Affirmed and Memorandum Opinion filed March 16, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00538-CV

UNIVERSITY OF TEXAS MEDICAL BRANCH - GALVESTON, Appellant

V.

JAMES NIGHTINGALE, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF KAREN NIGHTINGALE, DECEASED, Appellee

On Appeal from the Probate Court
Galveston County, Texas
Trial Court Cause No. 68,400A

M E M O R A N D U M O P I N I O N

This is a healthcare liability case governed by chapter 74 of the Texas Civil Practice and Remedies Code.[1] Appellant, University of Texas Medical Branch - Galveston ("UTMB"), filed this interlocutory appeal to challenge the trial court's order denying its motion to dismiss based on appellee's alleged failure to file a sufficient expert report. We affirm.

[1] *See* Tex. Civ. Prac. & Rem. Code §§ 74.001–.507.

I. BACKGROUND

Mrs. Nightingale suffered from a congenital heart condition known as coarctation, or the narrowing, of the aorta. To correct the coarctation, Mrs. Nightingale underwent a non-invasive procedure at UTMB. Dr. Barry Uretsky, a UTMB faculty member, performed the corrective procedure, electing to use percutaneous balloon angioplasty—dilation of a constricted vessel by injecting and advancing a balloon-tipped catheter to the narrowed vessel. During the angioplasty, Mrs. Nightingale experienced severe chest pains, and the angioplasty procedure was terminated. After losing a substantial amount of blood, Mrs. Nightingale received blood transfusions and ultimately needed to undergo emergency surgery.

The following day, an emergency aortic resection was performed on Mrs. Nightingale by Drs. Scott Lick and Vincent Conti to surgically correct the coarctation. Despite post-operative bleeding and cardiac tamponade, Mrs. Nightingale appeared to be recovering well after the resection surgery. Two weeks later, however, Mrs. Nightingale suffered from cardiac arrest and was rushed to emergency surgery again. The second emergency surgery revealed a partial disruption of the proximal aortic suture line. While undergoing surgery to correct the partial vessel disruption, Mrs. Nightingale died. Mrs. Nightingale's widower, appellee, James Nightingale, individually and as independent executor of the estate of Karen Nightingale, deceased, filed the underlying health care liability lawsuit against UTMB.

In his lawsuit, Mr. Nightingale claimed that Dr. Uretsky was negligent in performing the percutaneous balloon angioplasty on Mrs. Nightingale and that such negligence caused Mrs. Nightingale's death. To support his negligence claims against UTMB, Mr. Nightingale filed an expert report by Dr. Neal Shadoff, a board certified cardiologist. Dr. Shadoff opined that prior to the balloon angioplasty, Mrs. Nightingale suffered from calcified and stenotic coarctation of the aorta and membranous VSD—an abnormal opening between the two heart chambers. Dr. Shadoff opined that the

combination of these two additional heart deficiencies increased the risks normally associated with balloon angioplasty, including vessel rupture. Thus, according to Dr. Shadoff, the non-surgical catheter-based balloon angioplasty performed by Dr. Uretsky would have been unsuccessful on Mrs. Nightingale. Dr. Shadoff further opined in his report that he believed Mrs. Nightingale had a cystic medial necrosis of a vessel wall, additionally increasing the normally associated risks with balloon-angioplasty dilation. Dr. Shadoff concluded in his expert report that UTMB was negligent by:

(1) performing a catheter-based balloon angioplasty on a patient with calcified and stenotic coarctation and membranous VSD;

(2) failing to perform surgery as the primary corrective procedure;

(3) using an improper balloon size during the angioplasty;

(4) using excessive inflation pressure during the angioplasty; and

(5) failing to timely or immediately perform corrective surgery or stent the disrupted vessel upon vessel disruption that occurred during the balloon angioplasty.

Dr. Shadoff further opined that UTMB should have:

(1) recognized the full extent of Mrs. Nightingale's condition, including the calcified and stenotic coarctation, membranous VSD, and possibly cystic medial necrosis, before performing the angioplasty procedure;

(2) considered surgery to dilate the constricted vessel by stent or resection;

(3) used an appropriate size balloon during the angioplasty procedure;

(4) used less inflation pressure during the angioplasty procedure; and

(5) recognized when the vessel rupture occurred during the angioplasty procedure and performed immediate or timely surgery—resection—or implanted a stent on the ruptured vessel upon disruption.

