



**Fourth Court of Appeals
San Antonio, Texas**

MEMORANDUM OPINION

No. 04-19-00780-CV

STONEBROOK MANOR SNF LLC
d/b/a Advanced Rehabilitation & Healthcare of Live Oak,
Appellant

v.

Leticia **MENDOZA**, Individually and On Behalf of the Estate of Hector Chacon,
Appellee

From the 166th Judicial District Court, Bexar County, Texas
Trial Court No. 2019-CI-11033
Honorable Aaron Haas, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 1, 2020

AFFIRMED

Stonebrook Manor SNF LLC d/b/a Advanced Rehabilitation & Healthcare of Live Oak appeals the trial court's order denying its motion to dismiss the underlying health care liability claim filed by Leticia Mendoza, individually and on behalf of the Estate of Hector Chacon. Stonebrook Manor contends the trial court erred in denying its motion because the expert report filed by Mendoza to support her claim: (1) was written by an expert who was not qualified to opine on causation; and (2) failed to adequately address causation. We affirm the trial court's order.

BACKGROUND¹

On January 25, 2018, Hector Chacon, an eighty-nine-year-old resident of Stonebrook Manor's nursing home facility, underwent a swallow study. Because the study revealed symptoms of aspiration, Chacon was admitted to a hospital. A chest x-ray showed left lung lower lobe atelectasis but was otherwise normal. Chacon was diagnosed with dysphagia (difficulty swallowing) and malnutrition. The following day, Chacon successfully underwent a PEG tube placement and experienced no complications.

On February 1, 2018, Chacon was discharged from the hospital back to the nursing home facility. Orders were given to check the placement of Chacon's PEG tube and to check his gastric residuals every shift; however, those orders were not consistently followed.

On February 3, 2018, nursing staff at the facility noted Chacon had continued cough, congestion, and labored breathing at 5:00 a.m. At 7:30 a.m., a physician ordered a chest x-ray. The nursing staff did not complete the order for the chest x-ray or communicate the failure to complete the order to the physician. The nursing staff also did not stop providing the continuous PEG tube feedings to Chacon.

On February 4, 2018, nursing staff noted Chacon was restless and continued to have cough and congestion, his blood pressure was hypotensive, and his respiration rate was elevated to 23 breaths per minute. Because his oxygen levels were low, Chacon received supplemental oxygen. Because Chacon was also vomiting, an order was given to transfer him back to the hospital. EMS arrived at the nursing home facility at 1:23 p.m. At that time, Chacon was in obvious respiratory distress, with respiration at 40+ breaths per minute, and had audibly wet lung sounds. During his transport to the hospital, Chacon stopped breathing and became pulseless.

¹ In keeping with the applicable standard of review, the factual background is based on the four corners of the expert report.

When Chacon arrived at the emergency room at 1:58 p.m., he was in cardiac arrest and was unresponsive without respirations or pulse. Chacon was pronounced dead at 2:10 p.m. His death certificate listed his cause of death as respiratory failure and aspiration.

Mendoza sued Stonebrook Manor alleging its negligence caused Chacon's death. On June 25, 2019, Mendoza timely filed an expert report prepared by Dr. Jonathan Klein. On July 16, 2019, Stonebrook Manor filed objections to the report which were overruled. On September 24, 2019, Stonebrook Manor filed a motion to reconsider its objections and a motion to dismiss, requesting that the trial court dismiss Mendoza's claim with prejudice and award it attorney's fees. The trial court denied Stonebrook Manor's motion.

JURISDICTION

Stonebrook Manor filed this interlocutory appeal pursuant to section 51.014(a)(9) of the Texas Civil Practice and Remedies Code which authorizes an interlocutory appeal from an order denying a motion to dismiss filed under section 74.351(b) of the Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9). Mendoza questions our jurisdiction to consider this appeal, asserting the trial court's order states Stonebrook Manor's motion was denied under section 74.351(l) of the Code.

