Affirmed and Memorandum Opinion filed July 21, 2020.

In The

Fourteenth Court of Appeals

NO. 14-19-00270-CV

LUKE DAVID WALKER, M.D., Appellant

V.

PRIYANKA SRIVASTAVA, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2018-43929

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

Appellee Priyanka Srivastava sued Appellant Luke David Walker, M.D. and five other defendants, asserting health care liability claims arising under the Texas Medical Liability Act (the "Act"). Walker filed a motion to dismiss challenging Srivastava's expert report, arguing that (1) the expert was unqualified to render an expert opinion, and (2) the expert's report did not adequately address the standard of care, the alleged breach, and the causal connection between the breach and the injuries suffered. The trial court denied Walker's motion to dismiss and Walker

filed this interlocutory appeal. For the reasons below, we affirm.

BACKGROUND

Srivastava gave birth to her son via a planned cesarian section ("c-section") in December 2016. During the procedure, the medical personnel also performed a tubal ligation, which caused permanent sterilization. Srivastava sued Walker and five other defendants, asserting that the tubal ligation was performed without her knowledge and without her consent.

According to Srivastava, during her course of prenatal care she was not told that a tubal ligation would be performed during the c-section. On the day of the c-section, Srivastava said she was instructed to sign "many consent forms" that required her "to sign her name or initial her name in approximately 15-20 different places." Although one consent form stated that a tubal ligation would be performed during the procedure, three other consent forms stated that a c-section was the only procedure that would be undertaken and said nothing about a tubal ligation or permanent sterilization.

Srivastava's suit alleges that, before a surgical procedure is to be performed, medical personnel are required to undertake a "time out" during which they confirm with each other and with the patient which procedures are to be performed. Srivastava asserts that Walker and the other medical personnel who assisted in performing the c-section did not undertake a "time out" before the procedure began. This failure, Srivastava contends, was the proximate cause of the tubal ligation and her permanent sterilization.

Srivastava brings claims against Walker for negligence and gross negligence, alleging that Walker committed the following breaches of the applicable standards of care:

1. failing to realize there were discrepancies in the consent forms and pre-surgical clearance forms and failing to reconcile those discrepancies before the procedure began;
2. failing to perform or ensure performance of a "time out" procedure in the operating room prior to surgery; and
3. failing to document performance of the "time out" procedure.

Srivastava included with her original petition an expert report from Dr. Mark Akin, an obstetrician/gynecologist. An amended version of Akin's report was served on Walker. Walker filed objections to Akin's qualifications and his amended report.

Walker also filed a motion to dismiss, arguing that the alleged deficiencies in Akin's qualifications and report entitled Walker to a dismissal of Srivastava's claims. The trial court held a hearing on Walker's motion to dismiss and denied the motion in a written order signed March 5, 2019. Walker timely filed this interlocutory appeal.

ANALYSIS

Raising two issues on appeal, Walker argues that (1) Akin, an obstetrician/gynecologist, is not qualified to opine with respect to the actions taken by Walker, an anesthesiologist, and (2) Akin's report does not provide a fair summary of Akin's opinions as required by the Act. We analyze these issues below.

I. Standard of Review and Governing Law

The Act entitles a defendant to dismissal of a health care liability claim if, within 120 days of the suit being filed, the defendant is not served with an expert report showing that the claim has merit. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b); *Baty v. Futrell*, 543 S.W.3d 689, 692 (Tex. 2018). Where, as here, the trial court denies the defendant's motion to dismiss, the defendant may bring an

interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9); *Bailey v. Amaya Clinic, Inc.*, 402 S.W.3d 355, 361 (Tex. App.—Houston [14th Dist.] 2013, no pet.). We review a trial court's ruling on a motion to dismiss a health care liability claim for an abuse of discretion. *Harvey v. Kindred Healthcare Operating, Inc.*, 578 S.W.3d 638, 644 (Tex. App.—Houston [14th Dist.] 2019, no pet.). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner or without reference to any guiding rules or principles. *Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 512-13 (Tex. 2017).

