

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-10-00140-CV

NANCY NGO AND DURGA ANNAVAJJHALA, Appellants

v.

**KENNETH LEWIS AND DESTINIE LEWIS, INDIVIDUALLY AND AS
PARENTS AND REPRESENTATIVES OF THE ESTATE OF
IAN PATRICK LEWIS, Appellees**

**On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-184,156**

MEMORANDUM OPINION

Kenneth Lewis and Destinie Lewis, individually and as parents and representatives of the estate of Ian Patrick Lewis, filed health care liability claims against Dr. Nancy Ngo, a pediatrician, Dr. Durga AnnavaJJhala, a neonatologist, and a number of other health care providers. Their suit alleges that Ian's death was caused by the negligence of his various health care providers. Dr. Ngo and Dr. AnnavaJJhala filed separate motions to dismiss. Each motion to dismiss asserts that the Lewises' expert report does not comply with section 74.351 of the Texas Civil Practice and Remedies

Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l) (Vernon Supp. 2009). The trial court denied both motions to dismiss, and Dr. Ngo and Dr. Annavaajjhala then perfected their interlocutory appeals from the trial court's ruling.

Because the Lewises' expert report does not comply with the requirements of Texas law, we reverse the trial court's order, and we remand the case to the trial court. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6) (Vernon Supp. 2009). Upon its receipt of the case, we instruct the trial court to enter an order dismissing the plaintiffs' claims against Dr. Ngo and Dr. Annavaajjhala, and to award reasonable attorneys' fees and taxable court costs. *Id.* § 74.351(b) (Vernon Supp. 2009).

Background Facts

This case arises from complications that occurred during Destinie's pregnancy. Dr. Christopher Serrano was Destinie's obstetrician, and he delivered Destinie's child. On April 9, 2007, Dr. Serrano ordered prenatal lab tests; one of these tests determined that Destinie was positive for Vaginal Group B Streptococcus (GBS). Dr. Serrano's office erroneously recorded Destinie's GBS test as being negative. On May 2, 2007, Dr. Serrano sent Destinie to the hospital with orders that she be sent "[s]traight to Labor and Delivery for PIH labs." Destinie's hospital records include a neonatal admission summary, and it too erroneously reports that Destinie was GBS negative.

On the morning of May 3, 2007, Dr. Serrano induced labor. On the afternoon of May 3, 2007, Dr. Serrano ordered that Destinie's child be delivered by cesarean section.

At 5:21 p.m., Dr. Serrano delivered the child, Ian, by cesarean section. Ian died on May 11, 2007, from complications that were related to his GBS infection.

To comply with their obligation under Texas law, the plaintiffs filed an amended report¹ from Dr. Bradley Thach, who holds board certifications in pediatrics and neonatal-perinatal medicine. *See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351* (Vernon Supp. 2009) (providing requirements for expert reports in health care liability claims). Based on Dr. Thach's report, it appears that Dr. Ngo first became involved in Ian's care when she examined him on May 3, 2007, around 7:50 p.m. Based on Ian's symptoms, Dr. Ngo consulted with Dr. Annavajjhala twenty five minutes later, at 8:15 p.m. Ian was transferred to the neonatal intensive care unit (NICU) at 9:00 p.m.

When admitted to the NICU, Ian had symptoms of respiratory distress, transient tachypnea, and possible sepsis. At 9:37 p.m., Ian received his first dose of broad spectrum antibiotics. Although Ian received medical treatment while in the NICU, he continued to deteriorate. Dr. Annvajjhala ordered Ian's transfer to a Houston hospital at 3:20 a.m. on May 4, 2007, and Ian was turned over to the transport team at 5:45 a.m.

