

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00403-CV

**CLINT L. HINES, INC. D/B/A SHADY ACRES HEALTH AND
REHABILITATION CENTER, AND SHADY ACRES HEALTH AND
REHABILITATION CENTER, Appellants**

V.

TOM DAVIS, AS NEXT FRIEND FOR DOROTHEA DAVIS, Appellee

**On Appeal from the 1A District Court
Newton County, Texas
Trial Cause No. 13977**

MEMORANDUM OPINION

This interlocutory appeal concerns the adequacy of an expert report under the standards that apply to health care liability claims. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(a)(9), 74.351 (West Supp. 2016). Appellee Tom Davis, as next friend for his aunt, Dorothea Davis (“Dorothea”), filed a health care liability claim against appellants Clint L. Hines, Inc. d/b/a/ Shady Acres Health and Rehabilitation

Center, and Shady Acres Health and Rehabilitation Center (“Shady Acres”), which provided long-term care to Dorothea. Shady Acres objected to Davis’s expert report and moved to dismiss the lawsuit pursuant to section 74.351 of the Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b). The trial court overruled Shady Acres’s objections and denied its motion to dismiss. Shady Acres challenges the trial court’s denial of its motion to dismiss. *See id.* § 51.014(a)(9) (West Supp. 2016). We reverse and remand.

Standard of Review and Applicable Law

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.” *Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (citing *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001)); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a), (l). Section 74.351 defines an “expert report” as follows:

[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; *see also 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 of vicarious liability, 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 878. “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. We may not substitute our own judgment for the trial court’s judgment. *Id.*

Expert Qualifications

In its sole issue on appeal, Shady Acres argues that Dr. David Seignious is not qualified as an expert under section 74.402 of the Civil Practice & Remedies Code. Shady Acres complains that the report does not show Seignious is familiar with the standard of care for non-physician health care providers such as Shady Acres. Shady Acres argues that Seignious has not shown himself to be qualified to give opinions regarding the standards of care applicable to nursing homes or regarding Shady Acres’s staffing.

A person may qualify as an expert on whether a health care provider departed from accepted standards of care only if the person:

- (1) is 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) has 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) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.

Tex. Civ. Prac. & Rem. Code Ann. § 74.402(b) (West 2011). Under the language of section 74.402(b)(1), an expert is only required to practice health care in a field of practice involving the same type of care or treatment and need not be practicing health care in the same field as the defendant health care provider. *Group v. Vicente*, 164 S.W.3d 724, 731 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Whether a witness is qualified on the basis of training or experience depends on whether, at the time the claim arose or at the time 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.

Tex. Civ. Prac. & Rem. Code Ann. § 74.402(c). The expert must have “‘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.” *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). An expert’s qualifications must be evident from the four corners of his report and curriculum vitae. *Christus Health Se. Tex. v. Broussard*, 267 S.W.3d 531, 536 (Tex. App.—Beaumont 2008, no pet.); *see Tenet Hosps. Ltd. v. Barnes*, 329 S.W.3d 537, 546-47 (Tex. App.—El Paso 2010, no pet.).

Seignious’s report and curriculum vitae indicate that he satisfies the statutory requirements. Seignious is a licensed, practicing, board-certified physician in geriatrics and internal medicine in Charleston, South Carolina; is a member of the American Geriatrics Society and the American Board of Occupational and Environmental Medicine; and routinely follows his patients in his office and in nursing homes. Seignious has knowledge of the national standards of care that apply in the nursing home/rehabilitation center setting, knowledge as to the care that the nurses and other staff are expected to provide to nursing home residents, and knowledge of the injuries that can occur when the standards of care are breached and a patient falls. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.402(b)(1), (2); *see also Group*, 164 S.W.3d at 731. By virtue of his credentials, experience, training, and

practice in the relevant area of health care, which involves the care and treatment of patients like Dorothea who are in facilities like Shady Acres, Seignious has the requisite training or experience to offer an expert opinion on the subject before the trial court. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.402(b)(3), (c); *see also Broders*, 924 S.W.2d at 153. We conclude that Seignious is qualified as an expert to opine on Shady Acres's standard of care and purported breaches thereof.

The Expert Report of Dr. Seignious

Shady Acres also argues on appeal that Seignious's expert report is conclusory. According to Seignious's expert report, Dorothea suffered injuries as a result of a fall during her stay at Shady Acres because its staff failed to implement adequate safety interventions. On November 3, 2004, Dorothea was admitted to Shady Acres for long-term care. Dorothea had a medical history of right knee replacement, cerebrovascular event, muscle wasting, abnormality of gait, non-Alzheimer's Disease dementia, and seizures. Dorothea was incontinent and required two-person assistance with transfers and one-person assistance for ambulation via wheelchair, toileting, dressing, and hygiene. In January 2015, it was noted in Dorothea's medical records that Dorothea was experiencing sedation and drowsiness due to her medication prescription intake, placing her at an increased risk for falls and dizziness. Dorothea's January 2015 medical records documented that she had

functional limitation in range of motion due to extremity impairment in her bilateral lower extremities and identified her as a fall precaution. However, there were no care plans, updates regarding falls, fall risk assessments, or fall prevention protocols in Dorothea's medical records.

In February 2015, Dorothea suffered a fall when staff at Shady Acres attempted to transfer Dorothea from a shower chair to her "geri chair." When additional staff responded to the fall in Dorothea's shower room, Dorothea was lying on her back on the floor and unable to move. The staff noted that Dorothea's lower right extremity was bent in a 90-degree angle with swelling and a large raised area present to her mid-thigh area with obvious deformation to her right femur. Dorothea's medical records from the date of the fall indicate that, less than one hour after her fall, Dorothea was assessed as only a moderate risk for falling. Dorothea was transported by ambulance to the emergency room at Christus Jasper Memorial Hospital for evaluation and treatment. X-rays revealed that Dorothea had sustained a fracture to her right femur. Dorothea was transferred to Christus St. Elizabeth Hospital, where she underwent surgery to repair and correct the fracture.

After reviewing the medical records regarding Dorothea's fall, Seignious opined that the staff at Shady Acres violated the standard of care required of long-term care facilities. In his report, Seignious explained that Medicare and Medicaid

provide rules requiring long-term care facilities to provide a base level of care, mandating that residents must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychological well-being, in accordance with the comprehensive assessment and plan of care. Seignious opined: “This is the overarching standard of care that applies in a skilled nursing facility.” Seignious also identified the standard of care with respect to falls: “[A] facility and its nurses must ensure that a resident’s environment remains as free of accident hazards as possible and that each resident receives adequate supervision and assistance devices to prevent accidents.” Seignious explained that an “accident” refers to any unexpected or unintentional incident, which may result in injury or illness to a resident, and specifically includes falls. According to Seignious “[u]nless there is evidence suggesting otherwise, when a resident is found on the floor, a fall is considered to have occurred.”

Pursuant to regulations and the standard of care generally, Seignious stated that facilities and their staffs must meet the following standards of care: (1) maintain adequate supervision and assistance to prevent falls, (2) maintain adequate staffing, (3) develop and implement an adequate care plan that is consistent with a resident’s fall risk and fall history, and (4) analyze accidents and conduct a sufficient post-fall evaluation. Seignious opined Dorothea’s fall was avoidable and that the staff at

Shady Acres violated the standard of care by failing to (1) maintain adequate supervision and assistance to prevent Dorothea from falling, (2) maintain a sufficient number of adequately trained staff, (3) develop and implement an adequate care plan that was consistent with Dorothea's fall risk, and (4) properly analyze Dorothea's fall and conduct an appropriate post-fall evaluation. Seignious concluded that Dorothea sustained severe injuries from a fall because Shady Acres and its staff failed to provide adequate supervision and assistance to prevent accidents from occurring, and had Shady Acres provided proper assistance, Dorothea would not have fallen and sustained a right femur fracture.

Seignious also opined that based on Dorothea's medical history, she posed a high risk for falls, but Shady Acres had only assessed Dorothea as posing a moderate risk of falls. Seignious concluded that Shady Acres and its staff violated the standard of care by failing to develop and implement an adequate care plan in light of Dorothea's actual fall risk. While notes indicated that fall precautions were in place, there was no documentation of what precautions or interventions were actually being used to ensure Dorothea's safety. According to Seignious, given Dorothea's history and assessments, the staff at Shady Acres should have implemented every safety precaution to protect Dorothea from falling; however, it is clear, based on the fact that Dorothea was completely dependent on staff for transfers and required a two-

person assist, that because Dorothea fell during a transfer, the staff was not supervising or assisting her adequately. Seignious concluded that the failure of the staff to develop an appropriate care plan and implement necessary interventions in response to Dorothea's fall risk breached the standard of care. Additionally, Seignious noted that staff at Shady Acres also breached the standard of care by failing to perform a complete and thorough post-fall assessment and by failing to properly evaluate Dorothea after the fall.