A health care liability claimant must serve one or more expert reports, with a curriculum vitae for each expert, on each defendant within 120 days after the date the defendant's original answer is filed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). Each defendant whose conduct is implicated by the report "must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived." *Id.*

A defendant who is not served with a timely "expert report," as that term is statutorily defined, may file a motion to dismiss under section 74.351(b) requesting that the claim be

dismissed with prejudice and to be awarded attorney’s fees and costs. *Id.* § 74.351(b); *Lewis v. Funderburk*, 253 S.W.3d 204, 207 (Tex. 2008) (noting dismissal also authorized when inadequate report has been served). A motion to dismiss under section 74.351(b) cannot be granted, however, until the 120-day deadline for filing an expert report set forth in section 74.351(a) has passed. *Lewis*, 253 S.W.3d at 207; *Christus Santa Rosa Health Care Corp. v. Vasquez*, 427 S.W.3d 451, 455 (Tex. App.—San Antonio 2014, no pet.).

Because Stonebrook Manor was served with the expert report on June 25, 2019, it filed objections to the expert report on July 16, 2019;² however, it did not seek a dismissal and attorney’s fees, which is the relief authorized by section 74.351(b). Indeed, Stonebrook Manor had to file its objections within twenty-one days after June 25, 2019, the date it was served with Mendoza’s expert report, or it would have waived its objections. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). Instead, Stonebrook Manor only sought a dismissal and attorneys’ fees in the motion to reconsider and motion to dismiss it subsequently filed on September 24, 2019. And, Stonebrook Manor expressly noted in its motion that it was not setting a hearing on that motion until after the 120-day deadline passed.

Although the trial court’s order, which was entered after the 120-day deadline passed, stated relief was denied under section 74.351(l) of the Code, the motion filed by Stonebrook Manor clearly sought a dismissal with prejudice and attorney’s fees, which relief is only available under section 74.351(b) of the Code. *See Lewis*, 253 S.W.3d at 207–08 (disagreeing with appellate court’s conclusion that motion sought relief under section 74.351(l) and holding appellate court had jurisdiction to consider order denying motion which sought relief authorized by section 74.351(b)). Accordingly, we have jurisdiction to consider this appeal. *Christus Santa Rosa Health*

² Stonebrook Manor filed an answer on June 14, 2019.

Sys. v. Baird, No. 03-14-00521-CV, 2016 WL 462759, at *3–4 (Tex. App.—Austin Feb. 4, 2016, no pet.) (mem. op.) (rejecting jurisdictional argument where defendant timely filed notice of appeal of order denying motion to reconsider and motion to dismiss because prior order was ruling on objections to expert report and not a ruling on a motion to dismiss); *CHCA Mainland, L.P. v. Burkhalter*, 227 S.W.3d 221, 225–26 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (same); *Silsbee Oaks Health Care, L.L.P. v. Melancon*, No. 09-12-00293-CV, 2012 WL 5289372, at *2–3 (Tex. App.—Beaumont Oct. 25, 2012, no pet.) (mem. op.) (same).

SECTION 74.351 AND STANDARD OF REVIEW

When presented with a motion to dismiss a health care liability claim, the trial court must determine whether the expert report ““represents a good-faith effort to comply with the statutory definition of an expert report.”” *Bowie Memorial Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (quoting *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001)). Section 74.351 of the Code defines an expert report as “a written report by an expert that provides a fair summary of the expert’s opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.” TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). “[A]n expert report demonstrates a ‘good faith effort’ when it ‘(1) inform[s] the defendant of the specific conduct called into question and (2) provid[es] a basis for the trial court to conclude the claims have merit.’” *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 223 (Tex. 2018) (quoting *Baty v. Futrell*, 543 S.W.3d 689, 693–94 (Tex. 2018)). In evaluating an expert report, the trial court looks only to the information within the four comers of the report and is prohibited from filling gaps by drawing inferences. *Am. Transitional Care Ctrs. of Tex., Inc.*, 46 S.W.3d at 878; *Diagnostic Research Group v. Vora*, 473 S.W.3d 861, 872 (Tex. App.—San Antonio 2015, no pet.). A trial court must,

however, “view the report in its entirety, rather than isolating specific portions or sections, to determine whether it includes [the required] information.” *Baty*, 543 S.W.3d at 694.

