

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-08-240 CV

MATTHEW M. HOGAN, Appellant

V.

LORI CUNNINGHAM PINTO, Appellee

**On Appeal from the 9th District Court
Montgomery County, Texas
Trial Cause No. 07-09-09321-CV**

MEMORANDUM OPINION

Appellee Lori Cunningham Pinto sued appellant Matthew M. Hogan and other defendants for alleged medical malpractice. Hogan filed a motion to dismiss that challenged appellee's expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(*I*) (Vernon Supp. 2008). The trial court denied Hogan's motion to dismiss. We reverse and remand.

BACKGROUND

Pinto alleged in her original petition that she underwent a laparoscopic assisted hysterectomy performed by Drs. Young and Francis at Memorial Hermann The Woodlands

Hospital. Pinto also alleged that she was readmitted six days later with extreme pain, nausea, and vomiting, and her physicians determined that her right ureter was obstructed. According to Pinto's petition, Dr. Hogan unsuccessfully attempted to unblock her right ureter by inserting a wire from the bladder up toward the kidney. A nephrostomy tube was inserted into the kidney ". . . to allow it to drain." In her petition, Pinto contended she was then discharged with "medication for intense pain[,] and her physicians ultimately "determined that the ureter had been sewn shut during the laparoscopic assisted hysterectomy performed by Defendants Young and Francis." Pinto's petition alleged that she underwent a successful surgery at Methodist Hospital to break the suture, and that she was admitted to Methodist Hospital on three additional occasions to have her bladder irrigated, to have the catheter removed from her bladder, and "to have a ureteral stent inserted and the nephrostomy tube removed."

Pinto's petition alleged as follows with respect to the care provided by Hogan:

In addition to relying on general acts of negligence by Defendant Mathew M. Hogan, M.D. for submission of this case to the jury, Plaintiff would point out several specific acts of negligence based on information provided and gathered to date, and subject to further discovery and amendment, if necessary, as discovery progresses.

With her original petition, Pinto filed a two-page expert report by Rodney A. Appell, M.D., FACS. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351. Hogan filed an objection to Appell's report, in which he argued that the report did not demonstrate Appell's

qualifications to opine concerning the standard of care applicable to Hogan in his treatment of Pinto; that the report fails to identify particular physicians; and the report's statement of causation was speculative and conclusory. The trial court entered an order sustaining Hogan's objections to the expert report, and Pinto filed an amended report by Appell. The amended expert report alleged as follows, in pertinent part:

The delay in management in this case for over one month resulted in bringing the patient to Methodist Hospital on August 16 to attempt to pass a universal stent, which failed. August 24th she then urinated blood clots and returned to the emergency room, has [sic] her bladder irrigated and was admitted to the hospital again. August 26th the catheter was removed from the bladder and she voided more clots and the nephrostomy tube was set to straight drainage again and she was discharged. She returned to radiology at Methodist Hospital on September 12, 2005, and under conscious sedation an 8.5 French double-J ureteral stent was successfully passed from the nephrostomy site past the obstruction into the bladder and was deployed in the kidney and nephrostomy was removed. . . .

It is my opinion that after the obstruction could not be passed from below or above in early July and the patient was continuing to have substantial discomfort a risk was taken to leave the ureter ligated and waiting for the suture to dissolve when there was no guarantee that the blood supply to the ureter would not have been compromised resulting in significant risk to the kidney and a [sic] open or laparoscopic repair of the ureter should have been offered to the patient. The patient was not properly informed of the options to care for this problem and the patient's renal function on the right side was compromised with ultimate risk of the patient to right kidney loss. Simply waiting for the suture to dissolve over an extended period of time created an undue risk for the health and safety of the patient.

. . . .

The subsequent medical treatment following the patient's initial hysterectomy was the direct result of having stitched the ureter closed originally. This breach can then be extended to the post-operative management of the patient by Dr. Young, Dr. Francis, and Dr. Hogan, as all forms of management including surgical repair of the damaged ureter does not [sic] seem to have been discussed with the patient. Multiple tests had been performed which clearly showed a complete obstruction of the right ureter. However, the patient was not given the option of a surgical procedure that would . . . have prevented the multiple subsequent procedures she underwent resulting in the prolonged discomfort she endured. The appropriate standard of care in treating a patient with a complete ureteral obstruction would be to inform the patient of both invasive and non-invasive procedures, including procedures that would immediately determine the cause of the obstruction such as simply opening the area to visual examination. This option was not given to [the] patient thus breaching the standard of care and making further medical treatment unnecessary [sic].

After Appell provided the amended expert report, Hogan filed a motion to dismiss, in which he asserted that the amended report was conclusory because it fails to describe how he was involved in Pinto's care or why he had a duty to advise Pinto of surgical options; that the causation opinion in the amended report was conclusory and "based on assumptions and inferences that are not supported by the medical facts stated in the report;" and that the amended report "provides no information or basis for the Court to conclude there is merit to a number of Plaintiff's claims." The trial court entered an order denying Hogan's motion to dismiss, and Hogan then filed this accelerated interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008).

