

Opinion issued April 14, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-10-00437-CV

ARUNKUMAR J. SHAH, M.D. AND LARRY H. PENICK, M.D., Appellants

V.

**TONY KMIEC, INDIVIDUALLY AS WRONGFUL DEATH
BENEFICIARY OF GERALDINE KMIEC, DECEASED, AND ON BEHALF
OF THE ESTATE OF GERALDINE KMIEC, DECEASED, Appellee**

**On Appeal from the 155th District Court
Austin County, Texas
Trial Court Case No. 2010V-0023**

MEMORANDUM OPINION

This interlocutory appeal is from the denial of two motions to dismiss filed by appellants, Arunkumar J. Shah, M.D. and Larry H. Penick, M.D., in the

medical-malpractice suit filed against them by appellee, Tony Kmiec, individually as wrongful death beneficiary of Geraldine Kmiec, deceased, and on behalf of the estate of Geraldine Kmiec, deceased. Because the expert report submitted on behalf of Tony Kmiec satisfied the requirements of chapter 74 of the Civil Practice and Remedies Code, we affirm.

Background

Suffering pain in her right lower quadrant and experiencing nausea and vomiting, seventy-seven year old Geraldine Kmiec went to Bellville General Hospital the evening of Saturday, October 25, 2008. Ms. Kmiec was seen by her regular physician as well as Dr. Shah, an emergency room physician, before she was sent for blood work and X rays. Upon receipt of these results, Ms. Kmiec was discharged from the hospital with a diagnosis of abdominal pain, constipation, renal insufficiency and hypokalemia (low potassium) and given prescriptions for a potassium supplement and medications for abdominal cramping and constipation. Although her prescriptions were apparently written by Dr. Shah, Ms. Kmiec's medical records identify Dr. Penick as the prescribing physician.

The next afternoon, October 26, Ms. Kmiec was found breathing but unresponsive in her bathroom, and was taken by ambulance to Trinity Medical Center, where she died due to sepsis and multi-organ failure. On the day after her death, a Bellville Hospital radiologist reviewed the abdominal X ray taken two

days earlier and documented the presence of intraperitoneal air, which indicated that Ms. Kmiec's bowel was perforated.

Tony Kmiec, her son, filed the medical malpractice suit against Drs. Shah and Penick and two other defendants.¹ The defendants were timely served with the expert report and curriculum vitae of Tony Kmiec's expert, Dr. William Spangler, but both Drs. Shaw and Penick filed and served objections to this expert report as well as motions to dismiss based upon those objections. After a hearing, the trial court denied both Drs. Shah's and Penick's motions to dismiss and this appeal followed.²

Discussion

Drs. Shaw and Penick contend that the trial court abused its discretion when it denied their motions to dismiss because Dr. Spangler's expert report failed to satisfy the requirements of chapter 74 of the Civil Practice and Remedies Code. Specifically, Drs. Shaw and Penick contend that the expert report does not represent a good-faith effort to comply with the statutory requirements because (1)

¹ Although Southwest Medical Associates, Inc. and Bellville General Hospital were also named as defendants in this case, neither defendant is a party to this appeal.

² Section 51.014(a)(9) of the Civil Practice and Remedies Code specifically permits the appeal of an interlocutory order from a district court that "denies all or part of the relief sought by a motion" seeking to dismiss a plaintiff's claim for failure to meet the expert report requirements. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West 2008).

it fails to specify which defendant is responsible for each alleged act of negligence, (2) Dr. Spangler's opinions regarding the alleged breaches are based upon assumption and speculation, and (3) Dr. Spangler fails to link the alleged breaches to Ms. Kmiec's death. Drs. Shaw and Penick further contend that as to Dr. Penick, the report amounts to "no report" because it never alleges that he enjoyed a physician-patient relationship with Ms. Kmiec.

Standard of Review

We review a trial court's decision regarding chapter 74 for an abuse of discretion. *See Am. Transitional Care Ctrs. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2010). 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, 62 (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.).

