

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

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**NO. 09-10-00347-CV**

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**BEAUMONT SPINE PAIN & SPORTS MEDICINE CLINIC, INC.  
INDIVIDUALLY AND D/B/A BEAUMONT SPINE PAIN & SPORTS MEDICINE,  
BEAUMONT SPINE PAIN & SPORTS MEDICINE, JOHN Q.A. WEBB, JR.,  
JOHN Q.A. WEBB, JR., M.D., P.A., INDIVIDUALLY AND D/B/A BEAUMONT  
MEDICAL CLINIC, AND BEAUMONT MEDICAL CLINIC, Appellants**

**V.**

**DIANNE SWAN, INDIVIDUALLY AND AS REPRESENTATIVE OF THE  
ESTATE OF JENNIFER RENEE ABSHIRE AND FOR AND ON BEHALF OF  
ANY WRONGFUL DEATH BENEFICIARIES OF JENNIFER RENEE ABSHIRE,  
JASON HOLST, INDIVIDUALLY AND DAVID “ANDREW” MAXEY,  
AS NEXT FRIEND OF TRISTA MAXEY, Appellees**

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**On Appeal from the 60th District Court  
Jefferson County, Texas  
Trial Cause No. B-182,128**

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**MEMORANDUM OPINION**

Dianne Swan, individually and as representative of the Estate of Jennifer Renee Abshire, and for and on behalf of any wrongful death beneficiaries of Jennifer Renee Abshire, Jason Holst, individually, and David “Andrew” Maxey, as next friend of Trista Maxey, (“appellees”) sued Beaumont Spine Pain & Sports Medicine Clinic, Inc.,

individually and d/b/a Beaumont Spine Pain & Sports Medicine, Beaumont Spine Pain & Sports Medicine, John Q.A. Webb, Jr., M.D., John Q.A. Webb, Jr. M.D., P.A., individually and d/b/a Beaumont Medical Clinic, and Beaumont Medical Clinic (“appellants”) for negligent referral and under the doctrine of respondeat superior.<sup>1</sup> Appellants objected to appellees’ expert reports and moved to dismiss the lawsuit pursuant to section 74.351 of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (West Supp. 2010). The trial court granted appellees a thirty-day extension to file amended reports. After appellees filed additional expert reports, appellants again objected and moved for dismissal. The trial court denied the motions. In this interlocutory appeal, appellants challenge the denial of their motions to dismiss. We affirm the trial court’s judgment.

#### Standard of Review

Section 74.351 requires a health care liability claimant to timely file sufficient expert reports. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a),(l). When considering a motion to dismiss for failure to comply with section 74.351, the trial court must determine “whether ‘the report’ represents a good-faith effort to comply with the statutory definition of an expert report.” *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001); *Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002); Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a),(l). Section 74.351 defines an “expert report” as follows:

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<sup>1</sup> Appellees sued other defendants who are not parties to this appeal.

[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). “Because the statute focuses on what the report discusses, the only information relevant to the inquiry is within the four corners of the document.” *Palacios*, 46 S.W.3d at 878; *see also Wright*, 79 S.W.3d at 52.

“A report need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute.” *Palacios*, 46 S.W.3d at 878; *Wright*, 79 S.W.3d at 52. An expert report constitutes a “good-faith effort” when the expert sets out his opinions on the standard of care, breach, and causation with enough specificity to: (1) “inform the defendant of the specific conduct the plaintiff has called into question,” and (2) “provide a basis for the trial court to conclude that the claims have merit.” *Palacios*, 46 S.W.3d at 879; *see also Wright*, 79 S.W.3d at 52. “[T]he 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 report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill these two purposes.” *Palacios*, 46 S.W.3d at 879. “Nor can a report meet these purposes and thus constitute a good-faith effort if it omits any of the statutory requirements.” *Id.* Regarding claims under the doctrine of respondeat superior, an expert report is sufficient when it “adequately implicates the actions of that party's agents or

employees[.]” *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671-72 (Tex. 2008). “The report can be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial.” *Palacios*, 46 S.W.3d at 879.

We review a trial court’s ruling on a motion to dismiss pursuant to section 74.351 under an abuse-of-discretion standard. *Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 875, 877. “A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles.” *Wright*, 79 S.W.3d at 52. “When reviewing matters committed to the trial court’s discretion, a court of appeals may not substitute its own judgment for the trial court’s judgment.” *Id.*

#### Content of Expert Reports

Appellees provided expert reports by Dr. J. Michael Simpson and Dr. Keith E. Miller.<sup>2</sup>

Dr. Webb, whose place of business is Beaumont Spine, treated Abshire for a herniated disc. Dr. Webb referred Abshire to Dr. Merrimon W. Baker, an orthopedic

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<sup>2</sup> Appellees also filed the report of Arthur S. Shorr, FACHE. Because he is not a physician, Mr. Shorr cannot render an expert opinion against Dr. Webb. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(A), (C); *see also id.* §§ 74.401(a), 74.403(a) (West 2005). Additionally, appellees provided a report by Dr. Emilio B. Lobato, which addresses Dr. Baker’s conduct. We do not consider Dr. Lobato’s report because our analysis is limited to expert reports that implicate the defendant’s conduct. *Rivenes v. Holden*, 257 S.W.3d 332, 338-39 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Bogar v. Esparza*, 257 S.W.3d 354, 368-69 (Tex. App.—Austin 2008, no pet.).

surgeon. Dr. Baker performed a bilateral lumbar laminectomy and discectomy on Abshire. Dr. Simpson explained that, during the surgery, Dr. Baker transected Abshire's right iliac artery and completed the surgery without noticing the transected artery. After surgery, the transected artery remained undetected. Abshire suffered severe hypovolemic shock, cardiac arrest, and death. Dr. Simpson explained that Dr. Baker failed to make careful and precise incisions when performing Abshire's surgery. Dr. Simpson concluded that Dr. Baker failed to recognize and repair the transected artery. He concluded that Dr. Baker proximately caused Abshire's death.

Dr. Simpson stated that, according to public documents, Dr. Baker had a "well-known public history, both in the medical community and in the community at large, for incompetence and drug use." Dr. Baker was the subject of judicial opinions and complaints by the Texas Board of Medical Examiners. Dr. Simpson stated that this information was available at the time of Dr. Webb's referral.

Dr. Simpson's report indicated that one complaint involved a patient who suffered blood loss and neurological injuries. According to the report, the Board alleged that Dr. Baker's treatment of several patients fell below the standard of care, that Dr. Baker had performed unnecessary surgeries, and that Dr. Baker has a "continuing pattern of poor record keeping, poor surgical outcomes, inadequate indications for surgery, [and] numerous surgical and post-operative complications." Dr. Simpson noted that Dr. Webb's records did not show whether Dr. Webb investigated Dr. Baker's competency.

Dr. Simpson identified the standard of care applicable to Dr. Webb:

It is incumbent upon a referring physician to exercise reasonable care in referring a patient to another physician, whether in the context of simply seeking a consultation from a physician in a different specialty or in the case of an outright transfer of care of the patient to another physician. Reasonable care in making such a referral at the bare minimum requires that the referring physician have a basic knowledge of the skills and professional reputation of the physician to whom the patient is being referred. In other words, it would fall below the standard of care for a physician to refer a patient to a physician of whom he had no knowledge.

Assuming that a referring physician has a basic understanding of the skills and professional reputation of the physician to whom the patient is being referred, the standard of care requires that a referring physician refrain from referring a patient to a physician with a well-documented history of drug use, malpractice, and repeated complaints by the board of medical examiners.

