

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-09-00211-CV

VALORIE MARIE GINGRICH, BRUCE V. GINGRICH, LIFECHek CONROE PARTNERS, LTD., LIFECHek CONROE, INC., UNIMED MEDICAL CLINIC, LLC D/B/A UNIMED MEDICAL CLINIC, BEAUMONT AND JOHN EDWARD PERRY, III, Appellants

V.

KEN SCARBOROUGH AND ESTHER SCARBOROUGH, EACH INDIVIDUALLY AND AS REPRESENTATIVES OF THE ESTATE OF CHRISTOPHER F. SCARBOROUGH, Appellees

**On Appeal from the 60th District Court
Jefferson County, Texas
Trial Cause No. B-182,457**

MEMORANDUM OPINION

Valorie Marie Gingrich, Bruce V. Gingrich, LifeChek Conroe Partners, Ltd., and LifeChek Conroe, Inc. (collectively “Pharmacy Defendants”), along with Unimed Medical Clinic, LLC d/b/a Unimed Medical Clinic, Beaumont, and John Edward Perry III, M.D. (collectively “Prescribing Defendants”) appeal the denial of their motions to dismiss the health care liability claims asserted by Ken Scarborough and Esther

Scarborough, individually and as representatives of the Estate of Christopher Scarborough.¹ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon Supp. 2009). We hold that the trial court erred. As to the Pharmacy Defendants, we reverse and remand for consideration of their request for attorney's fees. As to the Prescribing Defendants, we reverse and remand for consideration of the Scarboroughs' request to cure the deficiency in their expert's report.

The Scarboroughs' petition alleges that on September 18, 2007, Kelly Lock, a physician's assistant working under the supervision of Dr. Perry at Unimed Medical Clinic in Beaumont, Texas, prescribed Soma, Lorcet, and Xanax for 25-year-old Christopher Scarborough. The petition alleges the medications were excessive and medically unnecessary. That same day, Christopher filled the prescription for the three medications at a LifeChek pharmacy in nearby Port Arthur, Texas. According to the petition, Christopher had never used that pharmacy before and the medications were excessive and medically unnecessary. The petition states that Christopher died on September 23, 2007, from accidental death caused by combined drug toxicity and pulmonary edema. The Scarboroughs allege that as a result of the defendants' negligence, Christopher Scarborough suffered injuries to his body that ultimately led to his death.

¹ These appeals have been severed from the appeal of Kelly Lock, P.A., which has been abated due to bankruptcy. *See* TEX. R. APP. P. 8.

The Scarboroughs provided expert reports from a physician, Andrea M. Trescot, M.D., a physician's assistant, Teresa F. Corley, PA-C, and two registered pharmacists, James O'Donnell, R.Ph., and Lester Williams, R.Ph. The Pharmacy Defendants objected to the reports of Trescot, O'Donnell, and Williams and moved for dismissal. Perry objected to Trescot's report and moved for dismissal. The trial court denied the defendants' objections and motions to dismiss.

The Pharmacy Defendants raise four issues in their brief: (1) failure to include a qualified expert's opinion on causation; (2) failure to provide a fair summary of the expert's opinion on the standard of care, breach, and causation; (3) failure to identify at least one standard of care that was breached and was also the cause of death; and (4) trial court error in failing to dismiss the claims with prejudice. The Prescribing Defendants adopted the brief of the Pharmacy Defendants.

Appellants complain that the reports are insufficient because they fail to provide a fair summary of the experts' opinions on the standard of care, breach, and causation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). To constitute a good-faith effort to satisfy the report requirement, the expert report must discuss the standard of care, breach, and causation with sufficient specificity to inform the defendant of the conduct the plaintiffs have called into question and to provide a basis for the trial court to conclude that the claims have merit. *Leland v. Brandal*, 257 S.W.3d 204, 207 (Tex. 2008); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001). The

requirements of Section 74.351 may be met by serving reports of separate experts. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(i). The standard of care, the breach of the standard, and causation must be established as to each physician or health care provider. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a).

