

Affirmed and Memorandum Opinion filed February 15, 2011.



In The

Fourteenth Court of Appeals

NO. 14-10-00506-CV

CARLOS HERRERA, M.D., Appellant

V.

**JAVONE HOLIDAY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF
ANIYAH TRENAE WRIGHT, Appellee**

**On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2009-67566**

MEMORANDUM OPINION

This is an interlocutory appeal in a healthcare-liability case governed by chapter 74 of the Texas Civil Practice and Remedies Code. Javone Holiday, individually and on behalf of her late daughter, Aniyah Wright, sued Carlos Herrera, M.D., the Memorial Hermann Hospital System, Memorial Hermann Sugar Land Hospital, and Memorial Hermann Fort Bend Hospital (collectively “Memorial Hermann”) for alleged medical malpractice. Holiday served the defendants with an expert report prepared by Douglas McIntyre, M.D. Dr. Herrera moved to dismiss Holiday’s healthcare-liability claim on the basis that Dr. McIntyre’s expert report failed to satisfy statutory requirements as to

causation. The trial court denied the motion and this interlocutory appeal followed. Because we conclude the trial court did not abuse its discretion in determining the report constitutes a good-faith effort at compliance with statutory requirements, we affirm.

I

Javone Holiday first visited Dr. Carlos Herrera in April of 2007 for prenatal care when she was roughly three months pregnant, and continued to see Dr. Herrera throughout the remainder of her pregnancy. Holiday went into labor on October 21, 2007, and was admitted to Memorial Hermann Sugar Land Hospital shortly before 6:00 p.m. Upon her arrival, nurses performed an initial vaginal examination and noted the baby was in a cephalic, head-first position. Shortly after 7:00 p.m. and apparently again around 11:00 p.m., Holiday was given Cytotec, a labor-inducing drug, on Dr. Herrera's orders. Around 2:10 a.m., Holiday reported she was feeling pressure and a nurse observed "meconium on the sheet." The nurse then performed a vaginal examination but was "unable to assess presenting part." Dr. Herrera was paged at 2:20 a.m., and upon his arrival he assessed the baby was breech and had non-reassuring heart tones.¹

Dr. Herrera performed a cesarean-section delivery at 3:00 a.m. and Aniyah was moved to the neonatal intensive care unit at 3:06 a.m. The baby was unresponsive to stimulation even after she was bagged and suctioned, and at 3:25 a.m. she was intubated. After intubation, Aniyah began breathing bilaterally and spontaneously. Aniyah was diagnosed as suffering from perinatal asphyxia, ischemic encephalopathy, and placental insufficiency. She was eventually transferred to Memorial Hermann Children's Hospital, where her condition continued to deteriorate until she passed away on November 29, 2007.

In her petition, Holiday bases her medical-malpractice claim on several breaches of the standard of care, including the failure to timely assess the position of the baby prior to, during, and following Holiday's admission to the hospital; the failure to diagnose the

¹ A breech presentation occurs when the baby enters the birth canal with the buttocks or feet first as opposed to the normal head-first presentation.

unborn baby's breech position prior to administering Cytotec to Holiday; and failure to timely perform a cesarean delivery to prevent complications and brain damage to the baby. Holiday notes that Dr. Herrera failed to perform an ultrasound examination during an October 19 appointment or on October 20, when Holiday was admitted to Memorial Hermann for the onset of labor but was later discharged. Additionally, Holiday notes the assessment that the baby was in a cephalic, head-first position when Holiday was admitted to the hospital on October 21 was made by nurses based on a vaginal examination rather than an ultrasound. Holiday also complains that nurses did not obtain reassuring fetal-strip data or employ a fetal-scalp electrode or intrauterine pressure monitor technology prior to the administration of Cytotec. The defendants' negligence in failing to meet the applicable standards of care, Holiday contends, led to a delayed diagnosis that the unborn baby was presenting breech and that the delay directly led to the conditions from which Aniyah suffered and ultimately died.

II

A medical-malpractice plaintiff must timely serve on each party one or more expert reports that set out (1) the applicable standard of care, (2) the manner in which the defendant's care failed to satisfy that standard, and (3) the causal relationship between the defendant's failure and the injury or damages claimed. *See* Tex. Civ. Prac. & Rem. Code § 74.351(a), (r)(6). The trial court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good-faith effort to comply with the statutory definition of an expert report. *See id.* § 74.351(l). Dr. Herrera moved to dismiss Holiday's claim on the grounds that the expert report submitted by Dr. Douglas McIntyre was not a good-faith attempt to comply with the requirements laid out in section 74.351. Specifically, Dr. Herrera claims "the report fails to explain the causal connection between alleged breaches and the harm and injuries contended." We disagree.

