

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-08-299 CV**

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**JEROME C. YOUNG, MARRA S. FRANCIS, AND  
OBSTETRICS AND GYNECOLOGY OF THE WOODLANDS, Appellants**

**V.**

**LORI CUNNINGHAM PINTO, Appellee**

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

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**MEMORANDUM OPINION**

Appellee Lori Cunningham Pinto sued appellants Jerome C. Young, Marra S. Francis, and Obstetrics and Gynecology of the Woodlands (“OGW”) for alleged medical malpractice. Appellants filed objections to Pinto’s amended expert report and moved to dismiss Pinto’s claim based upon the report’s various alleged inadequacies. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(*l*) (Vernon Supp. 2008). The trial court denied appellants’ motion to dismiss. Appellants then filed this accelerated interlocutory appeal, in which they raise four

issues for our consideration. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008). We affirm.

#### BACKGROUND

Pinto alleged in her original petition that on July 5, 2005, she underwent a laparoscopic-assisted hysterectomy performed by Drs. Young and Francis at Memorial Hermann The Woodlands Hospital. On July 7, 2005, Pinto was discharged. Pinto's petition also alleged that Young and Francis were employees of OGW. Pinto's petition further alleged that she was readmitted July 11, 2005, with extreme pain, nausea, and vomiting, and her physicians determined that her right ureter was obstructed. According to Pinto's petition, another physician attempted to unblock her right ureter by inserting a wire from the bladder up toward the kidney, but that procedure was unsuccessful, so "a nephrostomy tube was inserted into the kidney . . . to allow it to drain." In her petition, Pinto contended that 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 ultimately underwent a successful surgery at Methodist Hospital to break the suture, and that she was admitted to Methodist Hospital on several other 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 that Drs. Young and Francis were negligent because they:

- (a) fail[ed] to properly inform [Pinto] of the risks associated with a hysterectomy and to remove blockage from [her] ureter;
- (b) breach[ed] the standard of care in the performance of a hysterectomy;
- (c) breach[ed] the standard of care for treatment of a surgical patient;
- (d) breach[ed] the standard of care for the follow-up treatment of a surgical patient;
- (e) breach[ed] the standard of care for diagnosing post-surgical complications of a surgical patient;
- (f) fail[ed] to take precautions to minimize the risk of untimely treatment;  
and
- (g) violat[ed] the policies and procedures governing the proper administration of treating surgical patients.

In addition, Pinto alleged that OGW was liable for the alleged negligence of Drs. Young and Francis under the doctrine of *respondeat superior*. 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 (Vernon Supp. 2008). Appellants filed an objection to Appell's report, in which they argued that Appell's report did not establish that he is qualified to render opinions on causation and liability, and that the report (1) failed to sufficiently identify duty, standard of care, and breach of the standard of care as to each defendant; (2) failed to provide a sufficient factual basis for Appell's opinions and did not link his conclusions to the facts;

(3) failed to inform each defendant with sufficient specificity of the conduct plaintiff had called into question; (4) failed to discuss the elements of medical negligence with sufficient specificity to provide a basis for the trial court to conclude that the claims have merit; and (5) provided opinions that were “speculative, conclusory, vague, and assume facts.”

The trial court sustained appellants’ objections, and Pinto then filed an amended report by Appell. Appell’s amended report alleged as follows, in pertinent part:

Lori C. Pinto . . . underwent a laparoscopic-assisted hysterectomy and left salpingo-oophorectomy on July 5, 2005, as performed by Dr. Jerome C. Young and Dr. Marra S. Francis. Post-operatively she was readmitted on the 5<sup>th</sup> postoperative day with right flank pain and fever. Her creatinine was 1.1. She had a CT scan performed, which demonstrated distal right ureteral obstruction with no obvious stone as a cause but significant right hydroureter. An IVP demonstrated obstruction 4cm away from the right ureterovesical junction with surgical clips noted in the area but about 2cm away from the distal right ureteral obstruction. Appropriate urological consultation was obtained and attempted cystoscopy and failed right ureteral catheterization and stenting took place so that radiology was consulted and a percutaneous nephrostomy tube was placed without difficulty. Patient defervesed and was discharged on July 14. Medical tests ruled out a kidney stone, infection, calcification, and abnormal lab results. The conclusion was that a suture was obstructing the ureter and this would eventually dissolve and allow the ureter to become unobstructed again. It is my contention as an expert in the field of female urology and gynecology that this was very risky with a complete obstruction of the ureter.

. . . .

The documents reviewed for this report include all medical and surgical records of Lori Cunningham Pinto relating to the surgery performed on July 5, 2005, and thereafter. 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 24<sup>th</sup> she then urinated blood clots and returned to the emergency room, ha[d] her bladder irrigated and was admitted to the hospital again. August 26<sup>th</sup> 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 [the] nephrostomy was removed. I do not see in the records how long the stent was left in place and when it was removed and how the renal unit and obstruction is currently.

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[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 [to] the patient [of] 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 breach of the standard of care by Dr. Young and Dr. Francis was firstly, ligating the ureter which is not a portion of the surgical technique for hysterectomy. Having stitched the ureter completely closed during the performance of a routine hysterectomy falls below the standard of care to be expected in such a procedure. Had it not been for this act, the patient would have never had to undergo further medical treatment. 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 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, appellants filed a supplemental motion to dismiss, in which they incorporated their original objections and also argued that Appell's report does not satisfy the requirements of Chapter 74 and *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875-79 (Tex. 2001); Appell's report "attempts to impute negligence based on results alone[;]" and Appell was required to serve an expert report "as to entity defendant" OGW. The trial court denied appellants' objections and motion to dismiss, and appellants then filed this appeal.

#### STANDARD OF REVIEW

We review a trial court's decision regarding the adequacy of an expert report under an abuse of discretion standard. *Palacios*, 46 at 877. "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).

## ISSUE ONE

In their first issue, appellants contend that the trial court erred by determining that Appell is qualified to render liability and causation opinions against appellants.<sup>1</sup> Specifically, appellants argue that while Appell is an urologist, Young and Francis are gynecologists, and that because Appell's report states that all of the hysterectomies he performs involve uterine prolapse, Appell is not qualified to opine regarding Pinto's laparoscopic-assisted hysterectomy and left salpingo-oophorectomy. Appellants argue that this Court "cannot assume that [Pinto's] two procedures were included in the types of hysterectomies which Dr. Appell claims he has performed."

With respect to his qualifications, Appell's report provides as follows, in pertinent part:

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<sup>1</sup> Pinto argues that appellants did not timely assert their objections to Appell's qualifications because they did not file their objections until January 30, 2008. However, the record reflects that on September 14, 2007, Pinto filed her expert report contemporaneously with her original petition, and that Pinto served Appell's curriculum vitae upon appellants no later than November 19, 2007. Appellants filed both an answer and objections to the expert report on October 12, 2007, and appellants' objections included a complaint that Appell was not qualified to render an expert opinion as to appellants. Therefore, we hold that appellants timely asserted their objections to Appell's qualifications. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2008) ("Each defendant physician . . . whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.").

I am currently professor in both departments of urology (primarily) and gynecology at Baylor College of Medicine. I graduated from Jefferson Medical College in Philadelphia in 1973, then had my surgery training at George Washington University Medical Center followed by my urological training at Yale. Following my residency . . . I went on the staff at Louisiana State University Medical Center in New Orleans where I worked with and taught gynecologists, thus learning that field while teaching urogynecology to the gynecologists. . . . I am a clinical researcher as well as active clinician in female urology and gynecology. I have written text books, authored hundreds of peer reviewed papers, and won numerous academic awards. With respect to hysterectomies, I am one of the few urologists in the country performing them both vaginally and transabdominally. Since 1993[,] I perform approximately 12/year. They are all associated with prolapse. If there is pathology in the uterus I transfer the patients to a general or oncologic gynecologist in the presence of a diseased uterus. Based on my education and experience, I am qualified to offer medical opinions in this case.

The documents reviewed for this report include all medical and surgical records of Lori Cunningham Pinto relating to the surgery performed on July 5, 2005, and thereafter.

A person who offers an opinion concerning breach of the standard of care in a health care liability claim must qualify as an expert under section 74.402 of the Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402 (Vernon 2005). To offer an opinion regarding whether the health care provider departed from accepted standards of care, a person must:

(1) [be] practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;

(2) ha[ve] knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and



(3) [be] qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.

*Id.* § 74.402(b).

Section 74.402(c) provides as follows:

In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other substantial training or experience, in the area of health care relevant to the claim; and

(2) is actively practicing health care in rendering health care services relevant to the claim.

*Id.* § 74.402(c).

For purposes of section 74.402, “practicing health care” includes:

(1) training health care providers in the same field as the defendant health care provider at an accredited educational institution; or

(2) serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider.

*Id.* § 74.402(a).

A physician need not be a practitioner in the same specialty as a defendant to qualify as an expert. *See Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). “Under the Rules of Evidence, the test is whether the offering party has established that the expert has knowledge, skill, experience, training, or education on the specific issue before the court.” *Reddy v.*

*Seale*, No. 09-07-372 CV, 2007 WL 5011608, at \*3 (Tex. App.-- Beaumont Mar. 20, 2008, no pet.) (mem. op.) (citing TEX. R. EVID. 702; *Broders*, 924 S.W.2d at 153; and *Roberts v. Williamson*, 111 S.W.3d 113, 121 (Tex. 2003)).