Chapter 74 Expert-Report Requirements

If, after hearing, the expert report does not represent a good-faith effort to comply with chapter 74's requirements for an expert report, the trial court shall grant the motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l), (r)(6) (West Supp. 2010); *Palacios*, 46 S.W.3d at 877. For the purposes of section 74.351(r)(6), the report need be rendered by one qualified as an expert to testify 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). While 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 expert report must provide enough information to fulfill two purposes in order to constitute a good-faith effort: (a) inform the defendant of the specific conduct the plaintiff has called into question

and (b) provide a basis for the trial court to conclude that the claims have merit. *Palacios*, 46 S.W.3d at 879. 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.*, because the basis for his statements need be explained and his conclusions linked 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 is not to draw inferences, but rely exclusively on the information contained within the four corners of the report. *See Palacios*, 46 S.W.3d at 878.

Adequacy of Dr. Spangler's Report with Respect to Standard of Care and Breach

Drs. Shaw and Penick argue the expert report is insufficient on the issue of standard of care and breach with respect to both doctors because it applies the same standard to each without appropriate explanation, fails to specify which defendant is responsible for each alleged act of negligence, and assumes that Drs. Shah and Penick failed to take certain actions "without pointing to any factual evidence."³

³ Specifically, Tony Kmiec takes issue with the fact the Dr. Spangler assumes that neither Drs. Shah nor Penick performed an abdominal exam on Ms. Kmiec, reviewed the results of her blood tests, or reviewed her abdominal X rays. Dr. Spangler's statements, however, are expressly based upon the fact that Ms. Kmiec's medical records do not reference any such exam or review by *either* doctor.

Drs. Shaw and Penick also contend that Dr. Spangler's report is so deficient as to standard of care that it is "no report" at all as to Dr. Penick because the expert report never alleges a physician-patient relationship between Dr. Penick and Ms. Kmiec, absent which, no duty of care arises. Drs. Shaw and Penick thus further contend that the standard-of-care and breach opinions are likewise insufficient as to Dr. Penick because they are based upon this assumption of a duty of care.

Specifically, the expert report states that the standard of care required Dr. Shah, *inter alia*, to "perform a proper physical examination on Ms. Kmiec and document, in writing, the examination," review the results of the blood tests and abdominal X rays that he ordered, correctly read those X rays (which showed intraperitoneal air indicative of an intestinal leak or perforation), and order a surgical consultation and admit Ms. Kmiec to the hospital rather than discharging her "with clear evidence of an intestinal perforation and persistent significant pain." The Spangler report clearly states that Dr. Shah breached the applicable standard of care when he failed to take each of these specific actions.

Tony Kmiec also contends that Dr. Spangler's assumptions are not only erroneous, but refuted by the very documentation Dr. Spangler relied upon in forming his opinions. Even if Tony Kmiec is correct, he has not challenged Dr. Spangler's opinions with regard to the other negligent acts asserted against Drs. Shah and Penick, i.e., failure to seek surgical consult, failure to correctly interpret the results of Ms. Kmiec's laboratory work and X rays.

With respect to Dr. Penick, the Spangler report states that the applicable standard of care required him to neither authorize nor prescribe medication to Ms. Kmiec without first examining her and absent a specific, documented reason to do so. The standard of care required Dr. Penick, a treating physician, to those same steps required by Dr. Shah, i.e., written documentation of a proper physical examination on Ms. Kmiec, review of the results of the blood tests and abdominal X rays, a correct reading of the X rays, order a surgical consultation and admit Ms. Kmiec to the hospital rather than discharging her “with clear evidence of an intestinal perforation and persistent significant pain.” Dr. Spangler concludes that, as with Dr. Shah, Dr. Penick breached the applicable standard of care by his failure to take each of these specific actions.

Having done so, the report not only provided both Drs. Shah and Penick with a fair summary of the applicable standard of care and each doctor’s failure to meet it, but also informed both doctors of the specific conduct that Tony Kmiec has called into question. *See Palacios*, 46 S.W.3d at 879–80. Thus, pursuant to *Palacios* and its progeny, Dr. Spangler’s report is sufficient as to both Drs. Shah and Penick with regard to both the standard of care and its breach.