The Texas Supreme Court has held an expert report must provide enough information to fulfill two purposes if it is to constitute a good-faith effort. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001). First, the report must inform the defendant of the specific conduct the plaintiff has called into question. *Id.* Second, and equally important, the report must provide a basis for the trial court to conclude that the claims have merit. *Id.* In fulfilling these two requirements, the plaintiff must address the three elements identified by statute: standard of care, breach, and causal relationship. Tex. Civ. Prac. & Rem. Code § 74.351(r)(6); *see also Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51 (Tex. 2002).

To satisfy the element of causation, the expert must explain the basis of his statements and link his conclusions to the facts. *Wright*, 79 S.W.3d at 52. A plaintiff is not required to marshal all her proof or present evidence as if the plaintiff were actually litigating the merits. *Id.*; *Patel v. Williams*, 237 S.W.3d 901, 904 (Tex. App.—Houston [14th Dist.] 2007, no pet.). However, a report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill the two purposes set out in *Palacios*. *Wright*, 79 S.W.3d at 52. Nor does the use of “magic words” such as “reasonable medical probability” automatically establish a good-faith effort. *Id.* at 53. Rather, the expert must explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented. *Jelinek v. Casas*, No. 08-1066, 2010 WL 4910172, at *10 (Tex. Dec. 3, 2010).

We review a trial court’s denial of a motion to dismiss under section 74.351 for abuse of discretion. *See Palacios*, 46 S.W.3d at 877; *Group v. Vicente*, 164 S.W.3d 724, 727 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Larson v. Downing*, 197 S.W.3d 303, 304–05 (Tex. 2006); *Mem'l Hermann Healthcare Sys. v. Burrell*, 230 S.W.3d 755, 757 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

III

It was within the trial court's discretion to find that Dr. McIntyre's report constituted a good-faith effort at compliance with section 74.351. Although in the report the expert ultimately identifies only one standard of care that was breached, the expert sufficiently established a causal link between that breach and the complications that arose during Aniyah's birth and her untimely death in a manner adequate to inform the defendants of the specific conduct called into question and enable the trial court to determine whether the claim has merit. *See Palacios*, 46 S.W.3d at 879.

Dr. McIntyre's 16-page report details the risks posed by "breech presentation" and tracks Holiday's medical history from April 13, 2007, when she first visited Dr. Herrera for prenatal care, through Aniyah's birth on October 21, 2007. He opines that Aniyah ultimately died of "severe hypoxic ischemic encephalopathy caused by intrapartum asphyxia." The cause of the asphyxia, according to Dr. McIntyre, was "cord compression when Aniyah Wright's buttocks entered the pelvis."

Dr. McIntyre opines that the standards of medical care applicable to the circumstances beginning "on or around" 2:24 a.m. would require a physician to: (1) apply maternal oxygen; (2) reposition the patient to relieve cord compression and or optimize uterine blood flow; (3) increase maternal cardiac output to improve placental perfusion by maximizing fluid status via rapidly infused intravenous fluids, and (4) improve fetal-oxygen status by decreasing the oxygen-depriving effects of uterine contractions and/or umbilical cord compression by administering tocolytic agents such as terbutaline. Dr. McIntyre states that "although the first three treatments were instituted by the nurses, tocolytics were never administered." Dr. McIntyre goes on to explain that:

Furthermore based upon my qualifications discussed above and in my CV, the medical science discussed in the "general section" above, the medical facts summarized above, and the reasoning set forth supporting my opinion that Aniyah's injury and death was caused by intrapartum asphyxia detailed above, it is my professional opinion that but for the negligence of Dr. Herrera

as set forth above, Aniyah would not have died from severe hypoxic encephalopathy. As discussed in the “General Discussion” section, the progression from hypoxia to damaging tissue asphyxia and metabolic acidosis is a product of the severity of the hypoxia and the duration of the hypoxia. Thus, relieving the hypoxia is the critical goal to prevent damage to the infant and is the reason that obstetrical standards concerning intrauterine resuscitation have been established. Thus, it is more likely than not, that had Dr. Herrera used a tocolytic agent such as terbutaline to counter the otherwise uncontrollable Cytotec effects and relieved the oxygen depriving effects of contractions and/or cord compression in order to improve the intrapartum hypoxia asphyxia/acidosis that caused Aniyah’s terminal severe hypoxic encephalopathy, the effects of the intrapartum oxygen deprivation would have been significantly ameliorated or eliminated. Thus, it is my professional opinion to a reasonable degree of medical probability that Dr. Herrera’s medical negligence was a contributing factor and a proximate cause of Aniyah’s injuries, as detailed above, and death from said injuries.

The above statements along with Dr. McIntyre’s report taken as a whole explain that the unborn baby’s complications during labor could be traced to the deprivation of oxygen, a condition referred to as hypoxia. The hypoxia became pronounced as baby Aniyah descended into the pelvis in breech and suffered the oxygen-depriving effects of uterine contractions and cord compression. During this time, Dr. McIntyre explains, a tocolytic agent should have been administered to offset the effects of Cytotec, a labor-inducing drug that was earlier administered to Holiday. Dr. McIntyre explains that doing so would have countered the “uncontrollable” effects of Cytotec and increased the flow of oxygen to the baby. Dr. McIntyre explains the ultimate cause of Aniyah’s death and links the breached standard of care—the failure to dispense a particular medication—to the unfortunate result in this case and then establishes causation by explaining the medication would have “significantly ameliorated or eliminated” the oxygen deprivation Aniyah was suffering.

Although this explanation may not conclusively establish Holiday’s claim, it is a fair summary with sufficiently specific information to demonstrate causation beyond mere conjecture. *See* Tex. Civ. Prac. & Rem. Code § 74.351(r)(6); *Wright*, 79 S.W.3d at 53. Moreover, it fulfills both elements of the *Palacios* test because it informs Dr. Herrera of the

specific conduct called into question—the failure to administer a tocolytic agent—and provides sufficient information for the trial court to determine whether the claim has merit. *See Palacios*, 46 S.W.3d at 879. The statute does not require more.

Dr. Herrera argues the report in this case is similar to one deemed insufficient by the San Antonio court of appeals in *Hutchinson v. Montemayor*. 144 S.W.3d 614, 618 (Tex. App.—San Antonio 2004, no pet.). In that case, the court held the trial court did not abuse its discretion in finding the report was not a good-faith effort because the report simply opined that the plaintiff might have had the possibility of a better outcome without explaining how the defendant’s conduct caused injury. *Id.* at 617. The *Hutchinson* expert opined that:

If an arteriogram had been done, *there would have been a possibility* that Mr. Hutchinson *may have had* bypassable lesions and that the amputation *may have been* avoided. Within reasonable medical probability these doctor’s [sic] *breaches caused injury to Mr. Hutchinson.*

Id. (emphasis added). The causation element was not fulfilled because the expert failed to link the defendants’ inaction (failure to perform an arteriogram) to the injury (an amputation). *Id.* Dr. McIntyre’s report is not similarly lacking. Unlike *Hutchinson*, in which the expert physician opined that there “would have been a possibility . . . that the amputation may have been avoided,” in the case under review Dr. McIntyre does not simply speculate about the possibility of a better outcome. *See id.* Rather, Dr. McIntyre states that a tocolytic agent would have “significantly ameliorated or eliminated” the oxygen-depriving effects of uterine contractions and cord compression, and that the failure to administer the medication “was a contributing factor and proximate cause” of Aniyah’s injuries and death. While the adequacy of an expert report does not hinge on any “magical words,” in his report Dr. McIntyre does more than merely speculate about a better outcome; he states that Dr. Herrera’s omission caused complications in Aniyah’s birth and Dr. McIntyre demonstrates the causal link between the failure to administer a tocolytic

agent and the oxygen-depriving conditions that ultimately led to Aniyah's death. *See Wright*, 79 S.W.3d at 53; *Palacios*, 46 S.W.3d at 879.

Moreover, in *Hutchison* the trial court *granted* the motion to dismiss and the court of appeals held it had not abused its discretion. Likewise, we have held that the trial court in this case did not abuse its discretion when it *denied* the motion to dismiss. In the case under review and in *Hutchison*, the trial court's rulings are very appropriately afforded wide discretion.

* * *

Dr. McIntyre's report represented a good-faith effort to satisfy the requirements imposed by section 74.351 and by the supreme court in *Palacios*. Accordingly, the trial court did not abuse its discretion in denying Dr. Herrera's motion to dismiss. We overrule Dr. Herrera's sole issue. For the foregoing reasons, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown.