

Reversed and Remanded and Memorandum Majority and Dissenting Opinions filed July 27, 2023.



In The

Fourteenth Court of Appeals

NO. 14-21-00289-CV

BRADLEY K. WEINER M.D., Appellant

V.

PATRICK LASHFORD, Appellee

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2020-18756**

DISSENTING MEMORANDUM OPINION

I respectfully dissent from the majority opinion, which concludes the expert report provided by Lashford is inadequate.

The purpose of the Texas Medical Liability Act is to expeditiously eliminate frivolous health-care liability claims while preserving meritorious claims. In setting out the expert's opinions in support of a health care liability claim, the expert's report must provide enough information to fulfill two purposes: first, it

must inform the defendant of the specific conduct the plaintiff has called into question, and second, it must provide a basis for the trial court to conclude that the claims have merit. Tex. Civ. Prac. & Rem. Code Ann. § 74.351; *Baty v. Futrell*, 543 S.W.3d 689, 693 (Tex. 2018), *Cornejo v. Hilgers*, 446 S.W.3d 113, 120 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (citing *Scorseby v. Santillan*, 346 S.W.3d 546, 555–56 (Tex. 2011)).

To provide a fair summary of causation, the expert report must explain how and why the physician’s or health care provider’s breach caused the plaintiff’s injury. *Naderi v. Ratnarajah*, 572 S.W.3d 773, 781 (Tex. App.—Houston [14th Dist.] 2019, no pet.). The report must address all the elements; omissions may not be supplied by inference. *Scorseby*, 346 S.W.3d at 556. To satisfy the “how and why” requirement, the expert need not prove the entire case or account for every known fact; the report is sufficient if it makes “a good-faith effort to explain, factually, how proximate cause is going to be proven.” *Naderi*, 572 S.W.3d at 781 (quoting *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 460 (Tex. 2017)).

Here, the amended expert report did not, as the majority concludes, “fail to describe an injury Weiner caused.” To the contrary, the expert report outlined the three conditions required for the L5/S1 interlaminar fusion procedure to be medically necessary: instability, malalignment, or the need for extensive decompression, which the expert determined after review of Lashford’s medical records were not conditions exhibited by Lashford prior to the interlaminar fusion procedure performed by Weiner. The expert clearly states in his amended report that the performance of an “unwarranted and inappropriate surgery” was a breach of the standard of care. He further opined that during the course of “performing an unwarranted and inappropriate surgery,” Weiner decorticated Lashford’s spine,

resulting in injuries to Lashford: “It is my opinion to a reasonable degree of medical certainty, that the breach in the standard of care by Dr. Weiner has resulted in pain, the need for ongoing medical care, and physical limitations to Mr. Lashford, which can be expected to continue into the future.” Moreover, the expert detailed Weiner’s attempted spinal fusion at L5/S1, placement of an “experimental” medical device at L5/S1 (with this interspinous spacer later found free-floating in soft tissue), and removal of Lashford’s interspinous ligaments connecting L5/S1. I have found no authority requiring an expert report under section 74.351 to determine the exact nature and extent of damages at the pre-litigation stage of a medical malpractice claim, nor is it a statutory requirement; rather, as here, the breach of the standard of care must be linked to the existing harm. This is not a report that is *ipse dixit*, based merely on the expert’s “say so.” *See Baylor Coll. of Med. v. Davies*, 599 S.W.3d 323, 329–30 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

The majority further concludes “The report provided no explanation for how or why the surgery resulted in pain, medical care, or physical limitations beyond what Lashford would have experienced with no medical intervention for the condition that Lashford already suffered from.” Quoting an opinion from the El Paso Court of Appeals, the majority further avers, “Any recovery for pain and suffering in a medical malpractice case is limited to the additional pain and suffering caused by the improper medical treatment; recovery is not allowed for the normal pain that would have been experienced as part of proper treatment.” *Tenet Hosps. Ltd. v. Bernal*, 482 S.W.3d 165, 170 (Tex. App.—El Paso 2015, no pet.). However, we review the expert report in its entirety, not piecemeal, as the majority suggests. The expert’s report describes the additional surgeries Lashford had to undergo because of Weiner’s unwarranted and inappropriate surgery (the

need for ongoing medical care). It also includes symptoms and clinical findings that were first articulated after the attempted spinal fusion surgery, including left leg pain, persistent disc material left at L5/S1, and an affected nerve root at S1:

8/13/19 Clinic visit, Mark D'Alise, MD

Patient complained of left leg and low back pain. Straight leg was positive on the left side in an S1 distribution. Dr. D'Alise stated that he felt there was persistent disc material left at L5/S1, and that the S1 nerve root was affected, with little evidence of a laminotomy at the L5 level. He saw no evidence of facet diastasis or instability, and recommended bilateral L5/S1 rhizotomies.

Future Implications:

Dr. Weiner performed an attempted L5-S1 fusion for this patient. however more recent imaging

on 9/8/20

9/4/19 Clinic visit, Mark D'Alise, MD (note from Michelle Carlile NP-C)

Patient reports persistent left leg pain. The clinical note is identical except for the addition of a surgical discussion (surgery itself was not listed).

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Future Implications:

Dr. Weiner performed an attempted L5-S1 fusion for this patient, however more recent imaging on 9/8/20 demonstrates that the patient's L5 and S1 vertebrae are not fused together (a nonunion or pseudarthrosis). The patient has had three operations at his L5/S1 level, and his interspinous ligament between L5 and S1 has been excised. This places the patient at an increased risk for instability at the L5/S1 level. If this level becomes unstable in the future, he

As noted above, one doctor, whose records the expert reviewed, also recommended a bilateral L5/S1 rhizotomies (a procedure to remove sensation from painful nerves to treat on-going pain).

The majority's opinion thus subverts the purpose of the act—to reduce purported frivolous lawsuits, *see Scoresby*, 346 S.W.3d at 553, and instead sweeps aside Lashford's non-frivolous claims despite the good faith effort of his expert.

The trial court did not abuse its discretion in denying Weiner's motion to dismiss. For these reasons, I dissent from the majority, and would affirm the order of the trial court denying Weiner's motion to dismiss.

/s/ Margaret “Meg” Poissant
Justice

Panel consists of Justices Wise, Poissant, and Wilson. (Wise, J. Majority).