Application of the same standard of care to both doctors does not render the expert report insufficient. Both Drs. Shah and Penick treated Ms. Kmiec for abdominal pain, nausea, and vomiting either by examining her and ordering lab

work and X rays, or prescribing medication. The expert report, therefore, sufficiently explains why both doctors are to be held to the same standard. *See generally San Jacinto Methodist Hosp. v. Bennett*, 256 S.W.3d 806, 817 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (“Although [the expert]’s opinion for each defendant is identical, he unquestionably provided an opinion for each [defendant]. That he held each defendant to the same standard of care, found the same type of breach, and analyzed causation in the same way does not render his opinion inadequate.”); *Romero v. Lieberman*, 232 S.W.3d 385, 391–92 (Tex. App.—Dallas 2007, no pet.) (concluding report alleging “one size fits all” standard of care was sufficient as to general practitioner and psychiatrists because all three physicians participated in treating patient’s condition).

That Dr. Spangler never definitively stated that a physician-patient relationship existed between Dr. Penick and Ms. Kmiec does not render his report insufficient. The existence of a physician-patient relationship, however, is a question of law. *See Majzoub v. Appling*, 95 S.W.3d 432, 436 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (concluding that, as a matter of law, no physician-patient relationship existed). The duty to treat a patient with proper professional skill flows from the consensual relationship between the patient and physician, and only when that relationship exists can there be a breach of a duty resulting in medical malpractice. *St. John v. Pope*, 901 S.W.2d 420, 424 (Tex.

1995). A physician-patient relationship can exist even if a physician does not deal directly with a patient, so long as the physician has taken some affirmative action to treat the patient. *Id.*; *see also Day v. Harkins & Munoz*, 961 S.W.2d 278, 280 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Lecton v. Dyll*, 65 S.W.3d 696, 705 (Tex. App.—Dallas 2001, pet. denied) (“[O]n-call physician may assume a duty to the patient if he takes some affirmative action to treat the patient.”).

Although Dr. Spangler’s report states that “[o]n the basis of the prescriptions written for Ms. Kmiec labeled with Dr. Penick’s name, there may have been a doctor-patient relationship established between Dr. Larry Penick and Ms. Kmiec,” he also goes on to state:

As a result of Dr. Penick’s name appearing on the prescription bottles, *there was a duty owed to Ms. Kmiec by Dr. Penick to do what a reasonable physician would have done under the same or similar circumstances, or not to do what a reasonable physician would not have done under the same or similar circumstances.*

(Emphasis added). As such, Dr. Spangler has alleged, based upon Ms. Kmiec’s medical records, that Dr. Penick treated Ms. Kmiec—specifically, that he prescribed medication to treat her abdominal pain. He then definitively states that, as a result of the treatment he provided, Dr. Penick owed a duty of care to Ms. Kmiec.⁴ Accordingly, the Spangler report sufficiently alleged that the duty owed

⁴ The fact that Dr. Spangler acknowledges in his report that some of the facts set forth in Ms. Kmiec’s medical records may be inaccurate does not affect the sufficiency his report. Except under very limited circumstances, chapter

by Dr. Penick to Ms. Kmiec and Dr. Spangler's opinions regarding the standard of care applicable to the doctors' breaches of that standard are based upon their duty as her treating physicians.

Adequacy of Dr. Spangler's Report with Respect to Causation

Drs. Shaw and Penick contend that Dr. Spangler's report is also insufficient as to causation because it is conclusory and Dr. Spangler fails to link the alleged breaches to the harm—Ms. Kmiec's death. Dr. Spangler, in pertinent part, states in his report:

[w]ithout actually examining her abdomen, there was no way for Dr. Shah to evaluate what was going on and what could be causing her abdominal pain. In reasonable medical probability, if he had properly examined Ms. Kmiec, given the evidence of intra-peritoneal free air due to intestinal perforation, she would have exhibited signs and symptoms of pain on examination, often exacerbated by pressure in different areas of the abdomen, and/or rebound and guarding, symptoms of a surgical abdomen. In addition, an intestinal perforation is often accompanied by bleeding. If Dr. Shah had performed a rectal examination to check for occult blood, in reasonable medical probability, the test would have been positive, providing further evidence of the need for hospital admission and surgical evaluation. In reasonable medical probability, if Dr. Shah would have obtained a surgical consult, the surgeon would have seen the free air on the x-ray and taken Ms. Kmiec to surgery for exploration. Given her vital signs and laboratory data, Ms. Kmiec was not yet septic at the time she was seen and in

74 expert reports must be filed before discovery is allowed to proceed in a given case. As a result, experts have little choice but to rely upon the facts set forth in a patient's medical records and proceed on the implicit assumption that the information contained within those records is accurate.

reasonable medical probability, surgical repair of the perforation would have been successful. Because he failed to perform a proper physical examination, and document it in writing, Dr. Shah never appreciated the extent of the abdominal pain and never obtained a general surgical consultation. This failure to perform a proper physical examination and document it in writing was a direct and contributing cause of her death.