UTMB filed objections to Dr. Shadoff's expert report and moved to dismiss Mr. Nightingale's suit. UTMB contended that Dr. Shadoff was not qualified to tender an expert report and that his report was inadequate. Specifically, UTMB claimed that Dr. Shadoff was not qualified to render an expert opinion regarding the standard of care of each UTMB staff member because Dr. Shadoff did not have expertise in all disciplines unique to each UTMB employee. UTMB further contended that Dr. Shadoff's expert report was inadequate because it did not state (1) the applicable standard of care, (2) the manner in which UTMB breached the applicable standard of care, and (3) the causal relationship between the applicable standard of care and the alleged injury. Mr. Nightingale responded to UTMB's objections and motion to dismiss, maintaining that the report complied with the statutory requirements, and in the alternative, requested 30 days to amend the report to comply with the statute. After a hearing on UTMB's motion, the trial court denied UTMB's objections and the motion to dismiss. In turn, UTMB brought this interlocutory appeal to challenge the trial court's ruling. *See* Tex. Civ. Prac. & Rem. Code § 51.014(9).

On appeal, UTMB reurges its objections to Dr. Shadoff's expert report, arguing in four issues that Dr. Shadoff is not qualified to tender an expert report in the underlying cause and that his report is inadequate.

II. STANDARD OF REVIEW

We review a trial court's denial of a motion to dismiss under section 74.351 for an abuse of discretion. *Am. Transitional Care Ctrs. Of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *Group v. Vicento*, 164 S.W.3d 724, 727 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Likewise, we review a trial court's determination of whether a physician is qualified to opine in a health care liability case under an abuse-of-discretion standard. *Larson v. Downing*, 197 S.W.3d 303, 304–05 (Tex. 2006) (per curiam); *Mem'l Hermann Healthcare Sys. v. Burrell*, 230 S.W.3d 755, 757 (Tex. App.—Houston [14th Dist.] 2007, no pet.). A trial court abuses its discretion if it acts in an

arbitrary or unreasonable manner without reference to any guiding rules or principles. *Larson*, 197 S.W.3d at 304–05; *Kelly v. Rendon*, 255 S.W.3d 665, 672 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Furthermore, when reviewing matters assigned to the trial court's discretion, we may not substitute our judgment for the trial court's judgment. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002); *see also Burrell*, 230 S.W.3d at 757.

III. ANALYSIS

In four issues, UTMB challenges Dr. Shadoff's qualifications to tender an expert report in the underlying cause and the adequacy of his report. Taken out of order, UTMB specifically claims that the trial court erred in denying its motion to dismiss because: (1) Dr. Shadoff is not qualified to tender an expert report on the applicable surgical standard of care, the applicable standard of care for the entire UTMB staff, and causation; (2) Dr. Shadoff's expert report is inadequate to the extent that it contains conclusory statements regarding the applicable standard of care, breach of the applicable standard of care, and causation; (3) Dr. Shadoff's expert report does not address Mr. Nightingale's claims relating to the size of the catheters used during Mrs. Nightingale's angioplasty; and (4) there is no expert report supporting any claim against UTMB.

A. Dr. Shadoff's Qualifications to Tender An Expert Report

In UTMB's first issue, it challenges Dr. Shadoff's qualifications to tender an expert report in the underlying cause regarding (1) the angioplasty procedure performed on Mrs. Nightingale and (2) the need to perform surgery, not balloon angioplasty, to correct the coarctation of Mrs. Nightingale's aorta. An expert providing opinion testimony in a medical malpractice suit must establish that he is qualified to do so. *See* Tex. Civ. Prac. & Rem. Code §§ 74.351(r)(5)(A), 74.401. To be qualified to provide opinion testimony regarding whether a physician departed from the accepted standard of care, an expert must satisfy the requirements of section 74.401. *See* Tex. Civ. Prac. & Rem. Code § 74.351(r)(5)(A). Section 74.401 provides in relevant part:

(a) In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care 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.

(b) For purposes of this section, "practicing medicine" or "medical practice" includes, but is not limited to, training residents or students at an accredited school of medicine or osteopathy or ***serving as a consulting physician*** or other physicians who provide direct patient care, upon the request of such other physicians.

(c) In determining whether a witness is 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:

(1) is ***board certified*** or has other substantial training or experience ***in an area of medical practice relevant to the claim***; and

(2) is actively practicing medicine in ***rendering medical care services relevant to the claim***.