Appellants argue that the reports do not include a qualified expert's opinion on the issue of causation. Only a physician may provide an expert opinion regarding causation. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(C); TEX. CIV. PRAC. & REM. CODE ANN. § 74.403(a) (Vernon 2005). Of the four reports, only Trescot's meets the threshold requirement that causation be established by a report from a physician. Accordingly, to avoid dismissal, causation must be established through Trescot's report.

Trescot explains that she is certified as an anesthesiologist and is currently employed as a professor at the University of Washington School of Medicine. Her area of specialty is pain management. Trescot notes that she has been asked to review the case of Christopher Scarborough and comment on the care provided to him by Lock and the Prescribing Defendants. In preparing her report, Trescot reviewed the autopsy report, the death certificate, the prescription records of LifeChek Pharmacy #27, Unimed Clinic records, and the statement of "Lester Wilson R.Ph."² The recorded medical history stated that the patient reportedly had a motor vehicle accident two to five years prior to the date the prescription was written and filled, and the patient reported severe low back pain with

² We presume that Trescot meant to refer to the statement of Lester Williams R.Ph. that is contained in the appellate record.

radiation to the left thigh and leg that was aggravated by walking and bending. Christopher reported to Lock that he had previously been treated with Lorcet, Carisoprodol, and Xanax. Lock gave Christopher a prescription for 60 tablets of Xanax 2 mg., to be taken ½ pill four times daily; 120 tablets of Lorcet containing 10 mg.; hydrocodone and 650 mg., acetaminophen, to be taken one pill four times daily; and 120 tablets of Soma 350 mg., to be taken one pill four times daily. Trescot notes that Christopher filled the prescription at LifeChek Drug #27 in Port Arthur on the same day it was prescribed, and that Lorcet, Soma, and Xanax were dispensed as prescribed. Five days later, Christopher was discovered on the floor of his parents' home in an unconscious state and he died before he was transported to the hospital. According to Trescot, the autopsy report found that Christopher died an accidental death caused by combined drug toxicity and pulmonary edema. Trescot concludes her report, as follows:

After having reviewed the medical records and other information listed above I have reached certain opinions regarding the death of Christopher Scarborough after he was seen at the Unimed Medical Clinic under the treatment of Dr. John Perry and Kelly Lock, P.A. As a board certified pain physician, [an]d instructor of pain care professionals, including physician's assistants, it is my opinion that there was no legitimate medical purpose underlying the medications received by Mr. Scarborough from this clinic. The "history and physical" form preprinted with Lortab/Lorcet/Vicodin/Soma/Xanax as the only medication options, coupled with the pharmacist's statement that patients were driving from miles away to see a cardiologist dispensing nothing but opioids confirms that Dr. Perry, Ms. Lock and Unimed clinic were prescribing potentially lethal medications with a blatant disregard for human life.

It is highly foreseeable that the prescription of these controlled substances, when done without appropriate analysis and parameters, can lead to injury

to the patient. It is my opinion based on reasonable medical probability that the prescription of the three medications at issue here led directly to the combined drug toxicity listed by the Medical Examiner as Christopher Scarborough's cause of death. There is no other substance listed in the autopsy or toxicological tests that were performed. The result of combined drug toxicity was the direct cause of death of the patient. Had Dr. Perry followed the standard of care set out above [in] reasonable medical probability Christopher Scarborough would not have died of this prescribed drug overdose.

