



**In The
Court of Appeals
Seventh District of Texas at Amarillo**

No. 07-21-00125-CV

KASSANDRA MCQUILLEN, APPELLANT

V.

**LUBBOCK HEART HOSPITAL, LLC D/B/A
LUBBOCK HEART & SURGICAL HOSPITAL, APPELLEE**

**On Appeal from the 237th District Court
Lubbock County, Texas
Trial Court No. 2020-539,776; Honorable Les Hatch, Presiding**

May 9, 2022

OPINION

Before PIRTLE and DOSS, JJ., and ROSE, S.J.¹

This appeal involves a health care liability claim filed by Appellant, Cassandra McQuillen, against Mounir Y. Borno, M.D., Lubbock Heart Hospital, LLC d/b/a Lubbock Heart & Surgical Hospital, Texas Physicians Group, P.A., and Lubbock Cardiologist

¹ Senior Justice Jeff Rose sitting by assignment.

Specialists, P.A. d/b/a Cardiologists of Lubbock. Initially, McQuillen asserted claims against Dr. Borno, Texas Physicians Group, and Cardiologists of Lubbock for fraudulent nondisclosure, fraudulent misrepresentation, and negligent representation stemming from allegations of medical malpractice arising from the implantation of a cardiac pacing device in her chest. In her original petition, McQuillen asserted a claim of vicarious liability against Lubbock Heart Hospital based on an allegation that Dr. Borno and his medical staff were “acting as the agents and/or employees of [Lubbock Heart Hospital] and were acting within the course and scope of their agency or employment . . . making [Lubbock Heart Hospital] liable . . . under the theory of *respondeat superior* or actual, ostensible or apparent agency.” McQuillen also asserted a claim of direct liability against Lubbock Heart Hospital for acts of negligence in connection with McQuillen’s status as a patient. McQuillen subsequently asserted a claim against Lubbock Heart Hospital based on a claim of alter ego.² After McQuillen filed her amended petition, the trial court entered an order sustaining the objections of Dr. Borno, Texas Physicians Group, and Cardiologists of Lubbock to her original expert report.³ The court found that the expert report was insufficient and it granted McQuillen’s request for a thirty-day extension of time to cure those deficiencies. McQuillen filed her amended expert report on April 16, 2021, and on May 10, 2021, the trial court entered an *Order of Dismissal*, sustaining Lubbock Heart Hospital’s objections to the original expert report. The court’s order denied McQuillen’s request for leave to amend and it dismissed her “claims” against Lubbock Heart Hospital

² The nature of McQuillen’s claims have evolved during the course of this litigation. Claims of *alter ego* were not added until the filing of Plaintiff’s First Amended Original Petition, which was filed subsequent to McQuillen’s original expert report, but prior to the *Revised Expert Report* and *Order of Dismissal* at issue in this appeal.

³ Lubbock Heart Hospital’s Objections to the original expert report were not addressed.

with prejudice. McQuillen now appeals that dismissal, arguing through five issues that the trial court's judgment was made in error. We find the trial court erred in dismissing the claims against Lubbock Heart Hospital and we reverse and remand for further proceedings.

BACKGROUND

In May 2018, McQuillen, a healthy forty-five-year-old woman, experienced random episodes of lightheadedness, dizziness, and shortness of breath. Her primary care physician referred her to Dr. Borno. On May 14, 2018, McQuillen presented herself to Dr. Borno at Cardiologists of Lubbock. Dr. Borno administered several tests, all of which returned results within normal parameters. Dr. Borno then provided McQuillen with a heart rate monitor to be worn for seven days. After just two days, a physician's assistant with Dr. Borno's office called McQuillen and told her that her heart was "stopping" several times a day, requiring immediate placement of a cardiac pacing device. McQuillen informed her primary care physician, who was surprised by the information and asked if Dr. Borno would postpone any surgery to allow time for a sleep apnea test. Dr. Borno would not do so and on May 21, 2018, he implanted a pacemaker in McQuillen at the Lubbock Heart Hospital. At no time did Dr. Borno discuss with McQuillen different pacemaker devices, manufacturers, or other options.

Nine days after placement of the device, McQuillen developed a hematoma around her implant and the surgical incision began bleeding. Although McQuillen was not admitted as a patient, Dr. Borno cleaned and redressed her incision at the Lubbock Heart Hospital. The next day, McQuillen returned, shaking uncontrollably and complaining of chills and weakness. This time, she was readmitted to Lubbock Heart Hospital. Dr. Borno

diagnosed her with an infection and told her he needed to move the pacemaker from her left side to her right side. He performed that procedure on June 1, 2018, at the Lubbock Heart Hospital. Thereafter, McQuillen developed gastrointestinal symptoms and complained of those symptoms to Dr. Borno during follow-up appointments in June and July. At that time, Dr. Borno did not diagnose her with any condition or treat those symptoms. On July 5, 2018, McQuillen saw her primary care physician and he diagnosed her with *clostridium difficile*. After receiving a positive result for the bacteria, her physician prescribed medication to treat the condition.

McQuillen returned to Dr. Borno six months later. Her pacemaker showed extremely low usage and she said she could feel the device when she was at rest, causing Dr. Borno to reduce the pacemaker setting to forty beats per minute. When she returned for her follow-up appointment one year later, the device showed virtually no usage. At that time, McQuillen sought second and third opinions from two other physicians who were unaffiliated with Dr. Borno. Both of the new physicians determined that McQuillen did not have a condition that required a pacemaker.⁴

On May 20, 2020, McQuillen filed suit against Dr. Borno, individually. She also sued Lubbock Heart Hospital, LLC d/b/a Lubbock Heart & Surgical Hospital, Texas Physicians Group, P.A., and Lubbock Cardiologist Specialists, P.A. d/b/a Cardiologists of Lubbock for vicarious liability arising out of their association with Dr. Borno. McQuillen alleged causes of action for negligence, gross negligence, and fraud. Specifically, she

⁴ On June 17, 2020, McQuillen's new physician removed the pacemaker originally implanted by Dr. Borno.

alleged fraud and negligent misrepresentation, as well as joint and several liability against Dr. Borno, Lubbock Heart Hospital, and Cardiologists of Lubbock.

As required by chapter 74 of the Texas Civil Practice and Remedies Code, on September 11, 2020, McQuillen filed a single expert report prepared by Dr. Wilber Su, M.D. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). Lubbock Heart Hospital timely filed its objections to the sufficiency of that expert report on September 21, 2020. Later that same day, Dr. Borno, Texas Physicians Group, and Cardiologists of Lubbock filed a separate pleading objecting to the sufficiency of the expert report. A hearing was held on March 22, 2021. Following that hearing the trial court sustained the objections of Dr. Borno, Texas Physicians Group, and Cardiologists of Lubbock but did not specify its ruling as to Lubbock Heart Hospital. Finding the report to be deficient, the trial court granted McQuillen's request for a thirty-day extension to cure any deficiencies. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c).

On April 16, 2021, within the time allowed by the trial court, McQuillen filed her amended section 74.351 expert report by Dr. Su. The amended report addressed the objections raised by all parties. Thereafter, on May 10, 2021, the trial court signed an *Order of Dismissal*, with prejudice, as to Lubbock Heart Hospital only. The trial court found the section 74.351 expert report to be deficient as to Lubbock Heart Hospital, and further found the report did not represent a good faith effort to comply with that section. The order also denied McQuillen's request for a thirty-day extension. It is from this order that McQuillen brings this interlocutory appeal.

ANALYSIS

STANDARD OF REVIEW

We review a trial court's decision to grant or deny a motion to dismiss a health care liability claim under an abuse of discretion standard of review. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 858 (Tex. App.—Houston [1st Dist.] 2006, no pet.). We apply that same standard to a trial court's determination as to whether an expert is qualified. See *Broders v. Heise*, 924 S.W.2d 148, 151-52 (Tex. 1996); *San Jacinto Methodist Hosp. v. Bennett*, 256 S.W.3d 806, 811 (Tex. App.—Houston [14th Dist.] 2008, no pet.). When reviewing matters within a trial court's discretion, an appellate court may not substitute its judgment for that of the trial court. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). Under an abuse of discretion standard of review, a trial court does not abuse its discretion merely because it decides a discretionary matter differently than an appellate court would have decided the same issue under similar circumstances. *Harris Cty. Hosp. Dist. v. Garrett*, 232 S.W.3d 170, 176 (Tex. App.—Houston [1st Dist.] 2007, no pet.). That being said, a trial court has no discretion in determining what the law is or in correctly applying the law to the facts. See *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (finding that a trial court must correctly determine what the law is and must correctly apply that law to the facts of the case before it). Furthermore, a trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010).

A claimant bringing a health care liability claim must timely provide each defendant health care provider with an expert report. *Walgreen Co. v. Boyer*, No. 01-19-00093-CV,

2020 Tex. App. LEXIS 3210, at *6 (Tex. App.—Houston [1st Dist.] April 16, 2020, no pet.) (mem. op.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351). An expert report means 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 those 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). In setting out the expert’s opinions, the report must inform the defendant of the specific conduct the plaintiff has called into question as well as provide a basis for the trial court to conclude that the claims have merit. *Boyer*, 2020 Tex. App. LEXIS 3210, at *7 (citing *Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011)). A report that merely states the expert’s conclusions as to the standard of care, recites a breach, and assumes causation does not fulfill these purposes. *Boyer*, 2020 Tex. App. LEXIS 3210, at *7 (citing *Palacios*, 46 S.W.3d at 879). Instead, the expert must explain the basis of the statements and must link those conclusions to the facts. *Boyer*, 2020 Tex. App. LEXIS 3210, at *7 (citing *Wright*, 79 S.W.3d at 52).

If a defendant files a motion to dismiss challenging the adequacy of a claimant’s expert report, a trial court must grant the motion if, after a hearing, it appears that the report does not represent an objective good faith effort to comply with the definition of an expert report or that it is not sufficiently specific to provide a basis for the trial court to conclude that the claims have merit. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l). The trial court, in assessing the sufficiency of the report, may not draw inferences, but instead must rely exclusively on the information contained within the four corners of the

expert report or its accompanying curriculum vitae. *Boyer*, 2020 Tex. App. LEXIS 3210, at *7 (citing *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 463 n.14 (Tex. 2008)).

ISSUE ONE—ABUSE OF DISCRETION REGARDING AMENDED EXPERT REPORT

Via her first issue, McQuillen argues the trial court abused its discretion in sustaining Lubbock Heart Hospital's objections and dismissing McQuillen's claim because Lubbock Heart Hospital failed to object to the amended expert report.

Under section 74.351(a), “[e]ach defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.” TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). This requirement applies to amended reports such that if a defendant physician or health care provider whose conduct is implicated in the report fails to file and serve objections to amended expert reports, those objections will be waived. *Gordon v. Sebile*, 311 S.W.3d 190, 192 (Tex. App.—Beaumont 2010, no pet.). This is so because when a party files an expert report pursuant to the trial court's express permission to cure a deficient report, the new expert report constitutes “a report” within the meaning of section 74.351(a), thereby triggering the physician's or health care provider's obligation to file specific objections to the new report within twenty-one days of being served with the report. *Id.* at 193. If no objections are filed to a report that implicates the physician's conduct, all objections are waived. *Id.*

Here, McQuillen acknowledges that when she filed Dr. Wilber Su's original report, Lubbock Heart Hospital objected. However, she was then granted a thirty-day extension

to file an amended report. Thereafter, as permitted by the court, she filed an amended report, again implicating the conduct of all of the parties, including Lubbock Heart Hospital.⁵ Thereafter, Lubbock Heart Hospital did not file an objection to the adequacy of the amended report. McQuillen acknowledges that at one time, prior to granting leave to file an amended report, the trial court did send a letter to counsel stating how it was going to rule on Dr. Su's original report.⁶ McQuillen asserts, however, that the letter did not negate Lubbock Heart Hospital's obligation to lodge any objections it had to Dr. Su's amended report since the trial court had not ruled on Lubbock Heart Hospital's motion to dismiss at that time.

McQuillen contends that the amended report identified Lubbock Heart Hospital and implicated its conduct, both directly and vicariously for the negligent and fraudulent acts of Dr. Borno. Although Lubbock Heart Hospital's motion to dismiss was pending when McQuillen filed Dr. Su's amended report, it did not file new objections to Dr. Su's amended report. According to McQuillen, Dr. Su's *amended* report superseded the original report because, at the time of filing, the trial court had not entered its order on Lubbock Heart Hospital's motion to dismiss. *Otero v. Leon*, 319 S.W.3d 195, 204-05 (Tex. App.—Corpus Christi 2010, pet. denied); *HealthSouth Corp. v. Searcy*, 228 S.W.3d 907, 909 (Tex. App.—Dallas 2007, no pet.). As such, McQuillen argues, the trial court erred when it

⁵ There is some discussion in both appellate briefs concerning the identity of the entity "Cardiologists of Lubbock." McQuillen notes that she diligently sought to discover the true identity of Cardiologists of Lubbock but that Lubbock Heart Hospital concealed it. In May 2020, she sent a letter to counsel for the Dr. Borno parties regarding the legal status of Cardiologists of Lubbock. Lubbock Heart Hospital filed an Assumed Name Certificate assuming the name of Cardiologists of Lubbock on June 17, 2020, more than two years after the surgery in question. When in February 2021, McQuillen learned Lubbock Heart Hospital was conducting business as Cardiologists of Lubbock, she informed the trial court and alleged that Lubbock was vicariously liable for the acts of Cardiologists of Lubbock.

⁶ At oral argument, counsel argued that "no one thought that letter was an order." The letter also requested submission of a proposed order. The proposed order was not signed until many months later.

dismissed her claims against Lubbock Heart Hospital because the amended report was the operative report when the trial court issued its order dismissing McQuillen's claims against Lubbock Heart Hospital.

Lubbock Heart Hospital disagrees, arguing that its alleged waiver of any objection to Dr. Su's amended report is not before this court because the trial court granted its motion to dismiss based on the first report and that there was no requirement that new objections be filed as to the amended report because McQuillen was denied a thirty-day extension to provide an amended report as to Lubbock Heart Hospital. According to Lubbock Heart Hospital's arguments, the "sole issue in this appeal involves the initial report provided by [McQuillen] and whether it was sufficient under Chapter 74." Moreover, Lubbock Heart Hospital contends McQuillen never argued to the trial court that the amended expert report was an adequate report as to Lubbock Heart Hospital or that the amended report would require reversal of the trial court's letter-ruling concerning the motion to dismiss. Accordingly, it asserts McQuillen has failed to preserve her appellate argument on this point.

The record shows that during a hearing on the objections to Dr. Su's initial expert report, McQuillen admitted that the first expert report was deficient as to Lubbock Heart Hospital. The record also shows that, at the conclusion of that hearing, the trial court granted McQuillen a thirty-day extension of time to cure the deficiencies in the expert report of Dr. Su. The clerk's record reflects an order dated March 22, 2021, wherein the trial court finds the original expert report to be deficient. That same order grants McQuillen a thirty-day "grace period" to file an amended section 74.351 expert report. McQuillen filed her amended report within the time frame allowed by statute and the order

of the court. Thus, the amended expert report, filed April 16, 2021, became the operative report for all purposes. Because Lubbock Heart Hospital did not file any objections to the amended report, the trial court abused its discretion in failing to find that it waived any objections to Dr. Su's amended expert report. McQuillen's first issue is sustained.

ISSUE TWO—ABUSE OF DISCRETION IN DISMISSING SUIT AGAINST LUBBOCK HEART HOSPITAL

Through her second issue, McQuillen contends the trial court abused its discretion in dismissing her suit against Lubbock Heart Hospital because she alleged claims based on vicarious liability for the acts of its agent, Dr. Borno. Thus, according to her theory of the case, because her expert report implicated Dr. Borno's conduct, it thereby vicariously implicated Lubbock Heart Hospital's conduct.

McQuillen notes that the Texas Supreme Court has held that "an expert report that adequately addresses at least one pleaded liability theory satisfies the statutory requirements, and the trial court must *not dismiss* such a case." *Certified EMS v. Potts*, 392 S.W.3d 625, 632 (Tex. 2013) (emphasis added). Generally, when a plaintiff brings health care liability claims against more than one defendant physician or health care provider, the expert report must set forth the standard of care and breach of the standard of care as to each defendant and explain the causal relationship between each defendant's individual acts or omissions and the claimed injury. *Kuhn v. Sam*, No. 01-20-00260-CV, 2021 Tex. App. LEXIS 6196, at *39-40 (Tex. App.—Houston [1st Dist.] Aug. 3, 2021, no pet.) (mem. op.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (r)(6); *Seton Family of Hosps. v. White*, 593 S.W.3d 787, 792 (Tex. App.—Austin 2019, pet. denied); *Pharmacy Healthcare Sols., Ltd. v. Pena*, 530 S.W.3d 169, 175 (Tex. App.—

Eastland 2015, pet. denied)). But when a plaintiff brings a health care liability claim based on a vicarious liability theory against a defendant health care provider, an expert report that adequately implicates the actions of that party's agent or employee is sufficient as to the defendant health care provider. *Kuhn*, 2021 Tex. App. LEXIS 6196, at *39-40 (citing *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671-72 (Tex. 2008); *Seton Family*, 593 S.W.3d at 792; *Owens v. Handyside*, 478 S.W.3d 172, 191 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (“[W]hen 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.”). In other words, when a health care liability claim is based on vicarious liability, an expert report that meets the statutory standards as to an agent or employee of a health care provider is sufficient to implicate the health care provider. *Kuhn*, 2021 Tex. App. LEXIS 6196, at *40 (citing *Potts*, 392 S.W.3d at 632; *Seton Family*, 593 S.W.3d at 792; *Owens*, 478 S.W.3d at 191-92) (expert report that is sufficient as to employee or agent, on whose alleged negligent conduct vicarious liability claim was based, is also sufficient as to employer health care provider). Indeed, an expert report is not even required to name a hospital expressly or identify a standard of care breached by the hospital if the theory of liability against the hospital is based on the actions of the hospital's physicians. See *Hous. Methodist Hosp. v. Nguyen*, 470 S.W.3d 127, 130 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (citing *Univ. of Tex. Med. Branch at Galveston v. Qi*, 370 S.W.3d 406, 413 (Tex. App.—Houston [14th Dist.] 2012, no pet.)). See also *Univ. of Tex. Sw. Med. Ctr. v. Dale*, 188 S.W.3d 877, 879 (Tex. App.—Dallas 2006, no pet.).