Dr. Thach's report does not mention when Ian died, nor does his report discuss Ian's treatment after he was transferred to a Houston hospital. The Lewises' petition

¹The report that is now at issue was filed on February 3, 2010. The Lewises initially served defendants with a report from Dr. Thach in September 2009. The trial court determined that Dr. Thach's initial report failed to meet the requirements of Chapter 74 of the Texas Civil Practice and Remedies Code, and it ordered the Lewises to supplement the report. The trial court's order requiring a supplemental report states that the Lewises' expert report is to "[s]et forth, in reasonable medical probability, the causal relationship between the individual defendant's negligence and Ian Lewis[']s death."

asserts that Ian died on May 11, 2007. According to Dr. Thach's report, Ian's death and neurological damage were secondary to his infection with GBS.

Dr. Ngo and Dr. AnnavaJJhala challenged the adequacy of Dr. Thach's amended report, and each filed separate motions asking that the trial court dismiss the Lewises' claims. The trial court denied both Dr. Ngo's and Dr. AnnavaJJhala's motions to dismiss. Dr. Ngo and Dr. AnnavaJJhala then filed these interlocutory appeals. *See id.* § 51.014(a)(9) (Vernon 2008).

Standards

Generally, we review a trial court's ruling on a motion to dismiss a health care liability claim for abuse of discretion. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (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). In cases involving health care liability claims, the claimant must file an expert report that provides a "fair summary" of the expert's opinion as of the date of the report. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). To constitute a good-faith effort, a 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. A report that merely states the expert's conclusions on the applicable standard of care, breach, and causation "does not fulfill these two purposes." *Id.* at 879. "'Rather, the expert must explain the basis of his statements to link his conclusions to the facts.'" *Wright*, 79 S.W.3d at 52 (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). A 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.).

From Dr. Thach's report, it is apparent that Ian was exposed to a streptococcus bacteria for approximately nine hours while Destinie was in labor, which exposure had occurred hours before either Dr. Ngo or Dr. AnnavaJJhala became involved in Ian's care. None of the acts or the omissions that Dr. Thach identifies with respect to either doctor implicates a different risk of harm than the risk already present at the point that Dr. Ngo and Dr. AnnavaJJhala became involved in Ian's care; at that point, Ian had already been exposed to the streptococcus bacteria that caused the complications resulting in his death. In determining whether Dr. Thach's report represents a good-faith effort to explain how the alleged negligence of Dr. Ngo and Dr. AnnavaJJhala caused Ian's death, we look to the four corners of Dr. Thach's report. *Palacios*, 46 S.W.3d at 878. With respect to causation, we evaluate whether the report demonstrates causation beyond mere conjecture. See *Wright*, 79 S.W.3d at 53.

Analysis–Dr. Ngo

Dr. Thach's amended report criticizes Dr. Ngo for deviating from the standard of care because she: (1) failed to obtain a complete blood count and blood culture and order antibiotics in a timely fashion, (2) failed to order and evaluate blood gases in a timely fashion, and (3) failed to consult a neonatologist in a timely fashion. The causation section of Dr. Thach's report states, in its entirety: “[I]t is my opinion that the actions and inactions of Dr. Nancy Ngo deviated from the standards of care for Pediatricians and more likely than not proximately caused Ian's irreversible neurological damage and subsequent death.”

Dr. Ngo's motion to dismiss argues that Dr. Thach's report does not sufficiently explain whether Ian's outcome would have changed had she accomplished the tasks he identified sooner than she did.² Dr. Ngo contends that Dr. Thach's amended report is inadequate because his statements as to causation are conclusory. An adequate report in a health care liability case explains how the alleged malpractice caused the injury or death. *Wright*, 79 S.W.3d at 53. A report that merely asserts that causation exists is not enough.

² The Lewises argue that the physicians waived their objections to Dr. Thach's use of the terms “timely fashion” and “urgently” because they did not specifically complain about these terms when they filed their objections to his original report. Nevertheless, they did initially complain that his report was not sufficient to demonstrate how their conduct had caused Ian's death, and the trial court's order required the Lewises to file a supplemental report that sufficiently described the causal relationship between the acts or omissions and Ian's death. Because the physicians filed timely objections at the relevant stage to each report, we disagree that their objections as to causation were waived. See TEX. PRAC. & REM. CODE ANN. § 74.351 (a) (Vernon Supp. 2009) (requiring health care providers to file objections not later than the twenty-first day after the date the report is served).