Id. § 74.401(a)-(c) (emphasis added). An expert's qualifications must appear in the expert report and cannot be inferred. *See Palacios*, 46 S.W.3d at 878; *see also Baylor Coll. of Med. v. Pokluda*, 283 S.W.3d 110, 117 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Accordingly, analysis of section 74.351 expert qualifications is limited to the four corners of the expert's report and the expert's curriculum vitae. *Pokluda*, 283 S.W.3d at 117; *Burrell*, 230 S.W.3d at 758.

UTMB contends that Dr. Shadoff is not qualified to render an expert opinion regarding the angioplasty performed on Mrs. Nightingale and the need for corrective surgery because (1) neither Dr. Shadoff's expert report nor CV reflect that he has performed the same surgery—balloon angioplasty—on a patient with the same or similar heart condition as Mrs. Nightingale—coarctation of the aorta; (2) Dr. Shadoff has no knowledge of or experience with catheter-based procedures; and (3) Dr. Shadoff is not a surgeon. The applicable standard is whether Dr. Shadoff is qualified to render expert testimony regarding Mr. Nightingale's claim that Dr. Uretsky departed from accepted standards of care in treating Mrs. Nightingale for her heart condition. *See* Tex. Civ. Prac. & Rem. Code § 74.401. Section 74.401(d) provides that a court "shall apply" the following factors in determining whether an expert is qualified to offer expert testimony: (1) he practices medicine; (2) he has knowledge of accepted standards of medical care for the treatment or care involved in the claim; (3) he has training or experience regarding those accepted standards of medical care; (4) he is board certified; (5) he has substantial training or experience in an area of medical care relevant to the claim; and (6) he actively participates in rendering medical services relevant to the claim. *See id.* § 74.401(a)-(c).

Here, Dr. Shadoff's expert report and CV reflect that he has been practicing cardiology since 1983 and is board certified in cardiovascular disease and interventional cardiology—a medical specialty of cardiology specializing in catheter-based heart disease treatments. Dr. Shadoff's report and CV reflect that he has participated in the evaluation of and management decisions on patients suffering coarctation of the aorta. He has also performed percutaneous balloon angioplasty procedures. Dr. Shadoff's CV reflects that he has been involved as an investigator and researcher in numerous test trials on patients undergoing coronary angioplasty or stent replacement. Dr. Shadoff indicates in his report that based upon his training and knowledge of current literature, he is "familiar with the standard of care regarding the evaluation and management of coarctation of the aorta and interventional procedures [performed] on adults with congenital heart disease." Based on Dr. Shadoff's education, training, and experience in

catheter-based heart disease treatments and working with patients suffering from coarctation of the aorta, we find that the trial court acted within its discretion in concluding that Dr. Shadoff was qualified to render an opinion on the standard of care, breach of the standard of care, and causation at issue in the underlying cause.

Moreover, we reject UTMB's arguments that Dr. Shadoff is not qualified because: (1) he has no experience in catheter-based procedures and (2) neither his report nor CV reflect that he has performed a balloon angioplasty, or similar procedure, on a patient with coarctation. The four corners of Dr. Shadoff's expert report reflect that he has knowledge, training, or experience in catheter-based procedures: he is board certified in interventional cardiology—a medical specialty in catheter-based heart disease treatments—and has "training, experience, and knowledge of . . . current . . . literature regarding interventional catheterization procedures." Furthermore, Dr. Shadoff has performed percutaneous balloon angioplasty procedures. With respect to UTMB's argument that Dr. Shadoff is not qualified because he has not performed a similar procedure on a patient with coarctation, this Court recently rejected a similar argument, reasoning that the statute is not so narrow as to render an expert unqualified under chapter 74 merely because he has not performed the exact procedure in question. *See Pokluda*, 283 S.W.3d at 120 (stating there is no basis for "the proposition that a surgeon must have performed exactly the same surgery as the defendant surgeon in order to render an expert opinion"). Dr. Shadoff's expert report reflects that he has performed balloon angioplasty procedures and that he has made management decisions with regard to patients with the same heart condition as Mrs. Nightingale's. Furthermore, Dr. Shadoff's report and CV reflect that he is a board certified cardiologist in two areas: cardiovascular disease and interventional cardiology, a medical specialty in catheter-based heart disease treatments. *See* Tex. Civ. Prac. & Rem. Code § 74.401(c) (reasoning that a court must consider whether the proffered expert is "board certified or has other substantial training or experience in an area of medical practice relevant to the claim and rendering medical care services relevant to the claim"); *see also Pokluda*, 283 S.W.3d at

119. Dr. Shadoff's CV also reflects that he has been involved as an investigator in numerous test trials on patients undergoing coronary angioplasty or stent replacement. We conclude that Dr. Shadoff's report and CV reflect knowledge, training, and experience in the area of medicine *relevant* to Mr. Nightingale's claim—surgical and catheterization treatments in patients with coarctation.

