



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

No. 07-21-00233-CV

KENMAR RESIDENTIAL HCS SERVICES, INC., APPELLANT

V.

**JESSE URIEGAS, AS GUARDIAN OF BRANDON URIEGAS,
AN INCAPACITATED PERSON, APPELLEE**

On Appeal from the 26th District Court
Williamson County, Texas¹
Trial Court No. 20-0382-C26, Honorable Donna Gayle King, Presiding

March 11, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

In this interlocutory appeal, appellant Kenmar Residential HCS Services, Inc., appeals from an order finding sufficient the expert reports tendered by appellee, Jesse

¹ Originally appealed to the Third Court of Appeals, this appeal was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001. Should a conflict exist between precedent of the Third Court of Appeals and this Court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

Uriegas, as guardian of Brandon Uriegas (“Brandon”), an incapacitated person. We reverse the trial court’s decision.

Background²

Kenmar owns and operates a group home for individuals with intellectual and developmental disabilities. Brandon, a nonverbal adult with developmental disabilities, resides in the home. He requires assistance with tasks such as bathing and personal hygiene, as he is incapable of independently performing all aspects of personal care. On September 22, 2018, Brandon fell and hit his head while attempting to bathe without assistance. He was transported to a local emergency department, where he received treatment to repair the laceration on his scalp. He was then returned to Kenmar. The next day, September 23, Brandon slipped and fell while attempting to use the restroom, hitting his face on the toilet. Brandon was returned to his bed. The following morning, Brandon was transported to the hospital, where he was found to have a broken hip that required surgery.

On March 2, 2020, Uriegas filed suit against Kenmar, alleging it was negligent in its treatment of Brandon for failing to follow an appropriate hygiene care plan, failing to provide adequate supervision, failing to provide reasonable and adequate care, failing to timely seek medical treatment, and more. Uriegas also alleged that Kenmar negligently hired, supervised, and/or retained its employees. Pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code, Uriegas served Kenmar with an expert report on

² Given the procedural posture of this case, we draw background facts from the allegations against Kenmar in Uriegas’s petition.

August 6, 2020. See TEX. CIV. PRAC. & REM. CODE § 74.351(a) (requiring service of expert report not later than 120 days after defendant's original answer is filed).³ The report was authored by a nurse, Maureen Hildebrandt. Kenmar timely filed objections to the report asserting that it (1) failed to establish that Hildebrandt was qualified, (2) did not provide a fair summary of the standard of care or how it was breached, and (3) did not provide a fair summary of the causal relationship between the alleged breach and Brandon's alleged injury. Kenmar also objected on the grounds that Uriegas failed to serve Nurse Hildebrandt's curriculum vitae as required. Kenmar thus requested that the trial court strike Nurse Hildebrandt's report. The matter was set for oral hearing on November 16, 2020. On November 12, Uriegas responded with a motion to overrule Kenmar's objections and motion for leave to supplement his expert report. Uriegas attached an expert report by Dr. Brett Cascio, an orthopedic surgeon, to his response.

After the hearing, the trial court signed an order sustaining Kenmar's objections to Uriegas's report. The order, filed on January 13, did not grant or deny Uriegas's request for an extension. In March, Uriegas filed a motion requesting a status conference hearing; he sought clarification as to whether the case had been dismissed or whether he had thirty days to amend the report. After the March hearing, the trial court requested additional briefing from the parties and held another hearing in April.

Following the April hearing, the trial court found that the objections to Uriegas's expert report were sustained only on the qualifications of Nurse Hildebrandt to opine on

³ Further references to provisions of the Texas Civil Practice and Remedies Code will be by reference to "section __" or "§ __."

causation;⁴ the trial court overruled all other objections to Nurse Hildebrandt's report and found that the report constituted a good faith effort to comply with the requirements of Chapter 74. The trial court further found that it still had plenary power, that Nurse Hildebrandt's report could be amended and supplemented by Dr. Cascio's report, and that the deadline for the court to grant a thirty-day extension had not passed.