An expert report "must explain the basis of [the expert's] statements to link his conclusions to the facts." *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). The reviewing court cannot fill gaps in a report by drawing inferences. *Collini v. Pustejovsky*, 280 S.W.3d 456, 462 (Tex. App.--Fort Worth 2009, no pet.). For instance, in *Collini* the expert's report adequately described the alleged physical harm (sleep disturbances, hand tremors, and leg restlessness) and stated the conclusions of that expert and four others that the patient's tardive dyskinesia was related to the use of the drug Reglan that was prescribed by the defendant. *Id.* at 459, 467. The report provided no details as to how the Reglan caused the symptoms or how the specific prescriptions (beyond the taking of Reglan generally) attributed to the harm. *Id.* at 467. The court reasoned that "while the manufacturer's warning (that Reglan should not be prescribed for more than twelve weeks) coupled with the causation opinions of the four doctors (though conclusory) may create a reasonable inference that [the defendant doctor's] prolonged prescription of Reglan caused [the patient's] condition, we are not permitted to rely on that inference in reviewing [the

expert's] report.” *Id.* Because the expert's report failed to adequately address the link between the doctor's alleged breach of the standard of care and the patient's tardive dyskinesia that allegedly resulted, the court held that the report was insufficient. *Id.* at 467-68.

In this case, Trescot's report states that the prescription was filled “as prescribed,” but that the medications were not prescribed by the Prescribing Defendants for a legitimate medical purpose. However, the report fails to explain how prescribing Lorcet, Soma, and Xanax without a legitimate medical purpose leads to foreseeable death of the patient. Neither the therapeutic dose nor the toxic dose for each drug, individually or in combination, is stated in the report. No information is provided regarding the levels of the drugs determined by the post-mortem toxicological tests. The report does not explain whether the prescribed dosage would have been toxic if the treatment had been medically necessary or whether the patient took the medicine as prescribed. Although the report states that “[i]t is highly foreseeable that the prescription of these controlled substances, when done without appropriate analysis and parameters, can lead to injury to the patient,” Trescot does not explain what injury could result or how that injury would occur. Trescot's report mentions the cause of death--combined drug toxicity and pulmonary edema--but the report does not explain why combined drug toxicity occurred, how the combined drug toxicity related to the pulmonary edema, or why it was fatal. Thus, the report does not provide a fair summary of the expert's opinion on causation as it related

to the Pharmacy Defendants. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). A report cannot constitute a good-faith effort if it omits any of the statutory requirements. *Palacios*, 46 S.W.3d at 879.

The Scarboroughs requested permission to amend Trescot's report, both in the trial court and on appeal. Section 74.351 of the Texas Civil Practice and Remedies Code does not "mandate dismissal of deficient, but curable, reports." *Ogletree v. Matthews*, 262 S.W.3d 316, 320 (Tex. 2007); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c). A court may grant a single thirty-day extension of time to cure a timely filed expert report that is found to be deficient. *Leland*, 257 S.W.3d at 207.

The Pharmacy Defendants argue that as to them the report is so deficient as to be no report at all. Trescot's report states that she was asked to review the case and comment on the care provided to Scarborough by the Prescribing Defendants. She mentions that she reviewed "LifeChek Pharmacy #27 prescription records" and a report by a registered pharmacist. Trescot mentions that Christopher took the prescription to LifeChek Drug #27 on the same day he received it, and that Lorcet, Soma, and Xanax were dispensed as prescribed. Williams's report states that "[e]ach of the drugs at issue here has legitimate therapeutic uses when prescribed under appropriate parameters." Trescot's report states that no documentation is available showing that the pharmacist spoke to the patient or contacted the prescribing physician's assistant at Unimed Medical

Clinic regarding the prescriptions, but no other mention is made in the report regarding the Pharmacy Defendants.

Although Trescot looked at a report by a registered pharmacist, Trescot does not attempt to link the breach of the standard of care discussed in Williams's report to the cause of death. Thus, the Scarboroughs provided no report at all as to causation as it relates to the alleged breach of the standard of care by Valorie Marie Gingrich, Bruce V. Gingrich, LifeChek Conroe Partners, Ltd., and LifeChek Conroe, Inc.