Appellants contend in their brief that Appell is not qualified to render an opinion as to the standard of care applicable to them because Pinto's hysterectomy did not involve prolapse, and while Young and Francis are gynecologists, Appell is an urologist. A review of the appellate record, including Pinto's petition, Appell's report, appellants' answer, and appellants' objections and supplemental objections to Appell's report, does not reveal the specific medical condition that necessitated Pinto's surgery.<sup>2</sup> In their supplemental objections to Appell's report, appellants simply made the same argument they assert on appeal, *i.e.*, that Pinto's condition did not involve prolapse. Appell's report states that he performs hysterectomies "both vaginally and transabdominally" approximately twelve times per year solely in cases involving prolapse. However, assuming *arguendo* that Pinto's condition did not involve prolapse, we are unpersuaded by appellants' argument that because Appell specialized in performing hysterectomies on patients suffering from prolapse, he is unqualified to render an opinion concerning the standard of care in this case.

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<sup>2</sup> The appellate record does not include any of Pinto's medical records. In their supplemental objections, appellants stated that Pinto's uterus was "diseased" without further explanation.

Appell's report states that after graduating from Jefferson Medical College, he trained as a surgeon and then received urological training. In addition, Appell's report states that while he was on staff at Louisiana State University Medical Center, he "worked with and taught gynecologists, thus learning that field while teaching urogynecology to the gynecologists." At one point, Appell's report refers to the field of "urogynecology," which strongly suggests that the specialties of female urology and gynecology are often interrelated. Furthermore, Appell's report explains that he is a professor in both urology and gynecology at Baylor College of Medicine, and that he is both "a clinical researcher as well as active clinician in female urology and gynecology."

Appellants cite this Court's opinion in *Talmore v. Baptist Hosps. of S.E. Tex.*, No. 09-06-024 CV, 2006 WL 2883124 (Tex. App.--Beaumont Oct. 12, 2006, no pet.) as support for their argument that Appell is unqualified because his report does not state that he performed the particular type of hysterectomy and oophorectomy that Pinto underwent. In *Talmore*, the decedent suffered from several conditions, including hypertension, congestive heart failure, diabetes, and an abdominal aortic aneurysm, and she therefore received treatment from numerous doctors from disparate specialties, including an orthopedic surgeon, an infectious disease specialist, a cardiologist, a pulmonologist, a nephrologist, and a gastroenterologist. *Id.* at \*\*1-3. The expert reports in *Talmore* applied the same standard of care to the various specialists, as well as to the hospital. *Id.* at \*2. In the case *sub judice*, Appell, who practices

both urology and gynecology, opined concerning the standard of care applicable to the appellant gynecologists who performed Pinto's surgery. Hence, *Talmore* is inapposite.

Appellants also cite *Broders*. In *Broders*, the decedent, who had been assaulted, received treatment from three emergency physicians. *Broders*, 924 S.W.2d at 149-50. The plaintiffs called another emergency room physician, Dr. Condo, to testify at trial regarding the standard of care, breach of the standard of care, and causation. *Id.* at 150-51. Condo testified that the physicians' failure to properly diagnose and treat the decedent's head trauma caused her death. *Id.* at 151. The trial court sustained the defendants' objections to Condo's testimony on causation. *Id.* On appeal, the Supreme Court held that the plaintiffs failed to establish that "Condo's opinions on cause in fact would have risen above mere speculation to offer genuine assistance to the jury." *Id.* at 153. However, *Broders* does not hold that an expert must have performed the particular procedure at issue. *Id.* at 153-54. In fact, the *Broders* court explained that its

holding does not mean that only a neurosurgeon can testify about the cause in fact of death from an injury to the brain, or even that an emergency room physician could never so testify. What is required is that the offering party establish that the expert has "knowledge, skill, experience, training, or education" regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.

*Id.* at 153. Therefore, *Broders* does not support appellants' argument.

With the exception of *Talmore* and *Broders*, appellants cite no authorities in support of their contention that Appell's report must demonstrate that he has performed the particular

type of hysterectomy that Young and Francis performed on Pinto and, as previously discussed, *Talmore* and *Broders* do not so hold. *See* TEX. R. APP. P. 38.1(h).

We hold that Appell's credentials as set forth in his report qualify him as an expert under sections 74.402(a), (b), and (c); therefore, the trial court did not err by overruling appellants' objection to Appell's qualifications. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402(a), (b), (c). Accordingly, we overrule issue one.