Uriegas served the supplemental report from Dr. Cascio on May 19, 2021. Kenmar filed objections to Dr. Cascio's report and a motion to dismiss for failure to serve a sufficient expert report. Kenmar contended that the report (1) did not provide a fair summary of the standard of care or how it was breached, and (2) did not provide a fair summary of Dr. Cascio's opinions on causation. Kenmar also argued that the trial court's plenary power expired on January 20, 2021, well before the court's May 14 order granting Uriegas an extension.

The trial court overruled Kenmar's objections and denied its motion to dismiss. Kenmar brought this appeal.

Standard of Review

In reviewing a trial court's decision regarding the adequacy of an expert report, we apply the abuse of discretion standard. *TTHR Ltd. P'ship v. Moreno*, 401 S.W.3d 41, 44 (Tex. 2013). A trial court abuses its discretion if it acts arbitrarily, unreasonably, or without reference to any guiding rules or principles. *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010). An appellate court cannot conclude that a trial court abused its discretion merely

⁴ A causation expert must be a physician. See § 74.351(r)(5)(C).

because the appellate court would have ruled differently in the same circumstances. See *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam).

Expert Report Requirements

“In a health care liability claim, a claimant shall, not later than the 120th day after the date each defendant’s original answer is filed . . . , serve on that party or the party’s attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.” § 74.351(a). An expert report means a written report that provides a fair summary of the expert’s opinions regarding (1) applicable standards of care, (2) the manner in which the care rendered by the physician or health care provider failed to meet the standards, and (3) the causal relationship between that failure and the injury, harm, or damages claimed. § 74.351(r)(6). A report satisfies these requirements when it provides (1) enough information to inform the defendant of the specific conduct that is questioned, and (2) a basis for the trial court to conclude that the claim has merit. *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex. 2013). In assessing the sufficiency of the report, the court may not draw inferences but must rely exclusively on the information contained within the four corners of the expert report or its accompanying curriculum vitae. See *Bowie Mem'l Hosp.*, 79 S.W.3d at 53. This requirement precludes a court from filling gaps in a report by drawing inferences or guessing as to what the expert likely meant or intended. *Id.* If a sufficient expert report is not filed within the requisite period, the court is required to enter an order dismissing the claim, with prejudice. See § 74.351(b).

Analysis

Hildebrandt Report

In its first issue, Kenmar argues that the trial court erred in overruling in part its objections to the report of Nurse Hildebrandt. Kenmar objected to Nurse Hildebrandt's report on the grounds that it failed to establish her qualifications, failed to provide a fair summary of the standard of care or how it was breached, failed to provide a fair summary of the causal relationship between the alleged breach and the injury, and failed to include a curriculum vitae. The trial court sustained Kenmar's objection to the nurse's qualifications to opine on causation, but overruled Kenmar's remaining objections. We will first consider Kenmar's complaint that the report fails to provide a fair summary of the standard of care applicable to Kenmar and how that standard was breached.

The standard of care is defined by what an ordinarily prudent health care provider would have done under the same or similar circumstances. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 880 (Tex. 2001). Identifying the standard of care in a health care liability claim is critical. *Id.* To adequately identify the standard of care, an expert report must set forth "specific information about what the defendant should have done differently." *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 226 (Tex. 2018) (per curiam) (internal quotations omitted). Thus, while Chapter 74 requires only a "fair summary" of the standard of care and how it was breached, "even a fair summary must set out what care was expected, but not given." *Id.* The expert report must explain what the defendant should have done under the circumstances and what the defendant did

instead. *Palacios*, 46 S.W.3d at 880. It is not sufficient for an expert to simply state that she knows the standard of care and conclude that it was or was not met. *Id.*

Under the section of her report titled “Applicable Standards of Care,” Nurse Hildebrandt wrote:

The expectation is that the nurse is competent to provide care with the necessary knowledge, skills and judgment. Nurses are expected to know exactly what is necessary to provide nursing care and that measures are in place to determine whether the care meets the standards. Nurses are accountable for their actions and also the actions of those they supervise. The nursing process is closely related to and incorporated into the Standards of Care. The nursing process involves a specific set of responsibilities. They include, in order, assessment, diagnosis, outcome identification, planning, implementation and evaluation. This is an ongoing process and is based on the initial assessment with ongoing assessments if any changes in status occur. With a change in status, the nurse is independently responsible for assessing the client and determining if that change warrants a change in the care provided. The nurse is also responsible for educating and training those employees who are involved in caring for the Plaintiff. In this case, the nursing staff fell short of meeting the Standard of Care to the detriment of the Plaintiff.

