Opinion issued March 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00793-CV

NEXION HEALTH AT BEECHNUT, INC. D/B/A BEECHNUT MANOR, Appellant

V.

MARIA MORENO, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF MARIO MORENO, Appellee

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On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Case No. 2015-01975-133

MEMORANDUM OPINION

In this interlocutory appeal, Nexion Health at Beechnut, Inc. d/b/a Beechnut Manor ("Beechnut Manor") appeals the trial court's order denying its motion to dismiss the healthcare liability claim filed by appellee Maria Moreno, individually

and as representative of the estate of Mario Moreno.[1] Beechnut Manor contends that the trial court abused its discretion in denying its motion to dismiss because (1) the expert report of Dr. Donald Marks fails to establish a causal relationship between Beechnut Manor's alleged conduct and Mario's death and (2) Dr. Marks's expert report and curriculum vitae do not satisfy the expert qualifications required by Chapter 74 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.351, 74.402 (West 2011 & West Supp. 2015). We affirm.

Background

On April 13, 2013, Mario was admitted to Beechnut Manor, a residential nursing home and rehabilitation facility that provides long-term care to cognitively impaired individuals. Mario, who had previously resided in a group home for the disabled, was found wandering the streets and subsequently hospitalized prior to his admission to Beechnut Manor.

Upon Mario's admission, Beechnut staff observed that he suffered from an impaired level of consciousness, impaired balance, schizophrenia, seizures, and a tendency to wander.[2] A physician's examination on April 17, 2013, indicated that Mario required long-term residential nursing home care and close supervision and assistance. Mario's daily treatment regimen at Beechnut Manor included the

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[1] Maria is Mario's mother.

[2] The record also reflects that Mario suffered from Parkinson's disease, anxiety, diabetes, and hypertension.

following medications: Phenobarbital (seizure disorder) (129.6 mg), Seroquil (schizophrenia) (200mg), Depakote (seizure disorder) (2000 mg), Haldol (anxiety) (10 mg twice a day), Ativan (.5 mg twice a day, as needed), and Zoloft (50 mg).

On May 23, 2013, at 10:15 p.m., Mario fell and was found lying outside, with lacerations and bruises to the left side of his face. He was transported to the hospital for treatment and returned to Beechnut Manor early the next morning. Staff notes stated that Mario had been "up all night ambulating, exit seeking and ambulating from room to room" on the night before he fell. Staff notes further reflected that between April 13, 2013 (admission date) and May 23, 2013 (date of first fall), Mario was found "ambulating ad lib" thirty-four times, wandering seven times, and seeking an exit two times.

On May 29, 2013, at 9:00 a.m., Mario was observed "wandering about the facility, pushing key pads." At 1:30 p.m. that same day, staff found him lying on his back in the hallway near the exit door with "an open area" on the back of his head, bleeding profusely, and going in and out of consciousness. Mario was transported to the hospital where he later died due to "blunt head trauma." Beechnut Manor staff notes reflected that between May 23, 2013 (date of first fall) and May 29, 2013 (date of second fall), Mario was found "ambulating ad lib" nine times, wandering three times, and seeking an exit four times.

On January 14, 2015, Maria, individually and as representative of Mario's estate, filed suit against Beechnut Manor alleging that it was negligent in failing to (1) exercise ordinary care while treating Mario; (2) adequately diagnose and treat him; (3) provide adequate supervision to him; (4) provide adequate supervision when Mario returned to the facility; (5) act as a reasonable and prudent medical care facility would under the same or similar circumstances, and (6) adequately assess Mario's medical condition. On February 23, 2015, Maria served Beechnut Manor with the expert reports of Donald Marks, M.D., Ph.D, and Rhonda Rotterman, BSN, RNC.

On June 29, 2015, Beechnut Manor filed a motion to dismiss Maria's claims on the grounds that the expert reports failed to (1) demonstrate that Dr. Marks and Nurse Rotterman were qualified to testify as experts; (2) identify the standard of care applicable to Beechnut; (3) identify the alleged breach of the applicable standard of care; and (4) establish the causal relationship between Beechnut Manor's alleged acts and Mario's injuries and subsequent death. Following a hearing on August 24, 2015, the trial court denied the motion. This interlocutory appeal followed.