The Act specifies requirements for an adequate expert report and mandates "an objective good faith effort to comply" with these requirements. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(l), (r)(6); *Miller*, 536 S.W.3d at 513. First, the report must be provided by a qualified individual. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 74.351(r)(5)(B), 74.401 (qualifications of an expert witness in a suit against a physician). To determine if a person is qualified as an expert, courts look only to the report and the curriculum vitae – an expert's qualifications cannot be inferred. *Harvey*, 578 S.W.3d at 644; *Mem'l Hermann Healthcare Sys. v. Burrell*, 230 S.W.3d 755, 758 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Second, the report must provide a fair summary of the expert's opinions regarding (1) the applicable standard of care, (2) the manner in which the care 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 Ann. § 74.351(r)(6); *Miller*, 536 S.W.3d at 513. This showing is met if the report informs the defendant of the specific conduct the plaintiff has called into question and provides a basis for the trial court to conclude the claims have merit. *Miller*, 536 S.W.3d at 513; *Harvey*, 578 S.W.3d at 644. A report is inadequate if it only contains the expert's conclusions about these elements – rather, the expert must

explain the basis for his statements and link his conclusions to the facts. *Harvey*, 578 S.W.3d at 644-45 (citing *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010)).

When determining whether an expert report constitutes "an objective good faith effort to comply" with the Act's requirements, the trial court is limited to the four corners of the report and cannot consider extrinsic evidence. *Jelinek*, 328 S.W.3d at 539; *Bailey*, 402 S.W.3d at 361. But the Act does not require a plaintiff to present all evidence necessary to litigate the merits of the case and the expert's report "need not fulfill the same requirements as the evidence offered in a summary judgment proceeding or at trial." *Bailey*, 402 S.W.3d at 362 (citing *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001)). The purpose of the Act's expert-report requirements is to deter frivolous claims – not to dispose of claims regardless of their merits. *Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011); *see also Henry v. Kelly*, 375 S.W.3d 531, 535 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("The Supreme Court has encouraged trial courts to liberally construe expert reports in favor of plaintiffs[.]").

II. Qualifications

Walker argues that Akin's report and curriculum vitae do not establish that Akin "has any knowledge, training, or relevant experience to opine on what the standard of care requires for an anesthesiologist such as [Walker]."

To provide opinion testimony regarding whether a physician departed from the accepted standards of care, an expert must establish that she or he:

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.

Tex. Civ. Prac. & Rem. Code Ann. § 74.401(a); *see also Methodist Hosp. v. Addison*, 574 S.W.3d 490, 503 (Tex. App.—Houston [14th Dist.] 2018, no pet.). In determining whether a witness is "qualified on the basis of training or experience" to offer an expert opinion regarding the applicable standards of medical care,

> 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.

Tex. Civ. Prac. & Rem. Code Ann. § 74.401(c).

A physician serving as an expert need not be a specialist in the particular branch of the profession for which the testimony is offered. *See*, *e.g.*, *Bailey*, 402 S.W.3d at 359, 363-64 (an orthopedic surgeon was qualified to opine about the standard of care applicable to a dermatologist who was treating the claimant for weight loss with liposuction); *Blan v. Ali*, 7 S.W.3d 741, 745 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (neurologist could testify about standards of care applicable to a cardiologist and an emergency room physician where standards were not particular to the fields of cardiology and emergency medicine). Rather, the plaintiff must present an expert "with knowledge of the specific issue which would qualify him or her to give an opinion on that subject." *Blan*, 7 S.W.3d at 745 (citing *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996)). The plain language of the statute focuses not on the doctor's area of expertise, but on the condition or circumstances involved in the claim. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.401(a)(2).