Dr. Simpson explained that a “cursory inquiry” into Dr. Baker’s reputation would have revealed the judicial opinions and complaints against him. Thus, Dr. Simpson opined that Dr. Webb breached the standard of care by either (1) referring Abshire to a physician about whom Dr. Webb knew nothing, or (2) referring Abshire to a physician who Dr. Webb knew had problems. Dr. Simpson explained that Dr. Webb’s referral was the direct cause of Dr. Baker’s performing surgery on Abshire because, absent the referral, Dr. Baker would not have been the physician performing the surgery. Dr. Simpson stated, “In all reasonable medical probability, had Dr. Baker, a physician with a well-known reputation for surgical incompetence, not been [] Abshire’s surgeon, her right internal iliac artery would not have been transected and the transection left undiscovered to cause exsanguination and death.”

Like Dr. Simpson, Dr. Miller explained that public documents, the Texas Medical Board website, and Texas Medical Board newsletters show that at the time of Dr. Webb's referral, Dr. Baker had a "well-known public history, both in the medical community and in the community at large, for incompetence and drug use[.]" According to these records, Dr. Baker has had drug problems, mental health problems, erratic behavior, and loss of privileges at hospitals. Dr. Miller stated that Dr. Webb's records do not indicate whether he investigated Dr. Baker's competency, but the records show that Abshire did not see Dr. Baker independently of Dr. Webb's referral.

Dr. Miller identified the standard of care applicable to Dr. Webb:

- 1) The standard of care required that, when evaluating and treating . . . Abshire . . . [Dr. Webb] should have performed an appropriate physical examination, made an accurate diagnosis, formulated a thorough plan of treatment, and documented these items in a legible medical record in standard format.
- 2) The standard of care required that, when evaluating and treating . . . Abshire . . . [Dr. Webb] should have used reasonable medical judgment and effort in determining the need for a referral and in selecting a competent physician to which this patient could appropriately be referred. Every licensed physician in the State of Texas, such as Dr. Webb was at the time of his treatment of [] Abshire, receives in the mail the newsletter of the Texas Medical Board. Physicians are expected to be familiar with the contents of this newsletter because it contains updates to the legislative statutes, Board rules, and Board regulations that govern the practice of medicine in Texas. In addition, this same newsletter contains the disciplinary actions taken by the Board against physicians, such as the numerous disciplinary actions taken by the Board against Dr. Baker, which had been published in the Board newsletter prior to the time that Dr. Webb made the referral of [] Abshire to Dr. Baker. Therefore, Dr. Webb should have been well aware of Dr. Baker's incompetence through the Board newsletter. Dr.

Webb was even more aware than most physicians about the content and purpose of the Board's newsletter since Dr. Webb himself had previously been the subject of disciplinary action by the Texas Medical Board which had also been listed on the Board's public website as well as in their newsletter.

- 3) The standard of care required that [Dr. Webb] should not have referred . . . Abshire to [Dr. Baker] for medical care due to his well-known history of drug use, erratic behavior and most of all, his history of serious adverse patient outcomes.

Dr. Miller stated that Dr. Webb breached the standard of care that required him to select a competent physician. Dr. Miller explained that “[a] reasonable physician practicing according to acceptable standards of medical care would have used reasonable efforts to ascertain the qualifications of physicians to which they refer patients, and . . . a reasonable physician would not have referred a patient to a physician such as [Dr. Baker] who[] was facing multiple complaints for incompetence from the Texas Medical Board.” Dr. Miller stated that the records show that Abshire presented to Dr. Baker as a direct result of Dr. Webb's referral and there is no indication that Abshire would have ever even heard of Dr. Baker but for the referral. Dr. Miller stated that Dr. Webb should not have referred Abshire to Dr. Baker.

Dr. Miller concluded that Dr. Webb's breach of the standard of care resulted in (a) a referral to a physician, who was known to any reasonable physician to be incompetent, and (b) a negligently performed surgery that led to Abshire's transected artery and death. Dr. Miller opined that Dr. Webb knew or should have known that his failure to meet the standard of care would place Abshire at extreme risk and likely cause injury to Abshire.



Dr. Miller further concluded that had Dr. Webb met the standard of care, more likely than not, and based on a reasonable medical certainty, Abshire would not have undergone surgery by a physician known to any reasonable physician to be incompetent, and the negligently performed surgery, the transected iliac artery, and ultimate death of Abshire would not have occurred.<sup>3</sup>

### Sufficiency of Expert Reports

In two issues, appellants contend that appellees' expert reports are insufficient as to the standard of care, breach, and causation.

