NUMBER 13-16-00694-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

RORY N. MINCK, M.D., **Appellant,**

v.

CORINA MAY PERALES AND DANIEL DAVILA PERALES, **Appellees.**

On appeal from the 139th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Hinojosa
Memorandum Opinion by Justice Rodriguez

In this interlocutory appeal, appellant Rory N. Minck, M.D., challenges the denial of his motion to dismiss the health care liability claim of appellees Corina May Perales and Daniel Davila Perales. By one issue, Dr. Minck argues that deficiencies in the

Peraleses' expert report required dismissal, and the trial court therefore abused its discretion in denying his motion. We affirm.

I. BACKGROUND

The Peraleses filed suit against Knapp Medical Center, which does not participate in this appeal, and Dr. Minck. The petition alleged that on the night of June 28, 2013, when Corina was nine months pregnant, she fell in the shower and landed "hard" on her stomach. She sought medical attention at Knapp Medical Center. Dr. Minck was Knapp's on-call obstetrician and gynecologist at the time, and he was notified by telephone of Corina's situation minutes after her arrival. Dr. Minck ordered an ultrasound, and various medical personnel at Knapp monitored her condition and administered other care over the coming hours. However, the petition alleged that in the hours that followed, the vital signs of Corina's unborn child began to deteriorate. Dr. Minck came to the hospital and performed an emergency cesarean section, but by the time of delivery, the child had died.

The Peraleses filed their health care liability claims on December 18, 2014, alleging that the death of their child was proximately caused by various acts and omissions by Knapp's medical personnel, with Dr. Minck among them. Pursuant to the medical liability statute, the Peraleses filed an expert report authored by Robert S. Crumb, M.D. After a series of objections by Dr. Minck and Knapp, the Peraleses obtained leave from the trial court to file Dr. Crumb's amended expert report. Dr. Minck again filed objections, which were overruled, and he then filed a motion to dismiss, which was denied. This interlocutory appeal followed.

II. DISCUSSION

By his sole issue on appeal, Dr. Minck argues that deficiencies in the expert report required dismissal pursuant to the expert report requirement of the medical liability statute. Dr. Minck challenges nearly every aspect of the report as conclusory and speculative. He also argues that the report fails to adequately address two of the three required elements of a health care liability claim: breach and causation. Dr. Minck contends that in light of these material deficiencies, the trial court abused its discretion in denying his motion to dismiss.

A. Standard of Review and Applicable Law

We apply the abuse-of-discretion standard in reviewing the trial court's decision on a motion to dismiss under the expert report rule. *Jelinek v. Casas*, 328 S.W.3d 526 (Tex. 2010). A district court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 911 (Tex. 2017).

"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 the 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) (West, Westlaw through 2015 R.S.). A court shall grant the motion to dismiss "*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) . . . ." *Jelinek*, 328 S.W.3d at 539

(quoting *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51–52 (Tex. 2002) (per curiam)) (emphasis in original); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(*l*).

A "good-faith effort" is one that provides information sufficient to (1) "inform the defendant of the specific conduct the plaintiff has called into question," and (2) "provide a basis for the trial court to conclude that the claims have merit." *Jelinek*, 328 S.W.3d at 539. All information needed for this inquiry is found within the four corners of the expert report, which need not marshal all the plaintiff's proof, but must include the expert's opinion on each of the three main elements: standard of care, breach, and causation. *Id.* (quoting *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001)). The report cannot merely state the expert's conclusions about these elements, but instead must explain the basis of the expert's statements to link his conclusions to the facts. *Id.*; *see Samlowski v. Wooten*, 332 S.W.3d 404, 409–10 (Tex. 2011) (plurality op.). In this inquiry, we are precluded from filling gaps in a report by drawing inferences or guessing as to what the expert likely meant or intended. *Fulp v. Miller*, 286 S.W.3d 501, 509 (Tex. App.—Corpus Christi 2009, no pet.).