Here, Akin's report and curriculum vitae show that he is a physician licensed in Texas, has been in continuous practice since 1979, and is a board-certified obstetrician and gynecologist. Akin has been in private practice in Austin for 35 years and has delivered over 11,000 babies. According to Akin, he served as chief of staff of the OB/GYN section at Seton Hospital and, in 2003, was the lead physician for Seton Hospital's Perinatal Safety Committee. Akin states that this Committee "created new standards of care for labor and delivery management, which led to a significant reduction in neonatal and maternal morbidity." Discussing this experience, Akin states:

> I played an integral role in promoting safety in the operating room, including pre-operative verification of the surgical procedure about to be performed, commonly known as "Time-Out". [The Joint Commission Accreditation of Healthcare Organization] has set forth as a standard of care that "Time-Out" is performed for all surgical procedures, and written documentation in the patient chart that the procedure was performed. . . . This "Time-Out" process is a universally accepted [Joint Commission Accreditation of Healthcare Organization] standard of care that I follow regularly in all surgeries, and the surgery does not begin until this process is complete.

In the underlying proceeding, Srivastava's claims against Walker are based on allegations that Walker (as well as the other defendants) failed to verify the procedures that would be performed on Srivastava and failed to perform a "time out" before beginning the c-section. Akin's report and curriculum vitae show he is qualified to opine regarding whether Walker departed from the accepted standards of care in these circumstances. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.401(a), (c). Akin was practicing medicine at the time these claims arose and has knowledge of the accepted standards of medical care for operating room procedures, including the "time out" procedure. *See id*. § 74.401(a)(1), (2). Akin's report and curriculum vitae also show that he has "substantial training or

experience" in the area of medical practice relevant to the claims, namely, operating room procedures designed to promote safety during labor and delivery. *See id*. § 74.401(a)(3), (c)(1). Akin states in his report that he (1) has delivered over 11,000 babies; (2) led Seton Hospital's Perinatal Safety Committee, which promulgates safety standards for labor and delivery; (3) played an "integral role" in promoting operating room safety, including use of the "time out" procedure; and (4) "regularly" follows the "time out" procedure "in all surgeries". Finally, Akin also states in his report that he "maintains an active obstetrical practice" and "continue[s] to remain actively involved in improving prenatal care through monthly nurse-physician liaison meetings". *See id*. § 74.401(c)(2). Considered together, Akin's report and curriculum vitae show he is qualified to opine as to the standards of care applicable to Walker with respect to the circumstances underlying Srivastava's claims.

The thrust of Walker's challenge to Akin's qualifications focuses on the fact that Akin is an obstetrician/gynecologist whereas Walker is an anesthesiologist. Because of this difference, Walker argues, Akin "is not qualified to opine on the standard of care for or breach by an anesthesiologist who is providing care and treatment as an anesthesiologist."

But Walker frames the issue too narrowly. Srivastava is only required to establish that her expert has "knowledge of the ***specific issue*** which would qualify him or her to give an opinion on that subject." *Blan*, 7 S.W.3d at 745 (emphasis added). Here, the specific issue underlying Srivastava's claims is not particular to anesthesiology – rather, it concerns the alleged non-performance of certain operating room safety procedures before Srivastava's c-section (specifically, the requirements of a "time out" procedure where all immediate members of the procedure verbally verify that all pre-procedure paperwork is consistent). As

shown in Akin's report and curriculum vitae, he has knowledge of and experience in this area and therefore is qualified to opine regarding whether Walker breached the applicable standards of care. Akin is not unqualified merely because he is not a practicing anesthesiologist. *See, e.g.*, *Bailey*, 402 S.W.3d at 359, 363-64; *Blan*, 7 S.W.3d at 745.

We overrule Walker's challenge to Akin's qualifications.

III. Standard of Care, Breach, and Causation

In his second issue, Walker contends that Akin's expert report does not contain a standard of care, does not set forth a breach of the standard of care, and does not show the causal relationship between the alleged breach and Srivastava's injuries or damages.

A. Standard of Care

Walker argues that Akin's report "wholly fails to recite a specific applicable standard of care applying to [Walker]." We disagree.

The applicable standard of care is defined "according to what an ordinarily prudent physician or health care provider would have done under the same or similar circumstances." *Naderi v. Ratnarajah*, 572 S.W.3d 773, 779 (Tex. App.—Houston [14th Dist.] 2019, no pet.). While a "fair summary" is something less than a full statement of the applicable standard, the expert's report must set out what care was expected but not given. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a), (r)(6); *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 226 (Tex. 2018).