In other portions of her report,⁵ Nurse Hildebrandt states that:

- [After Brandon’s fall on September 22] “[i]mmediate interventions should have been implemented and the assistive care staff should have been educated about how to properly monitor and care for the client.”
- “[T]here was no change in how they provided care for [Brandon] after the first head injury sustained on 9/22/2018.”
- [After Brandon’s fall on September 23] “Jan Robinson RN failed to meet the Standard of Care. She made no attempt to assess the client herself, instead depending on Shavone DCS to assess the client and determine that ‘Brandon has no injury from the fall in the bathroom.’”

⁵ We consider the report in its entirety. See *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 144 (Tex. 2015) (per curiam) (requiring court to fully credit all of expert’s factual statements and opinions).

Nurse Hildebrandt concludes:

Kenmar (including Jan Robinson, RN, Shavone DCS and others [sic] employees) breached the Standard of care by failing to have the required knowledge and training to identify the specific needs of the Plaintiff, failing to properly implement the necessary interventions in the Plaintiff's plan of care both before and after 9/22/2018, failing to properly train the assistive care personnel regarding monitoring and caring for the Plaintiff, failing to assess the Plaintiff when a change in status was reported thus delaying necessary medical treatment, negligently relying on unlicensed personnel to perform an assessment, and failing to modify the Plaintiff's plan of care after a change in status had occurred.

According to Kenmar, Nurse Hildebrandt's report contains only generic, conclusory statements that are insufficient to satisfy the expert report requirement. Kenmar argues that the nurse's statements fail to provide a fair summary of the applicable standard of care because she does not provide any details regarding what constitutes a "change in status," what assessment the nurse is required to perform, what education and training are required, or what "immediate interventions" should have been implemented. Kenmar asserts that the report fails to explain what specific actions Kenmar should have taken to avoid Brandon's injuries. See *Palacios*, 46 S.W.3d at 880.

In *Palacios*, a case which involved a patient's fall from a bed, the plaintiffs relied substantially on one statement in the expert report to establish the standard of care, viz: "Mr. Palacios had a habit of trying to undo his restraints and precautions to prevent his fall were not properly utilized." *Id.* at 879-80. The Supreme Court determined that this statement was not a statement of a standard of care, and neither the defendant nor the trial court could ascertain from it whether the expert believed the standard of care required the defendant "to have monitored Palacios more closely, restrained him more securely, or done something else entirely." *Id.* at 880. The Supreme Court explained, "Knowing

only that the expert believes that [the defendant] did not take precautions to prevent the fall might be useful if [the defendant] had an absolute duty to prevent falls from its hospital beds. But as a general rule, *res ipsa loquitur* does not apply in medical-malpractice cases.” *Id.*

Similarly, Nurse Hildebrandt’s report in this case includes conclusory statements that fail to inform Kenmar of what it should have done differently. Although she states that there was “no change” in the care provided to Brandon after his fall, it is not clear what change, if any, was required by the standard of care. For example, while the report indicates that interventions should have been implemented, Nurse Hildebrandt does not identify what those interventions were. She does not explain what instructions should have been provided to staff regarding proper monitoring and care. She does not explain what steps the standard of care requires an ordinarily prudent nurse or group home facility to take.