B. Analysis

First, we note that Dr. Minck challenges multiple aspects of Dr. Crumb's report as speculative—that is, not founded in evidence. But plaintiffs need not present all the evidence necessary to litigate their case in order to avoid dismissal. *Palacios*, 46 S.W.3d at 879. The expert report "may be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial." *Id.* Rather, Dr. Minck has access to other mechanisms to

address claims which lack a basis in evidence. *See Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 631–32 (Tex. 2013); *Methodist Hosp. v. Shepherd-Sherman*, 296 S.W.3d 193, 200 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Dr. Minck also argues that multiple aspects of Dr. Crumb's opinions regarding breach and causation are conclusory. According to Dr. Minck, the conclusory statements—along with other unexplained gaps in Dr. Crumb's opinions on breach and causation—render the report materially deficient and inadequate. *See Jelinek*, 328 S.W.3d at 539.

We disagree. Over the course of fourteen pages, Dr. Crumb's report offers a detailed explanation of his opinion on all elements of the Peraleses' health care liability claim, including the challenged elements: breach and causation.[1]

For example, Dr. Crumb describes the scientific principles pertaining to the injuries sustained as a result of Corina's fall and how these injuries put the child's life in jeopardy. Based upon our lay-understanding of his explanation, the placenta provides a means for the transfer of oxygen and nutrients from mother to the fetus and the transfer of waste from the fetus to the mother. This transfer depends on the "chorionic villi," which Dr. Crumb described as "tiny, finger-like" structures containing a fetus's capillaries, which project from the edge of the placenta, facing the wall of the uterus. These structures project into an "intervillous space" which integrates blood vessels from both the fetus and the mother, and blood flow in this space enables the exchange of oxygen, nutrients, and

[1] Dr. Crumb also details the standard of care under the specific circumstances, as well as his own qualifications to render that opinion. Dr. Minck does not challenge either of these aspects of the report.

waste. However, abdominal trauma can lead to what he referred to as "placental abruption," and with it, hematomas, clotting, distortion of the intervillous space, and damage to the placental tissues, which in turn disrupts the exchange of oxygen, nutrients, and waste, harming the fetus.

According to the report:

> the classical presentation of the traumatic abruption includes vaginal bleeding, abdominal pain and uterine contractions. These may not all be present and vary in degree. . . . The abdominal pain may present as uterine irritability and uterine contractions. . . . This may be accompanied by nausea, vomiting and reduced or absent fetal movements. Another common finding is evidence for fetal distress such as fetal tachycardia and late decelerations.

Dr. Crumb's report also detailed the facts of the case and his opinion that these facts demonstrated a breach of the standard of care which proximately caused the death of the child. According to the report, Corina was twenty-six at the time of the incident, and she previously had multiple uncomplicated pregnancies and deliveries. Corina fell in the shower at approximately 8:30 p.m. on June 28, 2013, and "she was sure something was terribly wrong." She presented to the emergency room at 8:51 p.m. with a tender stomach, pain, no vaginal bleeding, and fetal vital signs of 120 beats per minute. Dr. Minck was informed of her condition at 8:53 p.m., and he ordered the labor and delivery staff to evaluate her for blunt trauma to the abdomen, including an ultrasound. At 9:00 p.m., Mary Handy, R.N., initiated continuous monitoring of the baby's vitals and documented contractions at two to six minutes apart as well as Corina Perales's complaint of "not feeling [the] baby move." To allow for the sonogram, continuous monitoring of fetal vital signs were discontinued at 11:43 p.m., at which point the vital

signs were approximately 130 beats per minute with “absent decelerations” and frequent uterine contractions, which indicated decreased flow of oxygen to the fetus. According to the report, continuous monitoring resumed at 12:29 a.m., at which point vitals had declined to 120 beats per minute and indicated possible late fetal heart rate decelerations and continued, frequent contractions. Dr. Minck was notified of “non-reassuring fetal heart rate” at 12:55 a.m., at which point Dr. Minck ordered a cesarean section. At 1:11 a.m., Dr. Minck called on his way to the hospital and expressed his intention to begin the cesarean section as soon as he arrived. The incision was made at 1:40 a.m., and the deceased child was delivered at 1:41 a.m.

The report opined that the standard of care required Dr. Minck (1) to recognize that because Corina had suffered an abdominal trauma while nine months pregnant, this put her at high risk of an abruption and “feto-maternal transfusion”; in light of these risks, the standard of care further required Dr. Minck (2) to immediately proceed to the hospital to examine the patient, (3) to recognize that fetal status may deteriorate rapidly in the context of obstetrical abdominal trauma, (4) to order continuous fetal monitoring to detect signs of abruption and transfusion, and (5) to be adequately proximate to the hospital when on call to be able to respond to such emergencies in a timely fashion.

