrs., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001); *Stroud v. Grubb*, 328 S.W.3d 561, 563 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). The trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003); *Stroud*, 328 S.W.3d at 563. When reviewing matters committed to the trial court's discretion, we may not substitute our own judgment for that of the trial court. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). A trial court does not abuse its discretion merely because it decides a discretionary matter differently than an appellate court would in a similar circumstance. *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 858 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *Harris Cnty. Hosp. Dist. v. Garrett*, 232 S.W.3d 170, 176 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

b. Expert qualifications

With regard to the required qualifications of an expert witness on causation in a health-care-liability claim against a physician, the witness must be a physician and must be "otherwise qualified to render opinions on [causation] under the Texas Rules of Evidence." TEX. CIV. PRAC. & REM. CODE ANN. § 74.403(a) (West Supp.

2010). On the issue of whether a physician departed from accepted standards of medical care, a person may qualify as an expert witness only if the person is a physician who:

> (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. § 74.401(a). If a witness is to be qualified on the basis of training or experience, "the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness . . . is board certified . . . and . . . is actively practicing medicine in rendering medical care services relevant to the claim. *Id*. § 74.401(c).

Dr. Lotze argues that because Dr. Aldrete is an anesthesiologist, he has not satisfied the requirement that he have knowledge of the accepted standards of care applicable to urogynecologists. In this argument, however, Lotze focuses on Amanda's underlying urological problems, i.e., urinary-tract infections, rather than the main allegation that Amanda suffered nerve damage as a result of the negligent insertion of the InterStim devices and their subsequent manipulation.

The expert report sets out Dr. Aldrete's basis for knowledge of the accepted standard of care for the selection and implantation of the neurostimulator devices at issue in this case:

> The implantation of a neurostimulator device and the proper selection of patients for such implantation are performed within the medical community *in commonality* by anesthesiologists, "urogynecologists" (an unrecognized speciality), orthopedic surgeons, neurosurgeons, and other physicians who allegedly have specialized training in such implantations. The selection and implementation of neurostimulators such as the Medtronic InterStim may involve an anesthesiologist and/or a pain management specialist within anesthesiology such as myself, but it oftentimes does not (it is performed by other medical specialties *if the individual physician has proper training*), and thus the selection and implementation of neurostimulator[] devices within the medical community has an accepted standard of care *in commonality* amongst the physicians who perform such procedures. I have intimate and personal knowledge and experience with these standards as I was performing spinal instrumentation, supervising the proper selection of patient candidates for such procedures, supervising and preventing perioperative complications, and participating as an attending physician in spinal instrumentation at the time of the incidents at hand and beyond.

In his supplemental expert report, Dr. Aldrete clarified his opinion that the permanent nerve damage suffered by Amanda was the result of "repeated instrumentation and manipulation of the InterStim devices around the nerve roots."

An expert witness need not be a specialist in the particular branch of the medical profession for which the testimony is offered. *Keo v. Vu*, 76 S.W.3d 725, 732 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The fact that Dr. Aldrete does not practice urogynecology does not disqualify him from offering expert

testimony regarding the alleged negligent insertion of the InterStim devices and their subsequent manipulation. Accordingly, we hold that the trial court acted within its discretion by accepting Dr. Aldrete as a qualified expert on the issue of the standard of care.

c. Sufficiency of expert report

A medical malpractice lawsuit such as the Howtons' must be supported at the early stages of litigation by an expert report served in accordance with the Texas Medical Liability Act. Because "traditional rules of litigation are creating an ongoing crisis in the cost and availability of medical care," the Legislature has provided that "plaintiffs must support health care claims with expert reports shortly after filing." *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 461 (Tex. 2008); *see* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b), 2003 Tex. Gen. Laws 847, 884. This requirement ensures "that only meritorious lawsuits proceed by verifying, at the outset, that the plaintiff's allegations are medically well-founded." *Spectrum Healthcare Res., Inc. v. McDaniel*, 306 S.W.3d 249, 250 (Tex. 2010) (citing TEX. CIV. PRAC. & REM. CODE § 74.351(a); *Palacios*, 46 S.W.3d at 876–77). The role of the trial court in this regard has been described as a "gatekeeping" function akin to the admission of expert opinion testimony. *Mettauer v. Noble*, 326 S.W.3d 685, 691 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *see also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2795

(1993) ("under the [Federal] Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").

A plaintiff bringing a health-care-liability claim must provide each defendant physician or health care provider with an expert report. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). The substance of the required expert report must provide "a fair summary of the expert's opinions as of the date of the report 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." *Id.* § 74.351(r)(6).

The preliminary expert report fails to serve its purpose "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 in Subsection (r)(6)." *Id.* § 74.351(*l*). As elaborated by the Texas Supreme Court in *American Transitional Care Centers., Inc. v. Palacios*, in order to constitute a "good faith effort to comply," the expert report must provide enough information to fulfill two purposes: "First, the report must inform the defendant of the specific conduct the plaintiff has called into question. Second, and equally important, the report must provide a basis for the trial court to conclude that the claims have merit." 46

S.W.3d 873, 879 (Tex. 2001). The only information relevant to this inquiry is that found within the four corners of the report. *Id*. at 878. The report need not marshal all of the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute. *Id.*

Dr. Lotze argues that because Dr. Aldrete's report is "counterfactual" and "fact free," the trial court should have, in determining the sufficiency of Dr. Aldrete's expert report, considered the medical records Dr. Aldrete reviewed. Dr. Lotze asks this Court to hold that "[w]hen checking the specific medical facts cited by the expert . . . [a trial court should be allowed to] look in the medical records cited by the expert" rather than restrict its review to the four corners of the expert report and curriculum vitae in determining the sufficiency of the expert report. This legal contention was recently considered and rejected by this Court. *See Mettauer*, 326 S.W.3d at 691. As applied in this case, the trial court's review was restricted to determsining whether Dr. Aldrete's expert report "represent[ed] a good-faith effort to comply with the definition of an expert report," that is, whether it informed Dr. Lotze of the specific conduct called into question, provided a basis for the trial court to conclude that the Howtons' claims have merit, and explained the basis of Dr. Aldrete's statements to link his conclusions to the facts. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b), (*l*); *Bowie*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 878. The report served both of those required functions.

Accordingly, we hold that the trial court did not err in declining to review Dr. Aldrete's source material in its review of the expert report.

Conclusion

The trial court did not abuse its discretion by accepting Dr. Aldrete as a qualified expert on the issue of the standard of care or by concluding that his report was sufficient to permit the Howtons' health-care-liability claims to proceed. We therefore overrule Dr. Lotze's two issues and affirm the trial court's order.

Michael Massengale
Justice

Panel consists of Chief Justice Radack and Justices Massengale and Cox.[*]

[*] The Honorable Lonnie Cox, judge of the 56th District Court of Galveston County, Texas, participating by assignment. *See* TEX. GOV'T CODE ANN. § 74.003(h) (West 2005).