Furthermore, the causation analysis that does appear in the report regarding the Prescribing Defendants cannot be imputed to the Pharmacy Defendants. In *Gardner v. U.S. Imaging, Inc.*, a report that failed to address a defendant alleged to be liable on a theory of *respondeat superior* could still serve as a report to the extent the report adequately implicated the actions of the defendant's agents on a theory of *respondeat superior*. See *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671-72 (Tex. 2008). As a result, the Supreme Court decided that the vicarious liability claims should be remanded for consideration of the request for an extension to amend the report. *Id.* at 672. In this case, the Pharmacy Defendants are not alleged to be vicariously liable for the acts of the Prescribing Defendants. Accordingly, the actions of the Pharmacy Defendants are not implicated at all in Trescot's report. Because causation may only be established through a report by a physician, the Scarboroughs provided no report at all regarding the causal

relationship between the alleged breach of the standard of care by the Pharmacy Defendants and Christopher's injuries.

Although we have found the report to be deficient, Trescot did attempt to describe causation as it relates to the breach of the standard of care by Unimed Medical Clinic, LLC d/b/a Unimed Medical Clinic, Beaumont, and John Edward Perry III, M.D. Accordingly, an extension of time may be granted as to the claims against those defendants. *Leland*, 257 S.W.3d at 207; see TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c).

Perry and Unimed adopted the brief of the Pharmacy Defendants, but that brief discusses neither the standard of care that applies to a doctor nor the breach of that duty discussed in Trescot's report. As to Perry, neither the standard of care nor breach has been briefed in this appeal. See TEX. R. APP. P. 38.1(i). Because the trial court's rulings on those issues have not been challenged on appeal, we express no opinion on the trial court's rulings on Perry's objections to the analysis of the standard of care and breach discussed in Trescot's report.

Unimed Medical Clinic, LLC neither objected to the report nor filed a motion to dismiss. The trial court's duty to dismiss a health care liability claim is invoked by the filing of a motion. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b). The trial court did not err in failing to dismiss *sua sponte* claims that were not subject to a motion to dismiss, and the order being appealed did not rule on whether the Scarboroughs satisfied

the report requirement as to the claims asserted against the clinic. Because the clinic has been sued on a theory of *respondeat superior* for the negligence of Lock and Perry, ultimately a dismissal of the claims against Perry might affect the Scarboroughs' ability to successfully assert a claim against the clinic. Given our reversal of the order and remand to the trial court to consider the Scarboroughs' request for an extension of time to file an amended report, however, that issue is not before us at this time.

Finally, the Pharmacy Defendants ask that they be awarded reasonable attorney's fees and costs of court. An award of costs and attorney's fees is mandatory when a court dismisses a health care liability claim for failure to serve an expert report. *See Med. Hosp. of Buna Tex., Inc. v. Wheatley*, 287 S.W.3d 286, 294 (Tex. App.--Beaumont 2009, pet. filed). On appeal, the Pharmacy Defendants neither identify the amount of their fees nor do they request a remand for the trial court to determine the amount of a reasonable fee. In the trial court, their motion to dismiss requested an award of \$4,000.00 but they offered no proof of those fees during the hearing before the trial court. Thus, there is no evidence in the record on which this Court could base an award of attorney's fees. This is, however, an interlocutory appeal of an active case. Under these circumstances, the appropriate result is to remand the matter to the trial court so that the trial court may fully comply with Section 74.351(b). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b).

We reverse the trial court's order denying the motion to dismiss filed by Valorie Marie Gingrich, Bruce V. Gingrich, LifeChek Conroe Partners, Ltd., and LifeChek

Conroe, Inc. and deny the objections of John Edward Perry III, M.D. to the expert report of Andrea M. Trescot, M.D. We remand the case for the trial court to dismiss the claims against Valorie Marie Gingrich, Bruce V. Gingrich, LifeChek Conroe Partners, Ltd., and LifeChek Conroe, Inc., with prejudice and to assess a reasonable attorney's fee and costs of court. We further remand the case for the trial court to consider the request by Ken Scarborough and Esther Scarborough, individually and as representatives of the Estate of Christopher Scarborough, for an extension of time to cure the deficiencies in the report of Andrea M. Trescot, M.D.

REVERSED AND REMANDED.

STEVE McKEITHEN
Chief Justice

Submitted on March 11, 2010
Opinion Delivered April 29, 2010

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