Discussion

A. Chapter 74 Expert Report Requirements

Section 74.351 of the Civil Practice and Remedies Code serves as a "gate-keeper" through which no medical negligence causes of action may proceed until the claimant has made a good-faith effort to demonstrate that at least one expert believes that a breach of the applicable standard of care caused the claimed injury. *See* CIV. PRAC. & REM. CODE § 74.351; *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005). A person is qualified as an expert if the person "is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider." *See* CIV. PRAC. & REM. CODE § 74.402(b)(1).

To constitute a good faith effort, the report must provide enough information to fulfill two purposes: (1) inform the defendant of the specific conduct that the plaintiff has called into question and (2) provide a basis for the trial court to conclude that the claim has merit. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878–79 (Tex. 2001). 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.* at 879. 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)).

Although a report need not marshal all of the plaintiff's proof, it must include the expert's opinions on the three statutory elements: standard of care, breach, and causation. *See 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 and how it was breached," and how that breach caused injury). As to causation, an expert report must provide a fair summary of the expert's opinions regarding the causal relationship between the failure of the health care provider to provide care in accordance with the pertinent standard of care and the injury, harm, or damages claimed. CIV. PRAC. & REM. CODE § 74.351(r)(6). Magic words are not always used, but magical words are not necessary. *Estate of Birdwell v. Texarkana Mem'l Hosp., Inc.*, 122 S.W.3d 473, 480 (Tex. App.—Texarkana 2003, pet. denied) (citing *Wright*, 79 S.W.3d at 53). It is the substance of the opinions, not the technical words used, that constitutes compliance with the statute. *Estate of Birdwell*, 122 S.W.3d at 480.

The trial court may not draw any inferences, but must rely exclusively on the information contained within the four corners of the report. *See Palacios*, 46 S.W.3d at 878. We determine whether a causation opinion is sufficient by

considering it in the context of the entire report. *Bakhtari v. Estate of Dumas*, 317 S.W.3d 486, 496 (Tex. App.—Dallas 2010, no pet.).

B. Standard of Review

We review a trial court's ruling on a motion to dismiss for an abuse of discretion. *Palacios*, 46 S.W.3d at 875. A trial court abuses its discretion when it acts in an arbitrary or unreasonable manner or without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id.* at 242. However, a trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding); *Children's Med. Ctr. of Dall. v. Durham*, 402 S.W.3d 391, 395 (Tex. App.—Dallas 2013, no pet.).

C. Analysis

1. Causation

Beechnut Manor first contends that Dr. Marks's report does not constitute a good faith effort to comply with section 74.351 because his opinions about causation are conclusory. Specifically, it argues that his report does not contain

any factual explanation of the causal connection between Beechnut Manor's alleged failure to supervise Mario and his falls and resulting death.

Dr. Marks's report states, in relevant part:

> Upon admittance on April 13, 2013, Beechnut Manor staff observed Moreno suffered from an impaired level of consciousness, impaired balance, schizophrenia, seizures and a tendency to wander. A physician's examination performed on April 17, 2013, indicated Moreno required long term residential nursing home care and close supervision and assistance.
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> Mario Moreno's daily treatment regimen at Beechnut Manor included the following mind altering medications:
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> - Phenobarbital 129.6mg
> - Seroquil 200mg
> - Depakote 2000mg
> - Haldol 10mg in the morning, 10mg at hour of sleep
> - Ativan .5mg twice a day
> - Zoloft 50mg
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> Nursing notes indicate on May 23, 2013 at 10:15am, Moreno fell outside and was found lying on his side with lacerations and bruises to the left side of his face. Moreno was transferred to WHMC by ambulance, treated, and returned to Beechnut Manor at 3:00am.
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> On May 29, 2013, at 9:00am Nursing Notes indicate Moreno "was wandering about the facility, pushing key pads." At 1:30pm Moreno was found lying in the hallway near an exit door. Moreno was observed on his back with an "open area" identified on the back of his head. Moreno was in and out of consciousness. Emergency medical services were contacted and Moreno was transferred to WHMC.
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> The Death Certificate issued by the Texas Department of State Health Services—Vital Statistics indicates Moreno died on May 30, 2013 due to "Blunt Head Trauma."