Akin's report makes this showing and includes the following statements addressing the standard of care:

- "[M]ost hospitals (including Texas Woman's Hospital) have adopted

the pre-surgical safety standards of care advocated and promoted by [The Joint Commission Accreditation of Healthcare Organization, ("JACHO")], including the 'Time-Out' procedure. . . . [T]he standard of care for a physician at a JACHO certified hospital, like Dr. Walker at Texas Woman's Hospital, is to follow the hospital policies . . . , including how all members of the surgical team must be involved in the pre-surgical 'Time-Out' and how all members of the surgical team must execute the 'Time-Out' confirmation document provided by each hospital[.]"

- "The standard of care for any and every member of a surgical team during a Tubal Ligation with Cesarean Delivery has also been detailed by ACOG (American College of Obstetricians and Gynecologists). According to ACOG, JACHO, and the Texas Woman's Hospital's internal policies, the ***entire surgical team*** including the anesthesia personnel must conduct a 'Time-Out' immediately before starting an invasive procedure." (emphasis in original).
- "The 'Time-Out' involves ***all immediate members of the procedure***, including the obstetrician, the anesthesia provider present during the 'Time-Out', the circulating nurse, and the operating room technician, and all relevant members of the team must actively stop what they are doing . . . and actively communicate during the 'Time-Out'." (emphasis in original).
- "During the 'Time-Out' the surgical team members must all verbally agree upon, at a minimum: the correct patient identity; the correct site; and the procedure(s) to be done by clearly and directly asking these questions of the patient and **verifying that all pre-procedure paperwork is consistent, and all reflect the same procedure, at the same site, that is to be performed.** . . . Then, the 'Time-Out' must be documented[.]" (emphasis in original).

These statements describe the applicable standard, to whom it applies, when it is to be followed, and the steps that should be taken to ensure its proper performance. Akin's report therefore provides a fair summary of the applicable standard of care. *See, e.g., Peabody v. Manchac*, 567 S.W.3d 814, 822-23 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (expert report included a fair summary of standard of care where it opined that nurse should have confirmed certain instructions with

attending physician and, if physician could not be reached, have proceeded through "the nurse chain of command"); *Harvey*, 578 S.W.3d at 649-51 (expert report fairly summarized standard of care where it stated that medical personnel were required to "follow the orders of the primary attending physician", "take daily chest x-rays", and "monitor the placement of a chest tube").

Walker also contends that "there is no basis for Dr. Akin's unsubstantiated opinions regarding publications of or standards promulgated by ACOG (American College of Obstetricians and Gynecologists) applying to anesthesiology providers such as [Walker]." But to the extent Walker argues the expert report is insufficient because Walker is incorrect in his conclusions regarding what the standard of care requires, we note that "the ultimate evidentiary value of the opinions proffered by [an expert] is a matter to be determined at summary judgment and beyond." *Abshire*, 563 S.W.3d at 226; *see also Baty*, 543 S.W.3d at 697 ("The parties to a medical-malpractice case may – and often do – disagree over what the standard of care in fact requires."). At this stage, whether those standards are reasonable is not relevant to the analysis of whether Akin's expert report constitutes a good-faith effort to comply with the Act's requirements. *See, e.g.*, *Peabody*, 567 S.W.3d at 823.

B. Breach

Walker summarily asserts that "Dr. Akin does not set forth a specific breach of the standard of care by [Walker]."

But Akin's report fairly summarized how Walker's care failed to meet the standards described above:

> In this case, the standard verification form was filled out by the pre-op nursing staff prior to the Cesarean section and was for only "Cesarean Section". The form does not have tubal ligation listed any where. In

> addition, the section of the verification form for confirmation that the final "Time-Out" verification was performed, was never filled out. Based upon the "Time-Out" verification form, the scheduled procedure was only a Cesarean section, and the final "Time-Out" was not performed. Failing to perform the final "Time-Out" not only violated ACOG and JACHO guidelines, as well as Texas Woman's Hospitals' internal policies and procedures, but also led to an incorrect procedure being performed. Consequently, all members of the operating team (physician, anesthesiologist, circulating nurse, and scrub nurse) failed to meet the standards of care[.]