.....

In reasonable medical probability, if Dr. Shah had reviewed the lab tests and x-ray, he would have realized that Ms. Kmiec was not constipated but had a serious abdominal problem which needed investigation, including consultation with a general surgeon. Additionally, Dr. Shah failed to review and document his evaluation of the abdominal x-ray which clearly showed free intraperitoneal air, a classic sign of intestinal perforation which requires immediate general surgery consultation. If he had reviewed and correctly interpreted the lab tests and x-ray, he would have obtained a general surgery consultation, and in reasonable medical probability, Ms. Kmiec would have undergone exploratory surgery, the source of the intestinal leak or perforation would have been discovered and corrected and she would have survived. Because Dr. Shah failed to review and document his evaluation of the lab tests and x-rays, in reasonable medical probability, he sent her home with prescriptions for constipation and abdominal cramps instead of obtaining a general surgery consultation. In reasonable medical probability, Ms. Kmiec was sent home where she continued to leak bacterial contents, which caused a dramatic increase in bacterial contamination, leading to peritonitis and sepsis and causing her death.

.....

Dr. Shah failed to obtain a surgical consultation and admit Ms. Kmiec to the hospital, in spite of the clear radiographic evidence of free air under the diaphragms and intestinal perforation. In reasonable medical probability, if Dr. Shah had admitted Ms. Kmiec to the hospital, she would have been seen by a surgeon, she would have been taken to the operating room in a timely fashion for repair of the intestinal perforation, and she would have survived. Because Dr. Shah failed to admit her to the hospital, Ms. Kmiec was discharged from the hospital

with a life-threatening condition. Dr. Shah's failure to admit Ms. Kmiec prevented her from obtaining a surgery consultation which, in reasonable medical probability directly led to her death the following day.

....

Dr. Shah negligently discharged Ms. Kmiec when there was clear radiographic evidence of free air under the diaphragms and intestinal perforation. If he had not negligently discharged Ms. Kmiec, in reasonable medical probability, she would have been admitted to the hospital, seen by surgery, undergone the appropriate surgical procedure and would have survived.

Dr. Spangler then repeats these same statements as to Dr. Penick. Having done so, Dr. Spangler's report is sufficient with regard to the element of causation because he explains the basis for his statements and he links Dr. Shah's and Dr. Penick's alleged conduct with Kmiec's injuries. *See Bowie Mem'l Hosp.*, 79 S.W.3d at 52 (citing *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). Dr. Spangler's opinions are not based upon mere conjecture, but rather "reasonable medical probability."

Tony Kmiec's Request for Sanctions

In his response to Dr. Shah's and Dr. Penick's appellate brief, Tony Kmiec requested that this Court impose sanctions against Drs. Shah and Penick for filing a frivolous appeal. *See* TEX. R. APP. P. 45 (authorizing imposition of sanctions for filing of frivolous appeal). Tony Kmiec argues that there is no reasonable ground for believing that the trial court's denial of the motion to dismiss would be reversed because Dr. Spangler's report, which "explains in great detail" the standards of care required of Drs. Shah and Penick, how those standards were

breached, and how those breaches caused Kmiec's death, satisfies the requirements of chapter 74.

After considering the record, briefs, or other papers filed in this Court, we may award a prevailing party damages if we objectively determine that an appeal is frivolous. TEX. R. APP. P. 45; *Smith v. Brown*, 51 S.W.3d 376, 381 (Tex. App.—Houston [1st Dist.] 2001, pet. denied). An appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed. *Smith*, 51 S.W.3d at 381. The decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation. *Id.* Although imposing sanctions is within our discretion, we will do so only in circumstances that are truly egregious. *See id.* While we disagree with the merits of the appeal, after considering the record and briefs, we do not believe the circumstances in this case warrant sanction. Accordingly, we overrule Tony Kmiec's request for Rule 45 sanctions.

Conclusion

We affirm the trial court's order denying Dr. Shah's and Dr. Penick's motions to dismiss and deny the request for sanctions.

Jim Sharp
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.