#### *Dr. Miller's Qualifications*

Appellants contend that Dr. Miller is not qualified to render a reliable expert opinion under section 74.351(r)(5)(C).

An expert "giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, [is] a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence." Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(5)(C). "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*,

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<sup>3</sup> Dr. Miller also opined that Dr. Webb breached the standard of care in his own treatment of Abshire. Appellees admit that these portions of Dr. Miller's report are immaterial to their negligent referral claim.

No. 09-07-372 CV, 2008 Tex. App. LEXIS 2000, at \*\*7-8 (Tex. App.—Beaumont Mar. 20, 2008, no pet.); Tex. R. Evid. 702.

Appellants argue that Dr. Miller is not qualified to give an opinion because he served as a member of the Medical Board in “Dr. Baker’s [t]ermination [r]equest” and is biased. Thus, appellants argue Dr. Miller cannot render an objective and reliable opinion. *See* 22 Tex. Admin. Code § 161.3(e)(11) (2010) (“A board member should not appear as an expert witness in any case in which a licensee of the board is a party and in which the expert testimony relates to standard of care or professional malpractice.”). “Proof of bias may be offered to *impeach the credibility* of a witness.” *In re Weir*, 166 S.W.3d 861, 864 (Tex. App.—Beaumont 2005, orig. proceeding) (emphasis added); *see* Tex. R. Evid. 613(b). Any bias on Dr. Miller’s part goes to the credibility of his testimony and does not disqualify him from rendering an expert opinion in accordance with section 74.351. *See Schmidt v. Dubose*, 259 S.W.3d 213, 218 (Tex. App.—Beaumont 2008, no pet.) (Once the trial court performs its gatekeeper function under section 74.351, “[o]ther safeguards are provided to govern the evidence that is ultimately submitted to the trier of fact[.]”)

#### *Statutory Elements*

Appellants complain that appellees’ expert reports are conclusory, speculative, and inadequate regarding the statutory elements. Primarily focusing on Dr. Miller’s report, appellants argue that Dr. Miller fails to (1) state what efforts to ascertain physician

qualifications should have been made, (2) consider the fact that Dr. Baker was the only physician in the area, other than a UTMB physician, who accepted Medicaid patients like Abshire, (3) consider the “further-assessment” purpose of Dr. Webb’s referral, (4) consider intervening causes, such as Dr. Baker’s evaluation, Dr. Baker’s decision to perform surgery, Abshire’s consent to surgery, and the procedure itself, and (5) provide sufficient information regarding what Dr. Webb should have done differently.

Appellees were not required to marshal all their proof or present evidence in the reports as if actually litigating the merits. *Palacios*, 46 S.W.3d at 878-79. The reports need not meet the same requirements as evidence offered in a summary-judgment proceeding or at trial. *Id.* at 879. The reports need only: (1) inform appellants of the specific conduct appellees have called into question; and (2) provide a basis for the trial court to conclude that appellees’ negligent referral claim has merit. *Id.*; *Wright*, 79 S.W.3d at 52.

Drs. Simpson and Miller both explained that the standard of care required Dr. Webb to exercise reasonable care when referring Abshire to another physician. To meet this standard, the reports indicated that Dr. Webb had a duty to refer Abshire to a competent surgeon, educate himself regarding the other physician’s medical competence, and avoid referring Abshire to a physician about whom he knew nothing or to a physician with a history of incompetence. Dr. Miller’s report explained that to select a competent

physician, a “reasonable physician” would take “reasonable efforts to ascertain the qualifications of physicians to which they refer patients[.]”

According to the experts, Dr. Baker has a well-known reputation for incompetence and an investigation into Dr. Baker’s background, such as examining Board newsletters, Board complaints, and judicial opinions, would have revealed this information.<sup>4</sup> The reports indicate that readily accessible public documents contain a wealth of information regarding the substandard medical care provided by Dr. Baker.