Elsewhere in his report, Akin reiterates that Walker and the other members of the surgical team did not follow the applicable standards and did not perform a "time out" procedure prior to the c-section. These statements set forth a specific breach of the standard of care. *See, e.g.*, *Harvey*, 578 S.W.3d at 652 (expert report sufficiently described breach where it said none of the health care providers complied with the physician's order to take daily chest x-rays).

C. Causation

Asserting that Akin's report includes only "conclusory statement[s]", Walker argues that Akin fails to "actually connect some specific negligence [of Walker] to the damages."

An expert report sufficiently addresses the element of causation if it links the breach of the standards of care with the claimed injuries. *Bailey*, 402 S.W.3d at 370. Although the report need not use particular "magic words", it must "make a good-faith effort to explain, factually, how proximate cause is going to be proven[.]" *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 460 (Tex. 2017). Proximate cause has two components: (1) foreseeability, and (2) cause in fact. *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109, 113 (Tex. 2013) (per curiam). For an act or omission to have been a cause in fact of the harm, the act or omission must have been a substantial factor in bringing about the harm

without which the harm would not have occurred. *Id*.

Akin's report makes the necessary showing regarding causation:

> These violations of standards of care, listed above, resulted in Ms. Srivastava being permanently sterilized. Had any member of the surgical team, including the anesthesia team ([Walker] and CRNA Cruz) ever initiated, ensured performance of, and documented a time-out procedure . . . Ms. Srivastava would have been informed of the risks and benefits of the sterilization procedure. Ms. Srivastava makes clear in her affidavit that she most certainly would not have elected to proceed with the surgery had she been aware that it would result in her inability to ever naturally bear children again. Therefore, had the operating team fully and appropriately abided by ACOG, JACHO, and the hospital policy by conducting, the time-out procedure as stated above in this report, Ms. Srivastava would not have proceeded with the tubal ligation. Had Ms. Srivastava not proceeded with the tubal ligation, then Ms. Srivastava would, within all reasonable medical certainty, still have the ability to bear children. The violations of the standards of care above are the direct causation of Ms. Srivastava's current inability to bear children since the tubal ligation. The current inability of Ms. Srivastava to have children was certainly foreseeable at the time of the bilateral salpingectomy.

In sum, Akin's report provides a fair summary of how the alleged breach of the standards of care (Walker's failure to initiate or perform a "time out" procedure before undertaking the c-section) caused Srivastava's injuries (permanent sterilization). *See Bailey*, 402 S.W.3d at 370. Akin also opines that the breach was a cause in fact of Srivastava's permanent sterilization and that this injury was foreseeable. *See Rodriguez-Escobar*, 392 S.W.3d at 113. Therefore, Akin's report meets the Act's requirements with respect to causation.

In his causation challenge, Walker also brings up the merits of Srivastava's claims and points out that Srivastava "signed a consent form for a tubal ligation". But the determination of whether an expert report is adequate is not a merits determination – rather, it is "a preliminary determination designed to expeditiously

weed out claims that have no merit." *Loaisiga v. Cerda*, 379 S.W.3d 248, 263 (Tex. 2012). Therefore, the fact that Srivastava signed a form consenting to the tubal ligation does not bear on our analysis of the issues here. *See id*.

We overrule Walker's challenges to the contents of Akin's report.

IV. Remaining Issue

Finally, Walker argues that, if we conclude that Akin's report is deficient, we should dismiss the case rather than remand it for an opportunity to cure any deficiencies therein. *See Scoresby*, 346 S.W.3d at 557-58. Because we conclude Akin's report satisfies the Act's requirements, we need not reach this issue on appeal.

CONCLUSION

We affirm the trial court's March 5, 2019 order denying Walker's motion to dismiss.

/s/ Meagan Hassan
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant.