IN THE SUPREME COURT OF TEXAS

NO. 16-0164

BARBARA BATY, PETITIONER,

v.

OLGA FUTRELL, CRNA, AND COMPLETE ANESTHESIA CARE, P.C., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

JUSTICE JOHNSON, joined by JUSTICE BROWN, dissenting.

After Barbara Baty filed an expert report by Dr. Steven Chalfin in an attempt to comply with requirements of the Texas Medical Liability Act (TMLA), *see* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6), the parties agreed that the report was deficient. The trial court granted a thirty-day extension to allow Baty to cure the deficiencies, and she filed an amended report from Dr. Chalfin. The amended report added little but a few more references to the retrobulbar block performed by a certified registered nurse anesthetist (CRNA), Olga Futrell. Those references were to the effect that the procedure had not been performed in a "proper manner" to avoid injuring the optic nerve. Futrell responded by objecting to the second report and moving for dismissal of Baty's suit. The trial court granted the motion and the court of appeals affirmed. ___ S.W.3d ___ (Tex. App.—Waco 2015).

This Court has construed the TMLA as setting a relatively low bar as to what comprises an adequate expert report. But, even a low bar must be cleared. In my view, the trial court did not abuse its discretion in determining that Dr. Chalfin's second report does not do so.

Both Dr. Chalfin's first and second reports are divided into discrete sections, four of which are labeled "Brief Summary of Medical Care," "Standard of Care," "Breach of Standard of Care," and "Causation." The Standard of Care section of the first report, which the parties agreed was inadequate, is as follows:

> In evaluating and providing medical care for a patient such as Mrs. Baty, the standard of care for an ordinarily prudent practitioner such as a MD or CRNA requires:
>
> 1. Adequate preoperative assessment of the patient;
> 2. Adequate communication with the patient and/or the patient's family;
> 3. Performance of only procedures for which adequate training and level of competence has been achieved;
> 4. Performance of such procedures at the level of competence and skill required to minimize risk to the patient.

The Standard of Care section in the second report differs from the one in the first by including an additional fifth statement:

> In evaluating and providing medical care for a patient such as Mrs. Baty, the standard of care for an ordinarily prudent practitioner such as a MD or CRNA requires:
>
> 1. Adequate preoperative assessment of the patient;
> 2. Adequate communication with the patient and/or the patient's family;
> 3. Performance of only procedures for which adequate training and level of competence has been achieved;
> 4. Performance of such procedures at the level of competence and skill required to minimize risk to the patient;

> 5. In the case of retrobulbar anesthetic blocks, administering the block in the proper manner to preclude injuring the delicate structures of the orbit, including the globe and optic nerve.

The "standard" added is "administering the block in the proper manner to preclude [injury]." This substantively says nothing more than what Hippocrates long ago wrote: "The physician must . . . have two special objects in view with regard to disease, namely, to do good or to do no harm." HIPPOCRATES, OF THE EPIDEMICS bk. I, § 2(5) (Francis Adams trans., 2009) (400 B.C.E). Dr. Chalfin's report says nothing about how to properly perform, or how not to perform, a retrobulbar block—it just says "do no harm."

Dr. Chalfin specified what he considered to be the standards of care and set them out in the section labeled Standard of Care. According to the Court, however, sufficiency of the report with respect to the standards of care does not turn on what Dr. Chalfin said the standards are. Rather, the Court says the standard of care hinges on "three statements in different sections of the report [that] are pertinent." *Ante* at ___. Only the second of those is what Dr. Chalfin says is a standard of care. The first statement relied on by the Court is taken from a paragraph in the section of the report Dr. Chalfin labeled Brief Summary of Medical Care. There, Dr. Chalfin explains that it was necessary to perform two retrobulbar blocks on Baty because the first "produced inadequate akinesia and anesthesia," which could "distort the anatomy of the orbital structures, *and lead to injury by the needle on the subsequent attempt*." (Emphasis added). The third statement the Court references comes from the section of the report Dr. Chalfin labeled Breach of Standard of Care, and is simply more of the same.

Each of the statements the Court quotes to support its conclusion references "retrobulbar block" as the procedure Futrell performed. However, none of the quoted statements—or any other part of the report—explains what a retrobulbar block is or touches on how it should have been "properly" accomplished, other than saying what I doubt anyone would question: that the desired *result* should not be a needle stick to the optic nerve. Indeed, the Court circularly says that the *result* here is determinative of the requirement that an adequate report must say *how* Futrell failed to meet the standard of care:

> If "sticking [the optic nerve] with the retrobulbar needle" is a breach of the standard of care—which, in turn, requires administering the block in the proper manner—then the "proper manner" necessarily encompasses *not* sticking the optic nerve with the retrobulbar needle.