#### ISSUES TWO AND FOUR

In issue two, appellants contend that the trial court erred by determining that Appell's report met the requirements of Chapter 74 and *Palacios*. In issue four, appellants argue the trial court erred by determining that Appell's report provided a basis to conclude that Pinto's claims have merit. We address these issues together.

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). 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.

*Id.* § 74.351(r)(6). If a plaintiff furnishes the required report within the time permitted, the defendant may file a motion challenging the report. *Id.* § 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.); *see also* 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. However, an expert report need not marshal all of the plaintiff’s proof. *Wright*, 79 S.W.3d at 52.

Appellants argue that Appell's report is speculative, conclusory, assumes facts, and fails to explain the basis of his statements and to link his conclusions to the facts. Appellants also argue that the report fails to state the standard of care as to appellants and how appellants breached the standard of care, and that Appell assumes that appellants Young and Francis stitched the ureter closed. Appell's report stated that both Young and Francis performed Pinto's surgery. Appell stated in the report that the medical records reveal that Pinto's physicians concluded "that a suture was obstructing the ureter and this would eventually dissolve and allow the ureter to become unobstructed again." Appell's report does not assume that the ureter was ligated; rather, the report explicitly states that Pinto's post-operative evaluation led to that diagnosis.

In addition, the report stated that appellants breached the standard of care by "ligating the ureter which is not a portion of the surgical technique for hysterectomy." The report further explains that the subsequent medical treatment Pinto required "was the direct result of having stitched the ureter closed originally." Appell opines in the report that "[t]he 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." Appell's report states that appellants' failure to discuss "all forms of management including surgical repair of the damaged ureter" with Pinto breached

the standard of care and necessitated further medical treatment, which caused “prolonged discomfort” and compromised renal function. A laparoscopic-assisted hysterectomy and left salpingo-oophorectomy involves the surgical removal of certain female reproductive organs, yet Pinto’s petition alleges that during her surgery, Young and Francis ligated her ureter, which is not one of the female reproductive organs.<sup>3</sup> We hold that under the particular facts and circumstances presented here, the report adequately stated the standard of care and how appellants’ conduct breached the standard. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). Furthermore, we hold that Appell’s report discussed the standard of care, breach, and causation with sufficient specificity to inform appellants of the conduct Pinto has called into question and to provide a basis for the trial court to conclude that the claims have merit. *See Palacios*, 46 S.W.3d at 875; *see also Doades*, 94 S.W.3d at 671-72; *Rittmer*, 65 S.W.3d at 722-23. We overrule issues two and four.

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<sup>3</sup> “Hysterectomy” is defined as the surgical removal of the uterus. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1117 (2002). “Oophorectomy” is defined as “ovariectomy,” and “ovariectomy” is defined as the surgical removal of an ovary. *Id.* at 1578, 1605. With respect to the female reproductive system, “salpingo-” refers to the fallopian tube. *Id.* at 2005. “Salpingo-oophorectomy” is defined as “excision of a fallopian tube and an ovary[.]” *Id.* “Ureter” is defined as “either of the paired ducts that carry away urine from a kidney to the bladder[.]” *Id.* at 2521.



### ISSUE THREE

In their third issue, appellants argue that Appell was required to serve an expert report as to OGW. As previously discussed, Pinto's petition alleged that Young and Francis were employees of OGW, and that OGW was therefore liable for the alleged negligence of Young and Francis under the doctrine of *respondeat superior*. Pinto's claims against OGW involve only OGW's vicarious liability for the actions of Young and Francis, since professional entities cannot practice medicine. See *Hiner v. Gaspard*, No. 09-07-240 CV, 2007 WL 2493471, at \*5 (Tex. App.--Beaumont Sept. 6, 2007, pet. denied); *Univ. of Tex. Sw. Med. Ctr. v. Dale*, 188 S.W.3d 877, 879 (Tex. App.--Dallas 2006, no pet.); *In re CHCA Conroe, L.P.*, No. 09-04-453 CV, 2004 WL 2671863, at \*1 (Tex. App.--Beaumont Nov. 23, 2004) (orig. proceeding) (mem. op.); *Clements v. Conard*, 21 S.W.3d 514, 522-23 (Tex. App.--Amarillo 2000, pet. denied). The conduct of OGW is not measured by a medical standard of care; rather, the basis of those entities' liability involves legal principles. See *In re CHCA Conroe, L.P.*, 2004 WL 2671863, at \*1. Therefore, Pinto was not required to provide an additional expert report as to OGW. See *id.*; see also *Hiner*, 2007 WL 2493471, at \*5. Accordingly, we overrule issue three and affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN  
Chief Justice

Submitted on October 23, 2008  
Opinion Delivered November 26, 2008  
Before McKeithen, C.J., Gaultney and Kreger, JJ.