As the Texas Supreme Court has held, to establish causation, a report must contain sufficient facts explaining the expert's conclusions and must show causation beyond mere conjecture. *See id.* at 52-53; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6).

Dr. Thach's report does not explain how the delays he associates with Dr. Ngo's treatment caused Ian's death. His report, for instance, fails to identify what treatment might have been offered had the tests he identified been ordered sooner. From his report, Dr. Ngo was left uninformed on whether earlier test results would have led to Ian receiving antibiotics sooner. Dr. Ngo was also left to guess about whether administering antibiotics as much as ninety minutes sooner might have altered Ian's outcome. Dr. Ngo was further left to guess whether Ian would have been given different antibiotics other than those he was administered had Dr. Ngo more quickly done the tasks Dr. Thach identified as untimely.

Similar concerns exist regarding Dr. Thach's criticism of Dr. Ngo for failing to timely consult with a neonatologist. Dr. Thach's report first mentions that Dr. Ngo examined Ian on May 3, 2007 at 7:50 p.m. Then, Dr. Thach notes that “[a]t 8:15 p.m., Dr. AnnavaJJhala was consulted and was requested by Dr. Ngo to care for this infant[.]” Ian was then admitted to the NICU at 9:44 p.m. Thus, Dr. Thach's criticism of delay with respect to Dr. Ngo's failure to timely obtain a neonatology consult appears to involve a delay of twenty-five minutes. Without explanation about what treatment would have been

offered had there been an earlier neonatology consult, Dr. Ngo was left to speculate about how an earlier consult might have changed Ian’s treatment.

We conclude that Dr. Thach’s report contains analytical gaps with respect to connecting the delays identified by the report to having caused Ian’s death. The analytical gaps exist because Dr. Thach’s report does not explain the basis of his statements to allow the trial court to link Dr. Thach’s conclusions to the facts. *See Wright*, 79 S.W.3d at 52; *Jones v. King*, 255 S.W.3d 156, 160-61 (Tex. App.–San Antonio 2008, pet. denied) (concluding that the report failed to meet the standards with regard to causation where the report failed to link any delay in diagnosis to any additional pain or suffering or exacerbation of the meningitis than would have occurred in the face of the earlier diagnosis); *Hardy v. Marsh*, 170 S.W.3d 865, 870 (Tex. App.–Texarkana 2005, no pet.) (concluding that an expert report failed to provide sufficient information to show more than speculation on the element of causation because the report did not state what additional treatment would have been provided by the consulted surgeon or that the consultation would have avoided the injury); *see also Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510-11 (Tex. 1995) (concluding that the premature attempt to wean patient from respirator leading to patient’s death did not proximately cause death when the patient had “only a fifty percent or less chance of survival”).

We conclude that Dr. Thach’s report does not qualify as an “expert report” under Texas law because it fails to adequately explain how Dr. Ngo’s alleged delays were

substantial factors in bringing about Ian’s death. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6); *Costello v. Christus Santa Rosa Health Care Corp.*, 141 S.W.3d 245, 249 (Tex. App.—San Antonio 2004, no pet.). We hold that the trial court should have granted Dr. Ngo’s motion to dismiss. *See* TEX. PRAC. & REM. CODE ANN. § 74.351(c) (providing the Court with discretion to “grant one 30-day extension to the claimant in order to cure the deficiency”); *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007) (noting that the Legislature authorized a “single, thirty day extension for deficient reports”).