Ante at ___. "In the proper manner" simply does not say how Futrell should or should not have performed the block. No rational person would believe that a nurse anesthetist training program would teach a student how to perform a retrobulbar block by handing the student a syringe filled with anesthetizing liquid and saying, "Do a retrobulbar block on this patient in a proper manner—that means don't stick the optic nerve." Nor would any rational CRNA perform a procedure such as this without training as to how it should be done to minimize the possibility of unintended injury to a patient's eye. Certainly, Dr. Chalfin's report evidences his belief that there are "proper" ways for a CRNA to do a retrobulbar block—he just never explains how any of them are done. He says only that "proper care" would not have yielded a bad result. A medical dictionary defines "retrobulbar" as referring to the space behind the eyeball. *Retrobular*, DICTIONARY OF OPTOMETRY AND VISUAL SCIENCE (7th ed. 2009). Given the nature of this case,

one would surmise that the block performed by Futrell involved injecting the back part of Baty's eyeball or somewhere in proximity to it. Common sense would lead one to also surmise that performing an injection into either the back part of the eyeball or the space behind it would require some type of medical equipment with which to guide the needle insertion or make fairly specific measurements as to the correct placement and angle of needle insertion because the area in or behind the back part of the eyeball is not readily visible to the person making the injection. But common sense and surmise may not be right: maybe the standard for how a retrobulbar block should be administered by a nurse anesthetist is for it to be done solely visually and by touch and feel regarding the structures around the eyeball without specialized equipment at all. But whether the injection actually requires the use of specialized equipment, exact measurements, a more nuanced approach involving the feel of the patient's facial structures, or a combination of some or all of these is not the question. The question is what Dr. Chalfin explains in his report, and whether the trial court could have concluded that he did not explain, in a nonconclusory manner within the four corners of the report, how the injection should have been done (or not done) by Futrell, and what the standard of care was for a CRNA performing the procedure. *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010) (stating that all information needed for the inquiry must be found within the four corners of the expert report). As noted above, in order to reach its decision, the Court must cobble together three statements from different sections of the report to support its conclusion, even though the report does not say that two of the three statements fix the standard. That is, Dr. Chalfin specified in a discrete section of the report what his opinion of the standard of care was. The Court goes outside that section to reach its conclusion that the report is adequate and effectively holds that the

trial court abused its discretion by taking the report at face value. I disagree that a trial court abuses its discretion by reading an expert report to say what the expert says.

But even looking to the substance of the report as construed by the Court, one of the statements that the Court relies on and quotes is to the effect that an unsuccessful first block attempt is "significant because complications such as globe penetration and optic nerve injury *are more common* when blocks require augmentation (additional needle sticks)" because the first attempt "can distort the anatomy of the orbital structures and lead to injury by the needle on the subsequent attempt." *Ante* at ___ (emphasis added). Several aspects of this statement are noteworthy. First, Dr. Chalfin did not say, and the trial court could have concluded that Dr. Chalfin did not believe, his statement reflected a standard of care for a CRNA because the statement was not in the Standard of Care section of the report. Second, Dr. Chalfin notes that optic nerve injuries are "more common" under circumstances like those facing Futrell when he administered the second block. Third, Dr. Chalfin is not critical of either how the first block was done or its result. And Dr. Chalfin does not opine on whether distortion of the structures in Baty's eye actually occurred as a result of the first attempted block. Nor does he say that if that had occurred, just how much distortion there would have been. Fourth, he mentions that under the circumstances "many Ophthalmic surgeons augment an inadequate block by using a blunt cannula inserted via a conjunctival incision, rather than a needle." But in making that statement, Dr. Chalfin does not say what a cannula is; how a cannula would have been used; whether, in his opinion, a cannula should have been used and, if so, exactly how; or say whether a CRNA such as Futrell was qualified to make a conjunctival incision and insert a cannula through it.

The Court cannot reference Dr. Chalfin's explanation of what a "retrobulbar block" consists of because, as noted above, the report does not explain what such a procedure is. Nor can the Court reference Dr. Chalfin's description of how such a procedure should be performed with a needle in order for it to be "in the proper manner" because the report does not contain that information either. Likewise, the Court cannot address the report's description of how a second block should have been performed in light of the possibly altered structure of Baty's eyeball following the first attempted block, even though the second block by Futrell is the one that Dr. Chalfin opines damaged Baty's optic nerve. Why not? Because just as the report does not ever explain what a retrobulbar block is or how it is properly performed, the report does not explain how a second block should have been accomplished under these circumstances in order to have been "in the proper manner." All it says, in substance, is don't have a bad result by sticking the optic nerve. But a bad result, in and of itself, does not evidence breach of a standard of care. *Univ. of Tex. Sw. Med. Ctr. at Dall. v. Estate of Arancibia*, 324 S.W.3d 544, 550 (Tex. 2010). Much less does it evidence what the standard of care is. Nor can achieving a good result or, said the other way, avoiding a bad result, be the standard of care for medical treatment. If good or bad results were the standard, many medical treatments or courses of treatment would fail to measure up. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 880 (Tex. 2001).