The deficiencies in Nurse Hildebrandt’s report are apparent when compared to a report which does satisfy the requirements of section 74.351. For example, *Pinnacle Health Facilities XV, LP v. Chase*, also involved an injury resulting from a fall and considered whether the standard of care was adequately addressed in an expert report. No. 01-18-00979-CV, 2020 Tex. App. LEXIS 5003, at *28-29 (Tex. App.—Houston [1st Dist.] July 7, 2020, no pet.) (mem. op.). In *Pinnacle*, the defendant care center argued that the expert’s report was inadequate with respect to the standard of care because the expert opined that the standard requires an “adequate fall prevention program” and a “safe environment.” *Id.* However, the appellate court determined that the report was adequate because the expert provided specific information to support his conclusions,

namely that the standard of care required the care center to “have raised side rails whenever [decedent] was in bed” and to implement fall safety and protections measures including an operating bedside call button, bedside toileting device, bed-pressure alarm, and video monitoring of decedent’s room. *Id.* at *29. Thus, the expert explained what steps an ordinarily prudent health care provider would take under the same or similar circumstances. *Id.* In contrast to the report challenged in *Pinnacle*, Nurse Hildebrandt’s report does not identify what specific interventions should have been implemented by the facility or by the nurses, or what changes to Brandon’s care were required.

Nurse Hildebrandt’s report also alludes to an alleged breach of the standard of care stemming from the failure of Jan Robinson, RN, to assess Brandon after his falls. However, the report acknowledges that Brandon was transported to the local emergency department after his fall on September 22, where he was assessed and treated by emergency room personnel. Thus, Kenmar obtained a medical assessment of Brandon after his September 22 fall. Moreover, the report does not explain how the outcome would have changed had Nurse Robinson performed an independent assessment or what specific measures would have been taken to protect Brandon from future falls as a result of such an assessment. As for Brandon’s fall on September 23, Nurse Hildebrandt did not assert that the failure to have a nurse assess Brandon after this fall was the proximate cause of his injuries, i.e., his broken hip. Neither Nurse Hildebrandt nor Dr. Cascio claimed that, had Brandon been assessed by Nurse Robinson after his fall on September 23, he would have avoided hospitalization and surgical treatment for his hip fracture.

Therefore, we sustain Kenmar’s first issue as to its complaint that Nurse Hildebrandt’s report does not provide a fair summary of the standard of care applicable

to Kenmar or a fair summary of how Kenmar breached that standard. However, our analysis does not end here. Expert reports may be considered together in determining whether a healthcare liability claimant provided a report meeting the statutory requirements. See § 74.351(i). A single report need not “address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.” *Id.* But read together, the reports must provide a “fair summary” of the experts’ opinions. § 74.351(r)(6); see *Barber v. Mercer*, 303 S.W.3d 786, 791 (Tex. App.—Fort Worth 2009, no pet.). Therefore, we turn next to Kenmar’s second issue, in which Kenmar contends that the trial court erred in overruling its objections to the report provided by Dr. Cascio.

Cascio Report

In the first part of its second issue, Kenmar contends that the trial court erred in overruling its objection that Dr. Cascio’s report fails to provide a fair summary of the standard of care applicable to Kenmar and the manner in which Kenmar’s conduct breached that standard. Uriegas responds that Dr. Cascio’s report includes the applicable standard of care by stating that “Brandon’s care plan should include significant monitoring and assistance when moving to decrease the likelihood of Brandon falling and sustaining an injury.”

In his report, Dr. Cascio states, “[a]fter Brandon’s fall and injury on 9/22/2018, the proper standard of care is to fully examine Brandon for injury and evaluate the existing care plan to determine if a change or correction is needed.” Dr. Cascio alleges that “Kenmar and employees failed to make a change to [Brandon’s] care plan to include the

appropriate monitoring and assistance. Kenmar's repeated failure to monitor and assist Brandon led to Brandon falling" Additionally, the report asserts, "Kenmar failed to hire and train employees on the appropriate care plan in response to Brandon's specific needs," and "Kenmar and employees failed to provide the appropriate monitoring and assistance to reach the standard of care for Brandon on 9/22/2018 which resulted in him falling in the shower."

As with Nurse Hildebrandt's report, Dr. Cascio's report fails to provide a fair summary of the applicable standard of care as to Kenmar and its staff. The report provides no details regarding what constitutes "appropriate" or "significant" monitoring and assistance. Similarly, while Dr. Cascio asserts that Kenmar and employees should have "fully examined" Brandon following his falls, the report does not explain who was responsible for administering an examination or what an examination should have encompassed.

As to breach, Dr. Cascio's statement that Kenmar "failed to provide the appropriate monitoring and assistance to reach the standard of care" is also deficient, as it does not explain what specific action Kenmar should have taken but did not. *See Palacios*, 46 S.W.3d at 880 (it is not enough for expert to state that he or she knows standard of care and that it was breached). Similarly, the report does not describe how Kenmar "failed to hire and train employees on the appropriate care plan," as the report does not identify any specific Kenmar employees or provide any information about what training they should have received, but did not. Further, there is no explanation of what the appropriate care plan entailed and in what ways Kenmar or its employees deviated from it.

In *Hoelscher v. San Angelo Cmty. Med. Ctr.*, the plaintiff alleged that she was injured during her transfer from a gurney to a procedure table. No. 03-03-00236-CV, 2004 Tex. App. LEXIS 10765, at *7-11 (Tex. App.—Austin Dec. 2, 2004, no pet.) (mem. op.). In his report, the plaintiff's expert opined that the method used to transfer the plaintiff was required to be performed in a manner that did not harm her extremities or body parts, and that her injury indicated that the defendants must have breached their responsibility to transfer her properly. *Id.* at *10. However, the expert did not explain what improper method of transfer was used nor what the doctors or technicians should have done differently. *Id.* As the appellate court explained, "Essentially, [the expert] opines that the standard of care requires that the patient not be injured. This is not sufficient to notify the defendant of the specific conduct complained of and to allow the court to assess the merits of the claim. Section 13.01 expert reports cannot infer breach of a standard of care from the fact that an injury exists that normally should not." *Id.* at *10-11 (internal citations omitted).

We follow this reasoning and conclude that in this case, Dr. Cascio's report is insufficient with respect to both the applicable standard of care and breach. See *also Abshire*, 563 S.W.3d at 226 (to adequately identify standard of care, expert report must set forth "specific information about what the defendant should have done differently"); *Palacios*, 46 S.W.3d at 879-80 (mere statement that precautions to prevent patient's fall were not proper did not constitute statement of standard of care).

Because we have determined that Dr. Cascio's expert report does not adequately inform Kenmar of the applicable standard of care and the manner in which the care rendered by Kenmar failed to meet that standard, we conclude that the trial court erred in

overruling Kenmar's objections to the report on those bases. Thus, the expert reports tendered by Uriegas fail to adequately address the elements of standard of care and breach of the applicable standard. Accordingly, the trial court abused its discretion in finding that the expert reports proffered by Nurse Hildebrandt and Dr. Cascio constituted a "good-faith effort" to comply with section 74.351. The trial court therefore erred in denying Kenmar's motion to dismiss.

Because our resolution of issues concerning the adequacy of the report is dispositive, we do not need to address Kenmar's remaining arguments. See TEX. R. APP. P. 47.1.

Attorney's Fees and Costs

As set forth above, Uriegas has already been granted the opportunity to file an amended expert report. Section 74.351(b) requires that if a timely and sufficient expert report is not served, upon the motion of the affected physician or health care provider the trial court shall enter an order awarding reasonable attorney's fees and costs and dismiss the claim with prejudice. See § 74.351(b). Having concluded that the trial court should have granted Kenmar's motion to dismiss Uriegas's claims, we further conclude that the trial court erred in denying Kenmar's request for reasonable attorney's fees and costs of court.

Conclusion

We reverse the trial court's order denying Kenmar's motion to dismiss. We remand this cause to the trial court for the limited purpose of determining the amount of attorney's

fees and costs to be awarded to Kenmar and for entry of a final order dismissing Uriegas's claims against Kenmar with prejudice.

Judy C. Parker
Justice

Quinn, C.J., concurring and dissenting.