Analysis—Dr. Annavajjhala

With respect to Dr. Annavajjhala, Dr. Thach’s amended report criticizes Dr. Annavajjhala for deviating from the standard of care because she: (1) failed to provide Ian with timely respiratory support, (2) failed to evaluate Ian’s blood gases in a timely fashion, (3) failed to treat Ian’s hypotension in a timely fashion, and (4) gave Ian diuretics. Dr. Thach concluded that “[t]hese factors[,] taken singularly or in conjunction[,] were a proximate cause of Ian Lewis’[s] death.” Dr. Thach’s entire explanation on how Dr. Annavajjhala caused Ian’s death states: “Dr. Durga Annavajjhala deviated from the standards of care for Neonatology physicians and more likely than not proximately caused Ian’s irreversible neurological damage and subsequent death.”

Based on Dr. Thach’s report, it appears that Dr. Annavajjhala first became involved in Ian’s treatment three hours after he was born, and approximately twelve hours after the mother’s membranes were artificially ruptured. From Dr. Thach’s report,

it further appears that Ian was under Dr. AnnavaJJhala's care for approximately nine and one-half hours.

Dr. AnnavaJJhala's motion to dismiss asserts that Dr. Thach's opinions fail to establish a causal link between her alleged acts or omissions and Ian's alleged injuries. The expert's report must explain how the alleged malpractice caused the injury or death. *Wright*, 79 S.W.3d at 53. In cases involving a preexisting condition that results in the patient's death, an adequate explanation of causation would explain how the delays in the patient's treatment were substantial factors that caused the patient to lose his probability of surviving. *See Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 400 (Tex. 1993); *Jones*, 255 S.W.3d at 160; *Costello*, 141 S.W.3d at 249.

Dr. Thach's report never explains how the acts and omissions he identifies affected Ian's chance of survival. His report fails to explain what additional treatment should have been offered had the various procedures he describes been performed timely. With respect to the relationship between Dr. AnnavaJJhala's acts and omissions and the cause of Ian's death, we conclude that Dr. Thach's report contains significant analytical gaps because it fails to sufficiently tie the facts to his conclusion. How delays in providing Ian adequate ventilation support, delays in obtaining blood gases, or delays in treating Ian's hypotension caused Ian's death is never explained by the report.

Dr. Thach's report also fails to explain how giving Ian diuretics caused his death. *See Clark v. HCA, Inc.*, 210 S.W.3d 1, 11 (Tex. App.—El Paso 2005, no pet.) (explaining

that expert report deficient because of a large analytical gap in failing to explain how improper use of drug caused the patient's compartment syndrome). Instead, the report summarily concludes that Dr. AnnavaJJhala's acts and omissions proximately caused Ian's death. We conclude that Dr. Thach's report provides an insufficient explanation of causation to comply with the requirements of Section 74.351. *See Wright*, 79 S.W.3d at 53. We hold that the trial court should have granted Dr. AnnavaJJhala's motion to dismiss. *See TEX. CIV. PRAC. & REM. CODE ANN.* § 74.351(c).

We conclude that the trial court erred when it determined that Dr. Thach's report represented a good-faith effort to explain the causal relationship between Dr. Ngo's and Dr. AnnavaJJhala's acts and omissions and Ian's death. *See Palacios*, 46 S.W.3d at 879. Having found that Dr. Thach's report inadequately explains how Ian's death was caused by Dr. Ngo or by Dr. AnnavaJJhala, we need not address Dr. Ngo's and Dr. AnnavaJJhala's other arguments. *See TEX. R. APP. P.* 47.1.

Conclusion

We reverse the trial court's order denying Dr. Ngo's and Dr. AnnavaJJhala's motions to dismiss and remand the case for the trial court to dismiss the claims against Dr. Ngo and Dr. AnnavaJJhala, with prejudice, and to assess reasonable attorneys' fees and costs of court as provided by section 74.351(b) of the Texas Civil Practice and Remedies Code.

REVERSED AND REMANDED.

HOLLIS HORTON
Justice

Submitted on July 12, 2010
Opinion Delivered September 9, 2010
Before McKeithen, C.J., Gaultney and Horton, JJ.