Dr. Marks's report incorporates Nurse Rotterman's report which discusses the relevant standards of care and Beechnut Manor's alleged breaches of those standards. In particular, her report states:

> The reasonable standard of care requires that a facility charged with caring for frail, medically complex individuals with a history of mental illness understand and apply safety practices and principles as they relate to the proper supervision of such individuals.
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> . . . .
>
> Beechnut Manor's staff did not put a proper plan in place, nor did it modify the plan after MM's first fall with injury, to effectively monitor and supervise MM despite his history, comorbidities and daily mannerisms (i.e. wandering and exit seeking). With the various psychotropic and sedative medications he was receiving compiled [sic] with what was added by the facility within eleven days of his admission all having synergist effects, MM's fall risk which was already classified as "high risk" based on their own scoring instrument, went from high to critical.

With regard to causation, Dr. Marks's report states:

> Mario Moreno's injuries are consistent with the type of injuries likely to be sustained by a mentally impaired patient who suffers multiple falls. Specifically, based on reasonable medical probability, bruises, lacerations, blunt head trauma and death are all reasonably foreseeable injuries when a cognitively impaired patient prescribed six different mind altering medications is improperly supervised and falls repeatedly. . . . Mario Moreno was prescribed and administered six different antipsychotic medications, was improperly supervised and fell on his head on two separate occasions, the latter of which directly preceded his death. . . . The negligent acts outlined above were the proximate cause of Mario Moreno's fall and subsequent death caused by blunt force trauma Moreno suffered during that fall.

An expert report must provide a fair summary of the expert's opinions regarding the causal relationship between the failure of the health care provider to provide care in accordance with the pertinent standard of care and the injury, harm, or damages claimed. CIV. PRAC. & REM. CODE § 74.351(r)(6). When a plaintiff relies on one report to show the standard of care and breach and a second report to show causation, we must look to both reports to see whether the breach identified in the standard-of-care report is sufficiently linked to the cause of the alleged injury in the causation report. *See Columbia N. Hills Hosp. Subsidiary, L.P. v. Alvarez*, 382 S.W.3d 619, 629 (Tex. App.—Fort Worth 2012, no pet.) (considering hospital management consultant's report identifying standard of care and alleged breaches in conjunction with physician's report supplying causation element); *Salais v. Tex. Dep't of Aging & Disability Servs.*, 323 S.W.3d 527, 536 (Tex. App.—Waco 2010, pet. denied) (holding that when evaluating paramedic expert report offered only for standard of care and breach, court examines whether physician's report adequately links breach to alleged injury).

The issue is whether Dr. Marks's report articulated a causal relationship between Beechnut Manor's alleged failure to meet the applicable standards of care and Mario's falls and subsequent death. At the time of admission, Beechnut Manor staff observed that Mario suffered from an impaired level of consciousness, impaired balance, schizophrenia, seizures and a tendency to wander. A physician's

examination performed four days later indicated that Mario required close supervision and assistance. Mario, whose daily treatment regimen included six psychotropic medications, was repeatedly observed "ambulating ad lib," wandering, and exit seeking both before and after his first fall. According to Nurse Rotterman, the standard of care required that Beechnut Manor, a facility charged with caring for frail, medically complex individuals with a history of mental illness, provide proper supervision to its patients. Her report further stated that Beechnut Manor did not put a proper plan in place for Mario, or modify the plan after Mario's first fall, to effectively monitor and supervise him despite his medical history, comorbidities, and daily wandering and exit seeking. Dr. Marks opined that bruises, lacerations, blunt head trauma and death are all reasonably foreseeable injuries when a cognitively impaired patient prescribed six different mind-altering medications is improperly supervised and falls repeatedly. While unsupervised, Mario fell in the hallway near an exit door and was found with a gash on the back of his head and bleeding profusely, resulting in his death.