We review the trial court’s decision regarding the adequacy of an expert report under an abuse of discretion standard. *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015). “A trial court abuses its discretion if it rules without reference to guiding rules or principles.” *Id.*

QUALIFICATIONS

In its first issue, Stonebrook Manor contends the trial court abused its discretion in denying the motion to dismiss because Dr. Klein, the expert who prepared the expert report, was not qualified to render opinions regarding the causation element of Mendoza’s claim. Stonebrook Manor specifically asserts Dr. Klein did not have knowledge or experience regarding pulmonary or cardiac issues or in treating infectious disease.

Section 74.351(r)(5) defines who qualifies as an “expert” for purposes of providing an expert report in a health care liability suit. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5). To qualify to give an opinion regarding causation, the expert must be “a physician who is otherwise qualified to render opinions on [causation] under the Texas Rules of Evidence.” *Id.* § 74.351(r)(5)(C). Texas Rule of Evidence 702 provides, “A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion.” TEX. R. EVID. 702. To qualify as an expert on causation, the physician is not required to be employed in the particular field about which he is testifying so long as he can demonstrate that he has knowledge, skill, experience, training, or education “regarding the specific issue before the court which would qualify [him] to give an opinion on that particular subject.” *Broders v. Heise*, 924 S.W.2d 148, 153–54 (Tex. 1996).

In this case, Dr. Klein's report states he is board certified in geriatric and internal medicine. He has a private practice in internal medicine and currently serves as the medical director of a nursing home. He also has served as the medical director of other nursing home and rehabilitation facilities and currently treats patients in the assisted living and nursing home settings. He is "actively practicing medicine and rendering medical care services to elderly patients relevant to the care and treatment provided to" Chacon. Based on his extensive personal experience with nursing home facilities and care, he has experience with the medical care required to be provided to patients with Chacon's diagnoses, including vomiting or emesis, aspiration, shortness of breath, and PEG tube management. He also has knowledge and experience in writing orders for nursing home staff and managing and directing nursing home staff in their care of patients in a nursing home setting as well as evaluating and communicating with nursing staff regarding patient care in the nursing home setting. Specifically, Dr. Klein has knowledge and experience with the types of problems experienced by Chacon and the care required of Stonebrook Manor's nursing staff to prevent such injuries.

Having reviewed the four corners of Dr. Klein's report and curriculum vitae, we hold the trial court did not abuse its discretion in concluding Dr. Klein is qualified to opine on causation in this case. Stonebrook Manor's first issue is overruled.

CAUSATION

In its other two issues, Stonebrook Manor contends the trial court abused its discretion in denying the motion to dismiss because Dr. Klein's report does not provide a fair summary of the causal relationship between the breaches of the standard of care summarized in the report and the damages claimed. Specifically, Stonebrook Manor contends Dr. Klein's opinion as to causation is speculative with regard to timing and the nature of the actions that would have been taken and also assumes earlier intervention would have changed the outcome.

In providing a fair summary as to causation, an expert must “explain ‘how and why’ the alleged negligence caused the injury in question.” *Abshire*, 563 S.W.3d at 224. “A conclusory statement of causation is inadequate; instead, the expert must explain the basis of his statements and link conclusions to specific facts.” *Id.* “In satisfying this ‘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.” *Id.* (internal quotation marks omitted). Stated differently, an expert may establish causation “by explaining a chain of events that begins with a defendant healthcare provider’s negligence and ends in injury to the plaintiff.” *Premieant Inc. v. Snowden ex rel. Snowden*, No. 04-19-00238-CV, 2020 WL 1159055, at *8 (Tex. App.—San Antonio Mar. 11, 2020, no pet.) (mem. op.) (internal quotation marks omitted). As previously noted, “an expert report does not require litigation-ready evidence” and “does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial.” *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630–31 (Tex. 2013).

Dr. Klein opines in his report that Stonebrook Manor breached the standard of care when the nursing staff failed to inform the physician of the failure to complete the chest x-ray ordered on February 3, 2018. Dr. Klein states this breach was confirmed by a state investigation that concluded Stonebrook Manor provided deficient care by failing to provide radiology services for Chacon in a timely manner.