Seignious explained that "to a reasonable degree of medical probability," the breaches of the standard of care that he identified proximately caused Dorothea's fall. According to Seignious, Dorothea would not have fallen had Shady Acres consistently and adequately (1) supervised Dorothea, (2) educated her on calling for assistance and the importance of doing so, (3) assessed Dorothea, (4) minimized environmental hazards, (5) assured that Dorothea was promptly and properly assisted when mobility was required during transfer, or (6) provided an adequate number of staff to assist in transferring Dorothea. Seignious concluded that "[t]he breaches of the standard of care by the staff at Shady Acres, in terms of reasonable medical probability, resulted in [Dorothea's] fall and resulting injuries, fracture, pain, and suffering."

The Standard of Care, Breach, and Causation

Shady Acres contends that Seignious's report is conclusory as to all three required elements: the standard of care, breach, and proximate cause. Shady Acres argues that Seignious's report fails to adequately state the standard of care and fails to specify what care Shady Acres should have provided. Shady Acres complains that the report also fails to explain how Shady Acres's alleged breaches of the standard of care proximately caused Dorothea's injuries, *i.e.*, how Shady Acres's breaches were a substantial factor in her injuries.

Davis was not required to marshal all his proof or present evidence in the report as if actually litigating the merits. *See Palacios*, 46 S.W.3d at 878-79. The report need not meet the same requirements as evidence offered in a summary-judgment proceeding or at trial. *Id.* at 879. The report 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 the claims have merit. *Id.*; *Wright*, 79 S.W.3d at 52.

Seignious explained that the standard of care required Shady Acres to (1) maintain adequate supervision and assistance to prevent Dorothea from falling, (2) maintain a sufficient number of adequately trained staff, (3) develop and implement an adequate care plan that was consistent with Dorothea's fall risk, and (4) properly

analyze Dorothea's fall and conduct an appropriate post-fall evaluation. Seignious further explained that Shady Acres breached the standards of care by failing to provide adequate supervision and assistance to prevent accidents from occurring, develop and implement an adequate care plan in light of Dorothea's actual fall risk, perform a complete and thorough post-fall assessment, and evaluate Dorothea after the fall. However, Seignious's report does not adequately explain how Shady Acres violated these standards. It is not clear from the report if Shady Acres failed to adequately train its staff in the proper procedures for transferring a patient from a shower chair to a "geri chair," if Shady Acres did not provide an adequate number of staff for that transfer procedure, if Shady Acres needed a supervisor present during the transfer procedure, if Shady Acres should have used additional medical equipment to accomplish that transfer, or how the failure to implement a specific practice in transferring a patient from a shower chair to a "geri chair" was the cause of Dorothea's fall.

We conclude that the trial court was not justified in finding that Seignious's report is sufficient to explain how Shady Acres is claimed to have breached the standards that apply to transferring a patient from a shower chair to a "geri chair," to inform Shady Acres of the specific conduct called into question, and to explain how Shady Acres's failure to follow the applicable standards caused Dorothea's

injuries. *See Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 879; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). The report fails to provide a basis for the trial court to conclude that Davis's claims have merit. *See Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 879. Because Davis's expert report is deficient, we are of the opinion that Davis should be given the opportunity to file a compliant report. *See Palacios*, 46 S.W.3d at 878.

In summary, we conclude that the trial court abused its discretion in ruling that Seignious's report met the requirements of expert reports under Texas law. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). We hold that the trial court abused its discretion in overruling Shady Acres's objections and denying its motion to dismiss. We sustain Shady Acres's sole issue on appeal. Accordingly, we reverse the trial court's order and remand the cause to the trial court to consider whether to grant Davis a thirty-day extension of time *sua sponte* to cure the deficiencies in the expert report. *See Leland v. Brandal*, 257 S.W.3d 204, 207 (Tex. 2008).

REVERSED AND REMANDED.

STEVE McKEITHEN
Chief Justice

Submitted on March 2, 2017
Opinion Delivered April 6, 2017

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