Lubbock Heart Hospital objected to Dr. Su's initial expert report on the basis that Dr. Su did not have experience in hospital operations or nursing care and the report failed to demonstrate a breach of the standard of care by Lubbock Heart Hospital or its nursing staff that caused McQuillen's injuries. Lubbock Heart Hospital did not object to that report on the basis that it was insufficient as to Dr. Borno's and Lubbock Health Hospital's vicarious liability. As such, McQuillen contends Lubbock Heart Hospital has waived any objection to the expert report on those grounds. Therefore, even if we were to apply Lubbock Heart Hospital's original objections to the amended expert report, the record would show that the objections included were not on the basis of her vicarious liability claims.

In response to Lubbock Heart Hospital's objections, McQuillen argued the theory of vicarious liability for the acts of Dr. Borno. She alleged Dr. Borno was an agent, owner, and member of Lubbock Heart Hospital and that he was acting in that capacity at all times relevant to her treatment. McQuillen argues here that Lubbock Heart Hospital never disputed those allegations. Consequently, she asserts that she pleaded a health care liability claim premised on Lubbock Heart Hospital's vicarious liability for Dr. Borno's conduct. She further argues that since Lubbock Heart Hospital did not object to the report's implication of Dr. Borno's conduct, the trial court abused its discretion in dismissing her claims against Lubbock Heart Hospital.

Lubbock Heart Hospital responds that McQuillen did not raise before the trial court her specific argument that the expert report was sufficient as to the conduct of an alleged agent. As such, it contends McQuillen waived her argument for purposes of appellate review. However, this argument fails because it was Lubbock Heart Hospital's initial

burden to object to the expert report, not McQuillen's burden to raise arguments supporting it. The court was to look only at the four corners of the expert report in making its decision whether to overrule or sustain Lubbock Heart Hospital's objections.

The record shows that on the hearing regarding the motion to dismiss, McQuillen asserted she "always had pled vicarious liability in both petitions . . . and [she] even properly alleged that anyone being sued under a common or assumed name was a part of this." Lubbock Heart Hospital argues that the expert report addressed only Dr. Borno's conduct and did not name Lubbock Heart Hospital; instead, only referencing it in passing. However, McQuillen clearly pleaded that Lubbock Heart Hospital was vicariously liable for Dr. Borno's conduct. When a health care liability claim involves a vicarious liability theory, an expert report that adequately implicates the actions of that party's agents or employees is sufficient to implicate the party under the vicarious liability theory. *Nguyen*, 470 S.W.3d at 130 (citing *Gardner*, 274 S.W.3d at 671-72; *Obstetrical & Gynecological Assocs., P.A. v. McCoy*, 283 S.W.3d 96, 102-03 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)). And, if a liability theory has been adequately covered, the entire case may proceed. *Potts*, 392 S.W.3d at 632.

Having examined that report, we find the it provides a fair summary of the expert's opinions, as of the date of the report, regarding the standards of care applicable to a physician in the same or similar situation as Dr. Borno, the manner by which the care rendered to McQuillen failed to meet those standards, and the causal relationship between that failure and the injury, harm, or damages being asserted against Lubbock Heart Hospital. Based on those findings, we conclude the trial court abused its discretion in granting Lubbock Heart Hospital's motion to dismiss and we sustain issue two.

ISSUES THREE, FOUR, AND FIVE—ABUSE OF DISCRETION IN DENYING REQUEST FOR EXTENSION

Through her remaining three issues, McQuillen argues the trial court abused its discretion in denying her request for a thirty-day extension to cure the deficiencies in the original expert report as it pertained to Lubbock Heart Hospital. Having determined that McQuillen received the benefit of the thirty-day extension granted to the other co-defendants, and in light of the fact that disposition of those issues would not be outcome determinative, we pretermitted issues three, four, and five. See TEX. R. APP. P. 47.1.

CONCLUSION

Having sustained issues one and two, we reverse the order of dismissal and remand this matter to the trial court for further proceedings.

Patrick A. Pirtle
Justice