Keeping in mind that expert reports, such as that of Dr. Marks, are only a preliminary method to show that a plaintiff has a viable cause of action that is not frivolous or without expert support, we conclude that the trial court did not abuse its discretion in finding that Dr. Marks's report articulated the required causal

relationship. *See Kelly v. Rendon*, 255 S.W.3d 665, 679 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Beechnut Manor's first issue is overruled.

2. Qualifications

In its second issue, Beechnut Manor contends that the trial court abused its discretion in denying its motion to dismiss because Dr. Marks's report and CV do not evidence adequate qualifications. Specifically, it argues that the report fails to satisfy the expert qualifications requirements of Chapter 74 because (1) Dr. Marks is not actively practicing health care in a nursing home, and (2) he has no training or experience working in a nursing home or supervising nurses.

Not every licensed doctor is automatically qualified to testify on every medical question. *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996). To qualify as an expert, however, a doctor need not practice in the same specialty as the defendant. *Roberts v. Williamson*, 111 S.W.3d 113, 122 (Tex. 2003). Instead, the trial court should determine whether the proffered expert has "knowledge, skill, experience, training, or education" regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject. *Broders*, 924 S.W.2d at 153–54; *Blan v. Ali*, 7 S.W.3d 741, 744–46 (Tex. App.—Houston [14th Dist.] 1999, no pet.). A medical expert from one specialty may be qualified to testify if he has practical knowledge of what is customarily done by practitioners of a different specialty under circumstances similar to those at issue in

the case. *Keo v. Vu*, 76 S.W.3d 725, 732 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). "Expert qualifications should not be too narrowly drawn." *Larson v. Downing*, 197 S.W.3d 303, 305 (Tex. 2006) (per curiam).

Here, Dr. Marks's report and CV show that he is board certified in internal medicine, is a Fellow of the American College of Physicians, and is licensed to practices in four states. Dr. Marks has more than twenty-five years of experience working as a physician in hospitals, including as an attending physician for inpatient services at Cooper Green Mercy Hospital in Birmingham, Alabama. In addition to his experience in hospital internal medicine, Dr. Marks has significant experience in the field of clinical internal medicine.

Contrary to Beechnut Manor's assertion, the proper inquiry is not whether Dr. Marks has worked in a nursing home or has experience supervising nurses. Rather, the relevant question is whether he possesses the knowledge, skill, experience, training, or education regarding the fundamental principles of patient containment and safety in an in-patient care setting. Given his significant hospital experience, including as an attending physician for in-patient services, we conclude that the trial court did not abuse its discretion in finding that Dr. Marks is qualified to opine as an expert regarding these basic principles. *See Keo*, 76 S.W.3d at 732 (noting medical expert from one specialty may be qualified to testify if he has practical knowledge of what is customarily done by practitioners of

different specialty under circumstances similar to those in case at issue).[3] We therefore overrule Beechnut Manor's second issue.[4]

Conclusion

We affirm the trial court's order denying Beechnut Manor's motion to dismiss.

Russell Lloyd
Justice

Panel consists of Justices Bland, Brown, and Lloyd.

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[3] Further, Beechnut Manor does not object to the qualifications of Maria's second expert witness on the standard of care, Nurse Rotterman. Nurse Rotterman is a board certified registered nurse and health care administrator with more than twenty-five years' experience in health care who is "familiar with the standards of care in safely providing care for persons receiving care in a long-term care setting, including those with dementia and mental health complications." By itself, her report, which Dr. Marks's report incorporates, satisfies the qualifications requirement for the purposes of a Chapter 74 expert report on the liability issues.

[4] In light of our disposition, we do not reach Beechnut Manor's third issue asking that we deny Maria an opportunity to cure any deficiencies in Dr. Marks's expert report.