With regard to causation, Dr. Klein opines that a timely x-ray would likely have shown an acute finding of aspiration at which point Chacon would have been transferred to the hospital. Dr. Klein supports this opinion with the following facts: (1) Chacon’s symptoms of coughing, congestion, and shortness of breath on February 3, 2018, were consistent with aspiration pneumonia; (2) aspiration pneumonia is a known risk of a PEG tube; and (3) Chacon’s vomiting

or emesis on February 4, 2018 was further evidence that he was suffering aspiration pneumonia. Dr. Klein further opines that if the nursing staff notified the physician of the failure to complete the chest x-ray, the physician would have likely ordered Chacon to be transferred to the hospital to complete the x-ray. Based on the likely x-ray results, Dr. Klein opines Chacon would have been transferred to the hospital if he had not already been transferred to the hospital to complete the x-ray. At the hospital, Dr. Klein opines Chacon would have received antibiotics and close monitoring and the PEG tube feedings would have been stopped which likely would have prevented the vomiting or emesis on February 4, 2018. Dr. Klein further opines that if Chacon had not vomited on February 4, 2018, he would not have further aspirated emesis and would not have suffered the acute respiratory failure and cardiac arrest on the afternoon of February 4, 2018.

Dr. Klein's opinion on causation is similar to an expert opinion the Texas Supreme Court held to be sufficient in *Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510 (Tex. 2017). In *Miller*, the intermediate court of appeals "found Dr. Naegar's opinion insufficient because he stated only that the failure to timely remove the foreign body 'can' lead to aspiration, which 'can' be deadly." 536 S.W.3d at 515. The Texas Supreme Court first noted the intermediate court's "reading fail[ed] to credit the entirety of Dr. Naegar's report," asserting

Dr. Naegar also stated his interpretation of the x-rays was "consistent with the conditions stated in the death certificate as the cause of Hathcock's death." In relevant part, Dr. Naegar noted the death certificate's "diagnosis of 'aspiration' ... is demonstrated on [Metrostat's x-ray] in which a foreign object is noted in the airway, consistent with a foreign body aspiration." Read in context, Dr. Naegar opined that aspiration can be deadly and that it was deadly in this case.

Id.; see also *Van Ness*, 461 S.W.3d at 144 (reversing intermediate court's holding that expert report was insufficient and noting intermediate court "did not credit statements and opinions from Dr. Jaffee's report to the effect that (1) a stage existed at which pertussis could be treated with antibiotics; (2) if Dr. Ault had given Nicholas antibiotics prophylactically and ordered testing, the

tests would have shown his pertussis was at a treatable stage; and (3) Nicholas would have had a 51% chance of recovery if Dr. Ault had started Nicholas on prophylactic antibiotics and continued antibiotics as indicated by results of the tests.”).

In this case, Dr. Klein explained “how and why” a timely chest x-ray would have changed Chacon’s outcome, and his opinion was supported by the underlying facts regarding Chacon’s medical condition. *See Abshire*, 563 S.W.3d at 224. His opinion regarding Chacon’s cause of death was also supported by Chacon’s death certificate. *See Miller*, 536 S.W.3d at 515. Finally, Dr. Klein “explain[ed] [the] chain of events” that began with the nursing staff’s failure to follow the physician’s order or inform the physician of the failure to complete the chest x-ray and ended in Chacon’s death. *See Premieant Inc.* 2020 WL 1159055, at *8.

Having reviewed the entire report, we hold the trial court did not abuse its discretion in concluding the report provided a fair summary of the causal relationship between the nursing staff’s failure and Chacon’s death. Although Dr. Klein’s report detailed how other breaches of the applicable standards of care by Stonebrook Manor also caused Chacon’s death, we need not address the issue further because “[i]f a health care liability claim contains at least one viable liability theory, as evidenced by an expert report meeting the statutory requirements, the claim cannot be frivolous,” and a plaintiff has the “right to have the entire case move forward.” *Potts*, 392 S.W.3d at 631. Stonebrook Manor’s remaining issues are overruled.

CONCLUSION

The trial court’s summary judgment is affirmed.

Irene Rios, Justice