

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-16-00146-CV**

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**San Angelo Community Medical Center, Appellant**

**v.**

**Kelly Nelson, Appellee**

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**FROM THE DISTRICT COURT OF TOM GREEN COUNTY, 51ST JUDICIAL DISTRICT  
NO. A150086C, HONORABLE BARBARA L. WALTHER, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

This is an interlocutory appeal from trial court's denial of San Angelo Community Medical Center's (SACMC) motion to dismiss the claims of appellee Kelly Nelson. Nelson claims she suffers from major depression and post-traumatic stress caused by inappropriate touching by an SACMC employee. On appeal, SACMC contends that the trial court abused its discretion by failing to grant the motion because the expert reports did not satisfy Chapter 74's requirements.<sup>1</sup> For the reasons explained below, we will affirm the trial court's order.

**Background**

Nelson sued SACMC contending that an ultrasound technician inappropriately exposed and touched her during an ultrasound examination of her lower extremities. To support her

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<sup>1</sup> See Tex. Civ. Prac. & Rem. Code § 74.351 (expert-report requirement).

negligence claims against SACMC and to satisfy Chapter 74's expert-report requirement,<sup>2</sup> Nelson submitted reports from a hospital administrator and a psychiatrist. SACMC filed objections to Nelson's expert reports along with a motion to dismiss Nelson's claims against it. After a hearing, the trial court denied SACMC's motion to dismiss.

### **Discussion**

SACMC challenges the trial court's denial of SACMC's motion to dismiss in two issues: Nelson's expert reports are not adequate under subsection 74.351(r)(6) because the reports fail to (1) provide a fair summary of the applicable standard of care and how the conduct of SACMC's employee breached that standard of care; and (2) explain how the alleged breach caused the injury. We disagree.

Section 74.351 of the Texas Civil Practice and Remedies Code requires medical-malpractice plaintiffs to provide each defendant physician and healthcare provider an expert report with the expert's curriculum vitae.<sup>3</sup> The expert report must provide "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."<sup>4</sup> If a plaintiff timely files an expert report and the defendant moves to dismiss because of the report's inadequacy, the trial

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<sup>2</sup> *See id.*

<sup>3</sup> *Id.* § 74.351(a).

<sup>4</sup> *Id.* § 74.351(r)(6).

court must grant the motion “only if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report in Subsection (r)(6).”<sup>5</sup> To constitute a “good-faith effort,” the report must provide enough information to fulfill two purposes: (1) it must inform the defendant of the specific conduct the plaintiff has called into question, and (2) it must provide a basis for the trial court to conclude that the claims have merit.<sup>6</sup>

We review a trial court’s order dismissing a claim for failure to comply with Chapter 74’s expert-report requirements under an abuse-of-discretion standard.<sup>7</sup> A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles.<sup>8</sup> When reviewing matters committed to the trial court’s discretion, a court of appeals may not substitute its own judgment for the trial court’s judgment.<sup>9</sup>

### **Standard of care and breach**

Having reviewed Nelson’s expert report by the hospital administrator, Dr. John Hyde, which addressed the standard of care and breach, we conclude that the trial court could have reasonably determined that Dr. Hyde’s expert report represents a good-faith effort to summarize the appropriate standards of care and breach of those standards of care. Dr. Hyde provided a fair

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<sup>5</sup> *Id.* at § 74.351(l).

<sup>6</sup> *American Transitional Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

<sup>7</sup> *Id.* at 878.

<sup>8</sup> *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

<sup>9</sup> *See Flores v. Fourth Ct. of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989).

summary of the applicable standards of care and the manner in which the healthcare provider failed to meet those standards.<sup>10</sup> Dr. Hyde asserted that the standard of care for a radiological technician conducting an ultrasound exam on someone's lower extremities would require the technician to "act in a professional manner" and, in doing so, "preserve the full respect for the dignity of the patient." He further specifically explained that this standard of care does not include sexual conduct with or sexual exploitation of a patient. Finally, Dr. Hyde explained that it was his opinion that the technician violated this standard of care by making "unwanted sexual advances" toward Nelson, including inappropriate touching of a sexual nature and singing.

Dr. Hyde also gave his opinion that the standard of care for a hospital would be to have policies in place that:

- require a patient be given the details to her procedure before it takes place, including what areas of her body will be scanned/examined and the reasons;
- give each patient the opportunity to request a same-sex technician or chaperone to the procedure; and
- require its employees to abide by these procedures.

Dr. Hyde then explained that the failure of the hospital to have these types of policies, the failure of employees to follow these policies, or to uphold reasonable ethical standards of care is a breach in the standard of care. Dr. Hyde also stated that SACMC's radiological technician violated this standard of care by failing to explain the procedure in detail, including what areas of Nelson's body he would be scanning; by failing to ask Nelson if she was comfortable with him doing the procedure near an intimate area of her body; and by failing to offer her a same-sex technician or a chaperone.

We overrule SACMC's first issue.

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<sup>10</sup> See *TTHR Ltd. P'ship v. Moreno*, 401 S.W.3d 41, 44 (Tex. 2013).

## Causation

The third prong of a sufficient expert report is a description of the causal relationship between the healthcare provider's failure to meet the standards of care and the harm alleged.<sup>11</sup> Nelson offered an expert report from her treating psychiatrist, Dr. George Glass. After describing Nelson's mental-health issues in detail, including specific discussion of the incident with the radiological technician at SACMC, Dr. Glass concludes in his report that Nelson's current psychiatric symptoms of major depression and post-traumatic stress disorder "are a direct result of, and were caused by her having been sexually harassed in the [SACMC] Emergency Room on June 13, 2014 by a staff member of that facility." SACMC maintains that this statement is conclusory and not a good-faith effort to summarize the causal relationship. We disagree.

A report meets the causation requirement if it explains the basis of the expert's statements, linking his conclusions to the facts.<sup>12</sup> We determine whether a causation opinion is sufficient by considering the opinion in the context of the entire report.<sup>13</sup> Reading Dr. Glass's report in its entirety, it is clear he concluded that Nelson's major depression and PTSD were caused by the technician's inappropriate conduct. Dr. Glass's report does not simply make a conclusion regarding causation; instead, his report gives a detailed description of the underlying information on which his conclusion regarding causation is based. As such, the trial court could reasonably have determined

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<sup>11</sup> See *TTHR*, 401 S.W.3d at 44.

<sup>12</sup> *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam).

<sup>13</sup> See *Benavides v. Garcia*, 278 S.W.3d 794, 799 (Tex. App.—San Antonio 2009, pet. denied).

that Dr. Glass's expert report represented a good-faith effort to summarize the causal relationship between SACMC's failure to meet the applicable standards of care and Nelson's injuries.<sup>14</sup>

We overrule SACMC's second issue.

### **Conclusion**

Having overruled SACMC's issues, we affirm the trial court's order.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

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<sup>14</sup> See Tex. Civ. Prac. & Rem. Code § 74.351(r)(6).