Nevertheless, Dr. Webb referred Abshire to Dr. Baker, a physician with a history of providing substandard medical care. Dr. Webb’s records did not show that he conducted an investigation into Dr. Baker’s reputation. Because of Dr. Baker’s history, Dr. Miller stated that a “reasonable physician” would not have referred a patient to Dr. Baker. Thus, according to the expert reports, Dr. Webb breached the standard of care by referring Abshire to a physician whose competence he either failed to investigate or knew to be lacking.

Dr. Miller noted that Abshire saw Dr. Baker as a direct result of Dr. Webb’s referral. Dr. Simpson stated that Dr. Baker subsequently transected Abshire’s right iliac artery, which the standard of care requires a physician to avoid, and failed to detect the

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<sup>4</sup> Arguing that the newsletters would not have alerted Dr. Webb to any incompetency issues, appellants urge us to consider the contents of the newsletters. Because the newsletters are not part of the appellate record, we decline to do so. *See Christus Health Se. Tex. v. Broussard*, 306 S.W.3d 934, 938 (Tex. App.—Beaumont 2010, no pet.); *Barnard v. Barnard*, 133 S.W.3d 782, 789 (Tex. App.—Fort Worth 2004, pet. denied).

transected artery. The report further explained that, absent Dr. Baker's actions, Abshire would not have died. Thus, according to Drs. Simpson and Miller, had Dr. Webb selected a competent physician and avoided referring Abshire to Dr. Baker, a physician with a history of medical incompetence, Dr. Baker would not have been Abshire's physician and Abshire would not have suffered the transected iliac artery that caused her death.

After reviewing the reports together, we conclude that the trial court was justified in finding that they discuss the standard of care, breach, and causation with sufficient specificity to inform appellants of the specific conduct called into question, *i.e.*, what should have been done differently and what care was expected, but not received. *Wright*, 79 S.W.3d at 52-53; *Palacios*, 46 S.W.3d at 879-80. The reports provide a basis for the trial court to conclude that appellees' negligent referral claim has merit. *Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 879; *Moore v. Lee*, 109 Tex. 391, 211 S.W. 214, 216-17 (1919) (quoting *Youngstown Park & Falls St. Ry. Co. v. Kessler*, 84 Ohio St. 74, 95 N.E. 509, 511 (Ohio 1911)) (A negligent referral claim focuses on whether the referring physician “act[ed] in good faith and with reasonable care in the selection of the physician or surgeon, and has no knowledge of the incompetency or lack of skill or want of ability on the part of the person employed[.]”). The reports need not “rule out every possible cause of the injury, harm, or damages claimed” and they are not insufficient simply because there may be many links in the chain of events leading to Abshire's

death. *Baylor Med. Ctr. at Waxahachie v. Wallace*, 278 S.W.3d 552, 562 (Tex. App.—Dallas 2009, no pet.); *VHS San Antonio Partners LLC v. Garcia*, No. 04-09-00297-CV, 2009 Tex. App. LEXIS 7790, at \*15 (Tex. App.—San Antonio Oct. 7, 2009, pet. denied); *Methodist Hosp. v. Shepherd-Sherman*, 296 S.W.3d 193, 200 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *Patel v. Williams*, 237 S.W.3d 901, 906 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Whether the experts’ conclusions are correct is an issue for either trial or summary judgment. *Shepherd-Sherman*, 296 S.W.3d at 199 n.2; *Wissa v. Voosen*, 243 S.W.3d 165, 169-70 (Tex. App.—San Antonio 2007, pet. denied).

Because appellees’ expert reports represent a good-faith effort to comply with the statutory definition of an “expert report,” we conclude that the trial court did not abuse its discretion by denying appellants’ motions to dismiss. We overrule issues one and two and affirm the trial court’s judgment.

AFFIRMED.

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STEVE McKEITHEN  
Chief Justice

Submitted on December 9, 2010  
Opinion Delivered February 3, 2011

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