HOGAN'S THIRD ISSUE

In his third issue, Hogan asserts the trial court erred by “determining that appellee’s expert’s amended report provided a sufficient factual basis and explanation of how Dr. Hogan, as opposed to other defendants, caused appellee’s damages because the expert’s opinion on causation is conclusory, lacks a factual basis, and is based on assumptions unsupported by the facts in the report.” Because this issue is dispositive, we address it first.

We review a trial court’s decision regarding the adequacy of an expert report under an abuse of discretion standard. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001). “A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles.” *Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). A trial court also abuses its discretion if it fails to analyze or apply the law correctly. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

A plaintiff asserting a healthcare liability claim must provide each defendant physician and healthcare provider with an expert report no later than the 120th day after filing suit.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2008). The statute defines

“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). If a plaintiff furnishes the required report within the time permitted, the defendant may file a motion challenging the report.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l).

The statute provides that 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 definition of an expert report in Subsection (r)(6).” *Id.* When determining whether the report represents a good-faith effort, the trial court’s inquiry is limited to the four corners of the report. *Wright*, 79 S.W.3d at 53; *Palacios*, 46 S.W.3d at 878. To constitute a good-faith effort, the report “must discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit.” *Palacios*, 46 S.W.3d at 875. When a plaintiff sues more than one defendant, the expert report must set forth the standard of care for each defendant and explain the causal relationship between each defendant’s individual acts and the injury. *See Doades v. Syed*, 94 S.W.3d 664, 671-72 (Tex. App.--San Antonio 2002, no pet.); *Rittmer v. Garza*, 65 S.W.3d 718, 722-23 (Tex. App.--Houston [14th Dist.] 2001, no pet.); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (r)(6) (A claimant must provide each defendant with an expert report that sets forth the manner in which the care rendered failed to meet the standards of care and the causal relationship between that failure and the injuries

claimed.). A report that omits any of the statutory elements is not a good-faith effort. *Palacios*, 46 S.W.3d at 879.

Appell's amended report states that the standard of care required all of Pinto's physicians, regardless of their level of involvement in her operative or post-operative care, to fully inform Pinto of her surgical options, and the report then states that "all forms of management including surgical repair of the damaged ureter does [sic] not seem to have been discussed with the patient." However, the amended report does not link its conclusion to the facts, in that it does not explain the factual basis for the conclusion that surgical options did not "seem to have been discussed" with Pinto. *See Wright*, 79 S.W.3d at 52; *Nelson v. Ryburn*, 223 S.W.3d 453, 456 (Tex. App.--Amarillo 2006, no pet.) (Report that stated that physician's failure to perform a proper pre-operative medical evaluation of patient proximately caused patient's death during surgery and anesthesia was conclusory because its conclusions were not linked to the facts of the case.).

In addition, the report fails to explain the causal relationship between Hogan's treatment of Pinto and the alleged injuries, as opposed to the treatment provided by Pinto's other healthcare providers. *See Doades*, 94 S.W.3d at 671-72; *Rittmer*, 65 S.W.3d at 722-23; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (r)(6). Because of these inadequacies, the report does not meet the requirements of the statute, and it does not provide a basis for the trial court to determine that Pinto's claims have merit. *See* TEX. CIV. PRAC.

& REM. CODE ANN. § 74.351(r)(6); *Palacios*, 46 S.W.3d at 875, 879. Therefore, the trial court abused its discretion in failing to dismiss Pinto’s claims. We sustain issue three. We need not address Hogan’s remaining issues, since they would not result in greater relief. *See* TEX. R. APP. P. 47.1. Accordingly, we reverse the trial court’s order denying Hogan’s motion to dismiss and remand this cause to the trial court for further proceedings consistent with this opinion. *See id.* § 74.351(b).

REVERSED AND REMANDED.

STEVE McKEITHEN
Chief Justice

Submitted on August 21, 2008
Opinion Delivered October 9, 2008

Before McKeithen, C.J., Gaultney and Kreger, JJ.

DISSENTING OPINION

I respectfully dissent. The report states that “a[n] open or laparoscopic repair of the ureter should have been offered to the patient. The patient was not properly informed of the options to care for this problem and the patient’s renal function on the right side was compromised with ultimate risk of the patient to right kidney loss.” Dr. Hogan was treating a patient with a complete obstruction. The report expresses the opinion that he breached the standard of care by not informing the patient of the option of a procedure “that would

immediately determine the cause of the obstruction such as simply opening the area to visual examination.” I think the report can only be read as indicating the appropriate medical treatment should have been to repair the ureter, though the patient should make the decision, and if that had been done in July, the subsequent unsuccessful medical treatment and compromised renal function would not have occurred. No one questions the qualifications of the expert to express these opinions. The report adequately informs the defendant of the specific conduct that is thought to have caused harm, and is sufficient to allow the claim to proceed. I see no abuse of discretion by the trial court in denying the motion to dismiss based on the report presented.

DAVID GAULTNEY
Justice

Dissent Delivered
October 9, 2008