



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00150-CV

JOHN KOUTSOUFIS,
INDIVIDUALLY AND ON BEHALF
OF THE ESTATE OF NIKI
KOUTSOUFIS

APPELLANT

V.

PINNACLE HEALTH FACILITIES
GP V, LLC AND TEXAS
OPERATIONS MANAGEMENT, LLC

APPELLEES

FROM THE 141ST DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 141-274095-14

MEMORANDUM OPINION¹

In this accelerated appeal, we are asked to decide whether a plaintiff's healthcare-liability claims may proceed against the management companies of two healthcare facilities. We conclude that the trial court abused its discretion by

¹See Tex. R. App. P. 47.4.

denying the plaintiff an extension to amend his expert report as to one management company and dismissing the other management company.

I. BACKGROUND

A. HEALTHCARE FACILITIES

Niki Koutsoufis suffered a stroke and on August 28, 2012, was admitted to Pinnacle Health Facilities XXIX, LP d/b/a Arlington Villa Retirement Community (Arlington Villa) for nursing care and rehabilitation. Appellee Pinnacle Health Facilities of Texas GP V (Pinnacle) was the management company for Arlington Villa. Niki was hospitalized from September 24 through October 5, 2012, after she experienced urinary-tract infections, dehydration, kidney failure, and pressure ulcers.

When she was discharged, Niki was transferred to Interlochen Health and Rehabilitation. Interlochen Health's management company was Texas Holdco, LLC. After Niki again suffered dehydration and urinary-tract infections, Niki was transferred in March 2013 to Keller SNF d/b/a Heritage House at Keller Nursing and Rehabilitation (Heritage House). Appellee Texas Operations Management, LLC (Texas Operations) was Heritage House's management company. On March 2, 2014, Niki was admitted to a hospital and diagnosed with respiratory insufficiency, atrial fibrillation with rapid ventricular response, a urinary-tract infection, dehydration, seizures, and dementia. Niki was released from the hospital and returned to Heritage House the next day; however, Niki died on March 17, 2014, after suffering another stroke.

B. ALLEGATIONS IN PETITION

Niki's son, appellant John Koutsoufis, filed suit on his own behalf and on behalf of Niki's estate against each of the facilities Niki lived at and those facilities' management companies, including Pinnacle and Texas Operations. In his factual allegations, he specified which nursing facility committed which act or omission based on where Niki lived at the time of the injury, contributing to Niki's death. Based on these "cited acts and/or omissions," Appellant raised claims for "Medical Negligence" and "Gross Negligence" against "Defendants," which encompassed the three healthcare facilities as well as their management companies. Appellant alleged that Arlington Villa was "maintained," "owned, managed, operated, supervised and/or staffed" by Pinnacle and that Heritage House was "owned, managed, operated, supervised and/or staffed" by Texas Operations.

1. Direct Liability

Regarding direct-liability negligence, Appellant raised the following grounds against "Defendants": (1) "[f]ailing to observe, intervene, and care for [Niki]"; (2) "[n]eglecting [Niki] to such a degree that she suffered pressure ulcers[,] UTIs[,] and dehydration"; (3) "[f]ailing to provide the medical and nursing care reasonably required for [Niki's] known conditions"; and (4) "[f]ailing to provide the appropriate supervision and training to its staff and personnel that were providing care to [Niki]." Appellant also alleged that "Defendants" did not comply with the licensing regulations for assisted living facilities and for agencies providing

hospice services by (1) failing to provide sufficient staffing to ensure that each resident received the appropriate supervision and care required to meet basic needs and to ensure that residents' service plans were properly updated based on a significant change in condition; (2) failing to provide a written plan of care; (3) failing to provide appropriate nursing services; and (4) failing to provide "direction of care." 40 Tex. Admin. Code §§ 92.41(a)(3), 97.821(c)–(d), 97.823, 97.832 (2016) (Tex. Dep't of Aging and Disability Servs., Licensing Standards).²

Regarding gross negligence, Appellant alleged that the negligent acts or omissions by "Defendants directly" equated to gross negligence because they each acted with conscious indifference or malice by failing to take any reasonable preventative action even though they had "direct prior notice of [Niki's] high risk for dehydration, UTIs[,] and pressure ulcers."

2. Vicarious Liability

Appellant also sought to hold each defendant vicariously liable for those negligent actions taken by that defendant's agents or employees through the theory of respondeat superior:

The subject injuries caused by the tortious misconduct of Defendants, and each of them, occurred while Defendants' agents were within the regular scope of their employment by Defendants,

²The regulation regarding hospice providers Appellant cited in his petition—title 40, section 97.403 of the Texas Administrative Code—was repealed effective October 1, 2013, which was before he filed his petition. We cite to the current regulations that most closely hew to those specific allegations in the petition—title 40, sections 97.821, 97.823, and 97.832, of the Texas Administrative Code.

and under the doctrine of *respondeat superior*, Defendants may be held liable for the negligent acts of its agents/employees committed during the regular course and scope of their agency/employment even if the employer did not personally commit a wrong.

Regarding gross negligence, Appellant alleged vicarious liability based on vice-principal ratification: “The acts and omissions of gross negligence attributed to the Defendants were committed and/or ratified by vice principals of and/or managers acting in [a] managerial capacity.”

C. THE EXPERT REPORT

1. Contents

Appellant then served on the facilities and their management companies the expert report of Dr. Lige B. Rushing Jr., in which he opined that each breached the applicable standard of care, causing Niki’s injuries. See Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (West Supp. 2016). Regarding the management companies—Pinnacle and Texas Operations—Rushing stated that “[b]ased on the information [he] reviewed,” Pinnacle and Texas Operations were the management companies for Arlington Villa and Heritage House, respectively. Rushing represented that he was qualified to opine as to Pinnacle and Texas Operations because he had “provided guidance and offered [his] opinions regarding the appropriate oversight, protocol, regulations, and training by management companies of nursing facilities such as those involved in the care and treatment of residents like [Niki]”; therefore, he stated, he was “intimately

familiar with the standards of care for the facilities and management companies involved in this case.”

He defined the standard of care applicable to management companies as the equivalent to the standard governing the facilities themselves:

Defendants Pinnacle, [Interlochen Health], Texas Holdco, [Heritage House,] and Texas Operations owed a duty to [Niki] to act as . . . reasonably prudent owners, operators, and/or management companies of their skilled nursing facilities under the same or similar circumstances. The standard of care for each of the Defendants is the same in this context, as each of the owner/manager defendants were operating skilled nursing facilities for residents like [Niki]. . . . Further, the standard of care as to each of the Defendants is the same based upon the facilities providing care and treatment to [Niki], through their employees, agents[,] and representatives.

Rushing then identified the breaches caused by “Defendants . . . either directly or by and through their employees, agents, officers, supervisory, and representatives”:

[F]ailing to use ordinary care to monitor and supervise its employees charged with the care and supervision of skilled nursing patients, including but not limited to [Niki], all of which posed an unreasonable risk of harm to the resident, which Defendants knew or should have known about; and failing to have/or enforce policies and procedures on: 1) the hiring, monitoring, evaluating[,] and supervising employees and staff charged with the care and supervision of skilled nursing patients; 2.) patient safety and thus the implementation of proper procedures to ensure patients were properly evaluated, diagnosed[,] and treated from the time of admission through the time of discharge.

In summary, the care and treatment rendered to [Niki] by Defendants, and each of them, fell below the accepted standard care the following ways:

1. Accepted and retained a patient whose needs they could not meet.

2. Failed to have appropriate pressure ulcer prevention program.
3. Failed to prevent [Niki's] pressure ulcer.
4. Failed to properly treat [Niki's] pressure ulcer.
5. Failed to keep appropriate records.
6. Failed to prevent [Niki] from developing urinary tract infections.

Rushing opined as to causation that Arlington Villa's and Pinnacle's conduct in failing to have a pressure-ulcer-prevention program led to Niki's pressure ulcers. He additionally stated that "[t]he failure of the facility Defendants, and their management companies to provide appropriate care to [Niki] relating to her incontinence, hydration, and UTIs . . . complicated her conditions, and resulted in an overall decline in her health with associated suffering."

2. Objections and Rulings

Texas Operations filed objections to Rushing's report, arguing that Rushing was not qualified to discuss the standard of care for a management company, failed to identify the applicable standard of care, failed to sufficiently explain how Texas Operations breached the standard of care, and failed to adequately address causation. Based on these deficiencies, Texas Operations argued that the report did not comply with the statutory requirements, mandating dismissal of Appellant's claims against it. Heritage House also objected to Rushing's report and moved to dismiss Appellant's claims based on the report's insufficiency.

Pinnacle similarly objected to the report and moved to dismiss Appellant's claims on the same bases raised by Texas Operations. Arlington Villa joined in Pinnacle's objections and motion to dismiss.

The trial court sustained Pinnacle's objections to Rushing's report and found no good cause to grant an extension to cure the deficiencies, as Appellant had requested. Accordingly, the trial court granted Pinnacle's motion to dismiss, dismissing Appellant's claims against Pinnacle with prejudice. But the trial court denied Arlington Villa's objections to Rushing's report and motion to dismiss.

The trial court sustained Texas Operations' objection to Rushing's report and found no good cause justifying Appellant's requested extension; thus, the trial court granted Texas Operations' motion to dismiss and dismissed Appellant's claims against Texas Operations with prejudice. Based on Heritage House's objections, the trial court found that the report was deficient but granted Appellant an extension, as he requested, to address these deficiencies. Appellant then served an amended report prepared by Rushing, and Heritage House objected to the amended report. The trial court overruled Heritage House's objections to the amended report and denied its dismissal motion. We affirmed those rulings, concluding that Rushing's amended report sufficiently complied with section 74.351 regarding Appellant's claims against Heritage House. *Keller SNF v. Koutsoufis*, No. 02-16-00227-CV, 2017 WL 117318, at *6, *8–9 (Tex. App.—Fort Worth Jan. 12, 2017, no pet. h.) (mem. op.).

3. Appeal

Appellant appeals from the dismissals of his claims against Pinnacle and Texas Operations. See Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(10). In his first issue, he argues that the trial court abused its discretion by sustaining Pinnacle's and Texas Operations' objections and dismissing his claims because his suit against Pinnacle and Texas Operations was based on their vicarious liability for Arlington Villa's and Heritage House's actions, which removes the need to state and apply a separate standard of care as to the management companies. Appellant asserts in his second issue that sustaining the objections and dismissing his claims were abuses of the trial court's discretion because Rushing was qualified to opine as to the standard of care for management companies as reflected in the four corners of his report. Appellant argues in the alternative to these two issues that even if the trial court properly sustained Pinnacle's and Texas Operations' objections, the trial court abused its discretion by failing to give him an opportunity to cure any defect in Rushing's report. Because of the unique procedural posture of this case, we turn to Appellant's first and third issues and address them together.

II. THE EXPERT-REPORT REQUIREMENT

A. APPLICABLE LAW

In the healthcare-liability context, the legislature has erected a pretrial hurdle over which such claims must jump—the expert-report requirement—in order to ensure only claims that arguably are meritorious proceed.

See *Samlowski v. Wooten*, 332 S.W.3d 404, 410–11 (Tex. 2011); see also *id.* at 416 (Wainwright, J., dissenting & concurring). Within 120 days of filing suit, a claimant must serve each healthcare-provider defendant with an expert report, accompanied by the expert’s curriculum vitae. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a).³ Such a report must provide “a fair summary of the expert’s opinions . . . regarding applicable standards of care, the manner in which the care rendered by the . . . 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). A compliant report need not marshal the necessary proof and no particular words are required to address these elements, but bare conclusions or inferences will not satisfy the report requirement. *Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878–79 (Tex. 2001). In deciding whether this standard has been met, the trial court examines only the four corners of the expert’s report. See *Palacios*, 46 S.W.3d at 878.

If the claimant timely makes a good-faith effort to comply with this report requirement but the trial court concludes that the four corners of the report are deficient in some manner, the trial court may grant the claimant an additional thirty days in which to cure the deficiency. See Tex. Civ. Prac. & Rem. Code

³No party argues that Pinnacle and Texas Operations were not healthcare providers as contemplated by this statute or that Appellant’s claims against them were not healthcare-liability claims. See *id.* § 74.001(a)(12)–(13) (West Supp. 2016) (defining healthcare provider and healthcare-liability claim).

Ann. § 74.351(c), (l); *Scoresby*, 346 S.W.3d at 549. Although the extension provision is permissive, “[t]he trial court should err on the side of granting the additional time and *must* grant it if the deficiencies are curable.” *Scoresby*, 346 S.W.3d at 549 (footnotes omitted) (emphasis added). Indeed, deficiencies in a report, such as an individual’s lack of qualifications or an opinion’s inadequacies, will not support dismissal of the claims; thus, the trial court should give the claimant a fair opportunity to cure if possible. *See id.* On the other hand, if the deficiencies are incurable or the report was not a good-faith effort to comply—the report is “utterly devoid of substantive content” such that it equates to no report being filed at all—the defendant is entitled to a dismissal of the claims against it and an extension would be unwarranted. *Id.*

B. STANDARD OF REVIEW

We review the trial court’s decision to deny an extension request and grant a motion to dismiss under section 72.351 for an abuse of discretion. *See Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015); *Bosch v. Wilbarger Gen. Hosp.*, 223 S.W.3d 460, 465 (Tex. App.—Amarillo 2006, pets. denied). Such an abuse occurs if the trial court rules without reference to guiding rules or principles or renders a decision lacking support in the facts or circumstances of the case. *See Samlowski*, 332 S.W.3d at 410.

C. VICARIOUS LIABILITY

Because Appellant raised vicarious-liability claims, the requisite scope and sufficiency of Rushing’s report was altered. If a healthcare-liability claim

“contains at least one viable liability theory, as evidenced by an expert report meeting the statutory requirements, the claim cannot be frivolous.” *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 631 (Tex. 2013); *see also TTHR Ltd. P’ship v. Moreno*, 401 S.W.3d 41, 45 (Tex. 2013) (“[B]ecause the trial court did not abuse its discretion in finding Moreno’s reports adequate as to her theory that [the hospital] is vicariously liable for the doctors’ actions, her suit against [the hospital]—including her claims that the hospital has direct liability and vicarious liability for actions of the nurses—may proceed.”). Thus,

when a health care liability claim involves a vicarious liability theory, either alone or in combination with other theories, an expert report that meets the statutory standards as to the employee is sufficient to implicate the employer’s conduct under the vicarious theory. And if any liability theory has been adequately covered, the entire case may proceed.

Potts, 392 S.W.3d at 632. We have applied this holding and disapproved of “[c]arving out causes of action, i.e., alternative ‘theories of liability’” at the expert-report stage. *SCC Partners, Inc. v. Ince*, 496 S.W.3d 111, 115 (Tex. App.—Fort Worth 2016, pet. to be dism’d by agr.). Therefore, “[i]f an expert report on a single liability theory against a particular defendant satisfies the statutory requirements [of section 74.351], the lawsuit is not frivolous as to that defendant.” *Ennis Reg’l Med. Ctr. v. Crenshaw*, No. 05-12-01428-CV, 2013 WL 2446374, at *5 (Tex. App.—Dallas June 4, 2013, no pet.) (mem. op.).

III. APPLICATION

Here, Appellant raised both direct- and vicarious-liability claims against Pinnacle and Texas Operations. For example, Appellant alleged that “Defendants” represented that they were able to care for Niki’s conditions through appropriate medical oversight and properly trained and qualified individuals, leading to Appellant’s decision to place Niki in their care. Appellant contended that “Defendants” did not fulfill these representations and further failed to formulate “various Focus Plans (Care Plans) to account for [Niki’s] specifically identified conditions and potential complications related to [her] conditions.” In an attempt to extend Arlington Villa’s and Heritage House’s direct liability to Pinnacle and Texas Operations, Appellant alleged that Pinnacle “maintained,” “owned, managed, operated, supervised and/or staffed” Arlington Villa and that Texas Operations “owned, managed, operated, supervised and/or staffed” Heritage House. Rushing stated in his report that Pinnacle and Texas Operations were the “management compan[ies]” for Arlington Villa and Heritage House, respectively.

Importantly, the trial court concluded that Rushing’s original report was sufficient under section 74.351 regarding Appellant’s claims against Arlington Villa. Because Appellant raised vicarious-liability allegations, the success of Appellant’s claims against Arlington Villa at the pretrial stage mandated that his claims against its management company—Pinnacle—cleared that hurdle as well. See *Potts*, 392 S.W.3d at 632 (“And if any liability theory has been adequately

covered, the entire case may proceed.”); *Ince*, 496 S.W.3d at 115 (refusing to carve out alternative theories of liability at expert-report stage and allowing wrongful-death claim to proceed with supported survival claim). In other words, because Rushing’s original report was sufficient to push Appellant’s claims against Arlington Villa over the pretrial hurdle, Appellant’s vicarious-liability allegations operated to hoist his allegations against Pinnacle over that same hurdle. Therefore, it was an abuse of discretion for the trial court to dismiss Appellant’s claims against Pinnacle.

Relatedly, the trial court abused its discretion by finding no good cause to allow Appellant to address the deficiencies in Rushing’s original report regarding his claim against Texas Operations. The trial court granted Appellant an extension to address the deficiencies identified by Heritage House. The good cause justifying an extension as to Heritage House justified an extension as to Texas Operations as well based on Appellant’s vicarious-liability allegations. See *Scoresby*, 346 S.W.3d at 549. Thus, it was an abuse of discretion for the trial court to find no good cause to allow Appellant an extension to address the identified defects in Rushing’s original report.⁴

⁴Even if Rushing were unqualified to opine as to the standard of care applicable to healthcare management companies, such a deficiency would not warrant outright dismissal with no opportunity to cure. See *Scoresby*, 346 S.W.3d at 549.

IV. CONCLUSION

We conclude that the trial court abused its discretion by dismissing Pinnacle and by finding no good cause to grant Appellant an extension as to his claims against Texas Operations.⁵ We sustain issues one and three. We need not address issue two. See Tex. R. App. P. 47.1. Therefore, we reverse the trial court's order dismissing Pinnacle and its order finding no good cause to grant Appellant an extension as to his claims against Texas Operations. We remand the case to the trial court for further consistent proceedings. See Tex. R. App. P. 43.2(d), 43.3(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and SUDDERTH, JJ.

DELIVERED: January 26, 2017

⁵We note that Appellant, by arguing to the trial court that his case would not be "affect[ed] . . . at all" if the management companies were not sufficiently implicated by Rushing's original report, seemingly provoked the trial court to make the ruling he appeals today. In any event, the divorce of Appellant's claims against the management companies from the claims against the facilities was an abuse of discretion.