We also reject UTMB's argument that Dr. Shadoff is not qualified because he is not a surgeon. This Court has held that an expert need not be a surgeon to be qualified if the expert is shown to have skill, experience, training, or education regarding the specific issue before the trial court. *See Reardon v. Nelson*, No. 14-07-00263-CV, 2008 WL 4390689, at * 5 (Tex. App.—Houston [14th Dist.] Sept. 30, 2008, no pet.) (mem. op.); *see also Rendon*, 255 S.W.3d at 674 (recognizing "the statute 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). Here, the issue before the trial court and the relevant medical services are those for surgical and non-surgical coarctation correction. As noted above, Dr. Shadoff is a board certified cardiologist with a specialty in catheter-based heart disease treatments. He has worked with patients suffering from the same congenital heart condition as Mrs. Nightingale and has performed percutaneous balloon angioplasty procedures. Furthermore, his CV reflects that he has been involved, either as a researcher or investigator, in clinical trials involving stenting, catheterization, and coarctation correction. Based on the foregoing, we find that the trial court did not abuse its discretion in concluding that Dr. Shadoff was qualified to render an opinion in the underlying cause. Accordingly, we overrule UTMB's first issue challenging the qualifications of Dr. Shadoff.

B. Adequacy of Dr. Shadoff's Expert Report

UTMB's second and third issues challenge the adequacy of Dr. Shadoff's expert report. Under chapter 74, an expert report is defined as a written report by an expert that

provides a fair summary of the expert's opinions regarding (1) the applicable standard of care; (2) the manner in which the care provided failed to meet that standard; and (3) the causal relationship between that failure and the injury, harm, or damages claimed. Tex. Civ. Prac. & Rem. Code § 74.351(r)(6); *see also Wright*, 79 S.W.3d at 521. A report cannot merely state the expert's conclusions about these elements. *Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 878–79. The expert must explain the basis for his statements and must link his conclusions to the facts. *Wright*, 79 S.W.3d at 52 (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). Nevertheless, an expert 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. *Palacios*, 46 S.W.3d at 878–79; *Rendon*, 255 S.W.3d at 672. Moreover, to avoid dismissal, a plaintiff need not present all the evidence necessary to litigate the merits of his case. *Palacios*, 46 S.W.3d at 879; *Patel v. Williams*, 237 S.W.3d 901, 904 (Tex. App.—Houston [14th Dist.] 2007, no pet.). The report may be informal in that the information need not meet the standards required of evidence offered in a summary judgment proceeding or at trial. *Palacios*, 46 S.W.3d at 879; *Patel*, 237 S.W.3d at 904. Rather, the expert report need only to incorporate sufficient information to (1) inform the defendant of the specific conduct the plaintiff has called into question and (2) provide a basis for the trial court to conclude the claims are meritorious. *Wright*, 79 S.W.3d at 52.

Furthermore, the trial court should grant a motion challenging the adequacy of an expert report only when it appears that the report does not represent a good faith effort to comply with the statutory definition of an expert report. Tex. Civ. Prac. & Rem. Code § 74.351. When determining if a good faith effort has been made, the trial court is limited to the four corners of the report and cannot consider extrinsic evidence. *See Wright*, 79 S.W.3d at 52; *see also Palacios*, 46 S.W.3d at 878.

Here, UTMB first claims that Dr. Shadoff's expert report is inadequate because the report contains conclusory statements regarding the applicable standard of care,

breach of the applicable standard of care, and causation. Contrary to UTMB's contentions, Dr. Shadoff's expert report does not contain conclusory statements regarding the applicable standard of care, breach, and causation. Dr. Shadoff stated the following in his expert report:

> The standards of care for the evaluation and management of coarctation of the aorta in adults is as follows:
>
> 1. Recognize which vessels are amenable to percutaneous catheter based intervention and which vessels and clinical circumstances require surgical repair;
>
> 2. Consider both percutaneous and open surgical procedures for repair so as to be able to discuss both options with a patient and family in order to allow the patient and family to participate in therapeutic decisions and informed consent;
>
> 3. Perform interventional procedures in a safe and effective manner, recognizing when the risk or occurrence of a percutaneous balloon approach complication should result in procedure termination and/or crossover to surgery;
>
> 4. Use appropriately sized balloons for angioplasty when it is the chosen interventional approach and have stents available for balloon angioplasty failure;
>
> 5. Use appropriate levels of balloon inflation pressure to achieve successful dilation without causing vessel disruption;
>
> 6. Recognize when potentially life threatening complications occur during attempted percutaneous intervention; and
>
> 7. Arrange for surgery in a timely fashion when vessel disruption occurs during balloon angioplasty in a calcified coarctation of the aorta when stent implantation [is not] undertaken as a salvage procedure to prevent death.
>
> . . . Dr. Uretsky and . . . [UTMB] . . . breached the standards of care in their evaluation and treatment of [Mrs.] Nightingale in the following respects:

1. Failed to recognize that a calcified coarctation of the aorta with associated membranous VSD required surgical repair and not a catheter based approach;

2. Failed to adequately review the therapeutic options with Mr. and Mrs. Nightingale;

3. Failed to perform percutaneous angioplasty in a reasonable manner;

4. Failed to use appropriately sized balloons for the clinical situation;

5. Failed to use appropriate balloon inflation pressures for the clinical situation;

6. Failed to recognize the serious and life threatening nature of the percutaneous balloon dilation procedure complication of vessel disruption; and

7. Failed to arrange for Mrs. Nightingale to have surgery in a timely fashion following the complication during the percutaneous interventional procedure.

It is my opinion, based upon the reasonable medical probability that the above delineated breaches of the standard of care directly resulted in Mrs. Nightingale's death.

Dr. Shadoff's report does not contain mere conclusory statements regarding the applicable standard of care, breach, and causation. To the contrary, the report is a fair summary of Dr. Shadoff's opinions regarding (1) the applicable standard of care; (2) the manner in which the care provided failed to meet that standard; and (3) the causal relationship between that failure and the injury, harm, or damages claimed. *See* Tex. Civ. Prac. & Rem. Code § 74.351(r)(6).

UTMB further claims that the report is inadequate because the report does not address Mr. Nightingale's claims involving the size of the catheters used during Mrs. Nightingale's angioplasty. In Mr. Nightingale's amended petition, he contends that the size of the ***catheter*** was improper; Dr. Shadoff, in his expert report, indicated that the size of the ***balloon*** was improper. Because of this discrepancy, UTMB contends that the

expert report does not support any complaint regarding the size of the catheter used during the angioplasty. We disagree. The record reflects that the device at issue was a balloon-tipped catheter. Correspondingly, Mr. Nightingale's suit complains of the size of the balloon-tipped catheter, as does Dr. Shadoff's report. Applying the appropriate standard, we conclude that the expert report is a good faith effort to comply with the statutory requirements of an expert report. *See id.* § 74.351. Accordingly, we overrule UTMB's second and third issues.

C. Expert Report Regarding UTMB Staff

In its fourth issue, UTMB contends that Dr. Shadoff is not qualified to tender an expert report on the standard of care required by the entire UTMB staff because each employee has a separate distinct discipline. UTMB cites to an isolated sentence in Dr. Shadoff's expert report that "Dr. Uretsky and the staff of [UTMB] breached the standards of care in their evaluation and treatment of Mrs. Nightingale." However, despite this general statement, Mr. Nightingale's amended petition and Dr. Shadoff's expert report complain of UTMB, *through Dr. Uretsky*, not other UTMB employees. Specifically, Dr. Shadoff opined that UTMB was vicariously negligent in connection with Dr. Uretsky's evaluation and management of Mrs. Nightingale. Neither the petition nor the expert report charges other UTMB staff members with liability regarding Mrs. Nightingale's death. Because UTMB's alleged liability is purely vicarious through only Dr. Uretsky and because the expert report is adequate as to Dr. Uretsky, we conclude that the report is adequate as to UTMB. *See Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671–72 (Tex. 2008) (concluding that when a party's alleged health care liability is purely vicarious for the actions of its employee, an expert report is sufficient as to health care facility if the expert report is adequate as to that particular employee). Accordingly, UTMB's argument is without merit, and we overrule its fourth issue.

IV. CONCLUSION

Having overruled all of UTMB's issues, we affirm the trial court's order denying UTMB's objections and motion to dismiss.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Yates and Seymore.