For the report to set out the "proper manner" in which to perform a retrobulbar block it necessarily would have had to explain both *what* should have been done and *how* it should have been done. *Jelinek*, 328 S.W.3d at 539–40 (holding that an expert report must explain how a breach of the standard of care occurred); *Palacios*, 46 S.W.3d at 880 ("Identifying the standard of care is

critical: Whether a defendant breached his or her duty to a patient cannot be determined absent specific information about what the defendant should have done differently."). That includes more than just stating the desired result—"don't stick the optic nerve with the needle"—which the Court concludes is sufficient, even though the trial court found otherwise. *Ante* at ___. That is especially so in circumstances such as those here, where Dr. Chalfin said in his report that injuries to the optic nerve are "more common" in blocks administered after an unsuccessful first attempt. And, even if "don't stick the optic nerve" were a standard of care, Dr. Chalfin's report does not say *how* Futrell should have accomplished not sticking it. And the how is the critical—and necessary—aspect of an adequate report. *See Jelinek*, 328 S.W.3d at 539–40.

The Court's analysis regarding the alternative procedure Dr. Chalfin's report referenced as being used by many ophthalmic surgeons to augment an inadequate block—use of "a blunt cannula inserted via a conjunctival incision, rather than a needle"—shows to some extent what a proper report might look like. It at least partially advises the trial court "how" the second block could have been done, even though there is no explanation of how to make a conjunctival incision or insert a cannula through it to perform a block while avoiding the optic nerve. The Court notes that the statement does not apply to a CRNA like Futrell. *Ante* at ___ n.9. And the report did not establish that a procedure calling for making a conjunctival incision and inserting something called a "cannula" through it into Baty's eyeball was within the training and skill level of a CRNA such as Futrell. Nor did the report say that the appropriate standard of care required the use of a blunt cannula regardless of whether the procedure was performed by a surgeon or CRNA. While the Court apparently believes that the statement indicates "less risky alternatives exist," the trial court may not

have. After all, the report does not *say* that making a conjunctival incision and using a cannula is less risky than the procedure used by Futrell. And even if it did, reference to some unexplained type of "less risky procedure" is not what is required for an expert report to be adequate. First, "less risky" neither establishes a standard of care nor indicates that *how* Futrell performed the block did not meet the standard of care. An adequate report must explain the standard of care and how it was breached clearly enough for the trial court to conclude that the procedure used did not meet the standard. Dr. Chalfin never opined that the *procedure* used by Futrell was one that did not meet the appropriate standard. And recall, the trial court's decision is reviewed for an abuse of discretion. Even if this were a close call, and in my view it is not, we have said that close calls go to the trial court. *See Larson v. Downing*, 197 S.W.3d 303, 304 (Tex. 2006).

In sum, Dr. Chalfin's report does not do what this Court has said over and over is required: set out the standard of care for how the procedure should have been done, or not done, and explain how the defendant's actions did not meet that standard. The Standard of Care section of Dr. Chalfin's report offers only generalized conclusory opinions that the bad result was because of (1) failure to apply an unexplained "required level of training and competence . . . in the techniques of regional ophthalmic anesthesia including retrobulbar block"; (2) failing to perform the block with some unexpressed level of "sufficient competence and skill"; and (3) "sticking [the optic nerve] with the retrobulbar needle." That is not sufficient. *Jelinek*, 328 S.W.3d at 539 (Tex. 2010) (explaining that an expert report in a medical malpractice action cannot merely state the expert's conclusions about the elements); *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (noting that an expert must explain the basis of his statements and link his conclusions to the facts); *Palacios*, 46

S.W.3d at 879 (holding a report that merely states the expert's conclusions about the standard of care, breach, and causation does not meet the statutory requirements).

In my view, the court of appeals properly analyzed the record and applied the law. For the reasons expressed above and the reasons the court of appeals gave, I would affirm its judgment. Because the Court does otherwise, I respectfully dissent.

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Phil Johnson
Justice

OPINION DELIVERED: February 2, 2018