Dr. Crumb asserted that Dr. Minck committed multiple breaches of these standards which, individually and in tandem, proximately caused the death of the child. For one, the report asserted that Dr. Minck breached the standard of care when he failed to recognize the risks associated with the abdominal trauma, including the potential for rapid deterioration in the fetus’s condition due to abruption and feto-maternal transfusion, and

when he failed to come to the hospital to examine Corina. According to the report, if Dr. Minck had promptly come to the hospital and examined Corina, this would have led Dr. Minck to discover multiple symptoms of abruption, including abdominal pain and frequent uterine contractions.[2] Dr. Crumb determined that in the context of abdominal trauma for a patient with a history of prior uncomplicated term pregnancies, these symptoms would have led a reasonable obstetrician to diagnose abruption and to order cesarean delivery, but Dr. Minck's breach delayed this diagnosis until it was too late to save the child's life. According to Dr. Crumb, had Dr. Minck immediately come to the hospital, he would have in reasonable probability diagnosed placental abruption and performed a cesarean section before 11:00 p.m., at which time the fetal heart rate was still 130 beats per minute, demonstrating the child's viability.

The report also advanced a different scenario: that Dr. Minck *was* initially made aware of Corina's abdominal pain and worsening contractions, but he nonetheless failed to recognize these symptoms, diagnose abruption, and order cesarean section before the child's vital signs worsened, thereby breaching the standard of care.[3] Dr. Crumb opined

[2] In this connection, the report did not assert that Dr. Minck would have also noted Corina's complaint of reduced or absent fetal movements, which the report previously noted as a potential indicator of abruption. To the extent that this omission constitutes a "gap[] in a report," we may not fill it with inferences or guesswork. *See Fulp v. Miller*, 286 S.W.3d 501, 509 (Tex. App.—Corpus Christi 2009, no pet.).

[3] Dr. Minck faults the report for this uncertainty as to the sequence of events. We do not take a harsh view of accounting for different possibilities, given that a prospective plaintiff in a health care liability case has no access to pre-suit discovery, *see In re Jorden*, 249 S.W.3d 416, 420 (Tex. 2008) (orig. proceeding), and after filing suit, options for discovery remain limited. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s) (West, Westlaw through 2015 R.S.).

that had there been such a timely diagnosis and delivery as required by the standard of care, the child would have survived in reasonable medical probability.

Dr. Crumb also explained his opinion that Dr. Minck's failure to order continuous fetal monitoring resulted in the late detection of worsening vital signs, further delaying the decision to perform a cesarean section. Instead, Dr. Minck ordered an ultrasound which resulted in the discontinuation of monitoring for a lengthy interval. According to the report, "an ultrasound may be useful," but "it is not reliable enough to consistently diagnose nor exclude abruption. Therefore, valuable time should not be lost in performing an ultrasound examination in the presence of fetal distress." The fetal vital signs deteriorated at some point after the discontinuation of monitoring at 11:43 p.m. Dr. Crumb opined that if continuous monitoring had been in place, the earlier detection of warning signs would have in reasonable probability led to cesarean delivery before 12:30 a.m.—a time which was not too late to save the child's life, given the observed fetal heart rate of 120 beats per minute when monitoring resumed at 12:30 a.m.

The trial court could have reasonably concluded that the detailed opinions in the report informed Dr. Minck of the conduct called into question and provided a basis to show the claim's merit. *See Jelinek*, 328 S.W.3d at 539. It was not arbitrary or unreasonable for the trial court to conclude that the report constituted a good faith effort to provide a fair summary of the expert's opinions on breach and causation, the only two elements challenged by Dr. Minck. *See id.*; *see also Crawford*, 509 S.W.3d at 911. We therefore find no abuse of discretion in the denial of Dr. Minck's motion to dismiss. *See Jelinek*, 328 S.W.3d at 539.

We overrule Dr. Minck's sole issue.

III. CONCLUSION

We affirm the ruling of the trial court.

NELDA V. RODRIGUEZ
Justice

Delivered and filed the
25th day of May, 2017.