NUMBER 13-18-00608-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI–EDINBURG

JASON R. PHILLIPS, M.D., **Appellant,**

v.

MARIA MONTEMAYOR, INDIVIDUALLY, A/N/F OF A.J.M., A MINOR CHILD, AND ALFREDO MONTEMAYOR, SPOUSE, **Appellees.**

On appeal from the 445th District Court of Cameron County, Texas.

NUMBER 13-18-00618-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI–EDINBURG

APC HOME HEALTH SERVICE, INC., Appellant,

v.

MARIA MONTEMAYOR, INDIVIDUALLY, A/N/F OF A.J.M., A MINOR CHILD, AND ALFREDO MONTEMAYOR, SPOUSE, Appellees.

On appeal from the 445th District Court of Cameron County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes Memorandum Opinion by Justice Perkes

This dispute concerns a healthcare liability suit brought by appellees, Maria Montemayor individually, a/n/f of A.J.M. a minor child, and Alfredo Montemayor her spouse, against appellants, Dr. Jason R. Phillips and APC Home Health Service, Inc. (APC), following Montemayor's diagnosis of Wernicke's Encephalopathy (WE), a thiamine deficiency. By what we construe as one issue, appellants argue that the trial court abused its discretion in denying their respective motions to dismiss under the Texas Medical Liability Act (the Act).[1] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b). We affirm.

[1] Appeals No. 13-18-00618-CV and No. 13-18-00608-CV have been consolidated. Both appeals involve successive interlocutory trial court orders denying relief sought by motions under Texas Civil Practice and Remedies Code § 74.351(b). *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)(9), 74.351(b); *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 459 (Tex. 2017) ("[A] motion to

I. BACKGROUND

A. Montemayor's Medical History

According to the record, Montemayor underwent a laparoscopic sleeve gastrectomy on July 29, 2015; at the time of surgery, she weighed 228 lbs. The surgery was performed by Dr. Ashraf Hilmy at Valley Baptist Medical Center in Harlingen, Texas. Montemayor developed an intra-abdominal abscess, and she was hospitalized postoperatively. During her hospitalization, Montemayor's husband reported cognitive changes. Montemayor was discharged on August 18 and placed on a clear liquid diet with a protein supplement. On August 25, at a follow-up visitation with Dr. Hilmy, Montemayor reported struggling with nausea and having difficulty swallowing. Montemayor was instructed to drink protein shakes and referred for a "swallow study," which found a leak near her stomach. On August 27, Dr. Hilmy referred Montemayor to Dr. Phillips, a gastroenterologist, to control the gastric leak.

On September 17, Montemayor was examined by her primary care physician, Dr. Diana Lozano. Dr. Lozano documented nausea in Montemayor's patient file, although her notes also indicated Montemayor was able to eat and drink. Less than a week later, however, Dr. Lozano treated Montemayor for sore throat, fever, nausea, vomiting, and weakness. Dr. Lozano documented that Montemayor was suffering from dehydration, failure to thrive, and gastroparesis. Montemayor was treated with intravenous fluids (IV fluids) to address her dehydration. Montemayor met with Dr. Hilmy on September 29, and she complained of continued nausea and vomiting again to him.

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dismiss based on a timely but deficient report can be reviewed by interlocutory appeal"). *See* TEX. R. APP. P. 25.1(d)(6), 28.1.

On October 2, Montemayor was prescribed anti-nausea medication by Dr. Lozano. Three days later at a follow-up appointment, Montemayor was still reporting vomiting despite medication; she weighed 182 lbs—almost 50 lbs less than the month prior. In response to Montemayor's persistent nausea, Dr. Lozano recommended Montemayor supplement her diet with protein shakes and take her anti-nausea medication as needed. Montemayor saw Dr. Hilmy on October 6 and 8, and a CT-scan was performed to evaluate the extent of her gastric leak. Dr. Hilmy referred Montemayor back to Dr. Phillips on October 13, and on October 20, Dr. Phillips performed surgery to fix the leak. At a follow-up with Dr. Phillips on October 26, he documented that Montemayor "continues to vomit everything-small liquid meals, regular meals. Failed oral [medications]." Dr. Phillips also indicated in his notes that he:

> [S]poke with Dr. Hilmy and Lozano. [. . .] Send to Dr. Lozano for fluids, to Dr. Hilmy for drain removal [. . .] hopefully with regular oral intake her [nausea and vomiting] will resolve. [. . .] We also discussed a possible J tube as an option fir [sic] nutrition to rest her upper GI tract and break the recurrent [nausea and vomiting].

The same day Montemayor saw Dr. Phillips, Dr. Lozano also treated Montemayor for dehydration with IV fluids. Patient notes indicate Montemayor reported being unable to keep food down for weeks, and she had dropped down to 168 lbs. Montemayor was diagnosed with "failure to thrive, cachexia,[2] severe protein calorie malnutrition, nausea, and vomiting." Dr. Lozano states in her notes that Dr. Phillips recommended a feeding device (J-tube) but Dr. Hilmy was opposed. Montemayor was instead, once more, encouraged by Dr. Lozano to take her anti-nausea medication as needed and "protein

[2] "Clinically, cachexia manifests with excessive weight loss in the setting of ongoing disease, usually with disproportionate muscle wasting." John E Morley et al., *Cachexia: Pathophysiology and Clinical Relevance*, 83 AM. J. OF CLINICAL NUTRITION 735 (2006).

shakes as tolerated." Montemayor saw Dr. Hilmy on October 27 per Dr. Phillips's return referral, and she informed him of her continued nausea and vomiting. Dr. Hilmy advised Montemayor to "try some savory food rather than liquids such as Gatorade" to stimulate her appetite. Montemayor then saw Dr. Lozano again for IV fluids. On October 29, Montemayor was seen by Dr. Lozano for the fifth time in October, complaining of vomiting. Dr. Lozano noted Montemayor was suffering from "severe caloric protein malnutrition, failure to thrive, chachexia," and this time, Dr. Lozano prescribed IV fluids to be administered by APC every other day. On October 31, Montemayor was admitted into APC's care. During admission, APC staff documented that Montemayor was weak, had fallen, and was unable to eat or drink due to her nausea; the nurse observed a reported "increase in blurred vision."

On November 2, APC communicated Montemayor's condition to Dr. Lozano's office. Throughout the week, Montemayor continued to complain of blurred vision until November 6, when it was noted that her sight had cleared up considerably and she had begun "tolerating some light foods with some fluids by mouth" without nausea or vomiting. On November 9, Montemayor's husband called Dr. Hilmy's office to inform them of his wife's cognitive deterioration, and he was instructed to take Montemayor to Valley Baptist Medical Center. Montemayor was admitted to the hospital with neurological symptoms, including cognitive abnormality. She was seen by a neurologist and diagnosed with WE.

Over the course of four months, Montemayor struggled with excessive nausea and vomiting. Montemayor alleges that she developed permanent neurological impairment as a result and brought a healthcare liability suit against APC and each physician she saw in the four-month period prior to her diagnosis. In support of her claims and pursuant

to the Act, Montemayor submitted multiple expert reports[3] by four physicians and one nurse. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351. The reports collectively maintain that had Montemayor been given thiamine supplements at any point prior to her deterioration in November, it is medically likely that she would not suffer from the severe cognitive impairment that she does now.

B. Expert Reports

Dr. Todd Eisner, a physician licensed to practice in Florida and New York since 1989 and specializing in gastroenterology, submitted a report discussing Dr. Phillips's alleged culpability. His report contained separate sections addressing the applicable standard of care, breach of the standard, and causation. In the standard of care section, Dr. Eisner opined, in part, that the standard of care is:

> [F]or a reasonable gastroenterologist, when managing a patient who is status post gastric sleeve, specifically someone such as Ms. Montemayor, who had a post-operative anastomotic leak, and is unable to maintain meaningful oral intake, to monitor laboratory data including thiamine and electrolytes, and to supplement electrolytes, vitamins and minerals if necessary.

According to Dr. Eisner, Dr. Phillips breached the standard of care when he failed to (1) monitor laboratory data, including thiamine and electrolyte levels, and (2) order nutritional supplementation "when treating Montemayor's leak, knowing she was unable to maintain adequate nutrition." Dr. Eisner surmises:

> A reasonable gastroenterologist, upon seeing thiamine deficiencies in laboratory data . . . would order supplemental nutrition, including thiamine, for the patient. . . . [T]he failure to recognize and treat Montemayor's nutritional deficiencies in a timely fashion, resulted in her developing a significant thiamine deficiency. . . . Wernicke's encephalopathy, a serious

[3] Two reports assert that Dr. Ashraf Hilmy and Dr. Diana Lozano breached the standard of care. The Act does not require that a single expert address the standard of care, breach, and causation for all defendants, and expert reports may be read together to determine whether they represent a good-faith effort to satisfy the statutory requirements. TEX. CIV. PRAC. & REM. CODE § 74.351(i).

neurological condition, is a known consequence of thiamine depletion and deficiency.

A report by Dr. Nerses Sanossian, a licensed physician from California and Neurology Professor and Clinical Scholar at University of Southern California School of Medicine, echoed Dr. Eisner's causation report, stating that "[p]rompt thiamine replacement therapy, administered in September or October of 2015, when [Montemayor] saw Dr. Phillips, would probably have prevented her from further deterioration and development of [WE], which, again, results from thiamine deficiency." Dr. Eisner and Dr. Sanossian each set out their respective qualifications and stated that, in forming their opinions, they reviewed Montemayor's medical records.

In support of their claim against APC, appellees submitted a report by Yolanda Gonzalez, a registered nurse since 1992 and current home health nurse in San Antonio. Nurse Gonzalez opined that the standard of care requires an APC nurse to report an abnormal finding or change in the status of a patient to the patient's physician on the same day it is observed. Gonzalez asserts that this "coordination of care" between a nurse and physician is "a condition of practice under state guidelines."

According to Gonzalez, APC breached the standard of care when it failed (1) to immediately notify Montemayor's physician regarding changes to her vision, and (2) to immediately notify her physician when her symptoms went unresolved. Gonzalez also called into question the accuracy of APC nurse's notes because the "documentation wavers back and forth between vision within normal limits and blurred vision."

Gonzalez did not speak to the causational link[4] between APC's actions and Montemayor's development of WE; however, a supplemental report[5] by Dr. Sanossian did. Dr. Sanossian stated that Montemayor's records indicated that she did not begin to exhibit any neurological symptoms until she was under the care of APC:

> Nurses and, in particular, home health nurses act as the "eyes and the ears" of the physician. When they do not do their jobs properly, it can and often will prevent the physician from doing his or her job properly. A reasonable physician, if notified of [Montemayor's] new onset and, later, continuing neurological symptoms would have acted to diagnose the cause of these symptoms, and it is reasonably probable that thiamine depletion would have been one of the considerations. . . . Even though it is probable that [Montemayor] was actually suffering from some degree of [WE] by that point—in that she was displaying actual neurological symptoms—it is also probable that prompt treatment with thiamine would have halted the progression of her [WE] and spared her long-term damage and disability. Days make a difference in treating this condition. The longer a patient goes without thiamine replacement, the worse is the damage and the greater is the likelihood that damage will be permanent.

Dr. Sanossian states that had APC accurately reported her cognitive condition to her physicians, "a reasonable physician would have tested her thiamine levels and prescribed supplemental thiamine, in reasonable likelihood preventing her deterioration." Dr. Sanossian further states that absent APC's report, Montemayor's physicians were unaware of her "new onset symptoms or unaware that those symptoms were not resolving and continued to be a problem."

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[4] A nurse is unqualified to provide expert opinion on causation in a medical negligence action. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(5)(C).

[5] A supplement report for Dr. Nerses Sanossian was submitted pursuant to the trial court's order granting a 30-day extension of time to serve additional supplemental reports after finding deficiencies in the initial report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (providing that a trial court may grant one 30-day extension to cure deficiencies).

Following a review of the collective reports, the trial court concluded Montemayor provided a good faith effort to comply with the statutory requirements and denied appellants' motions for dismissal. This interlocutory appeal followed.

II. STANDARD OF REVIEW

We review a trial court's ruling on a motion to dismiss under § 74.351 of the Texas Civil Practice and Remedies Code for an abuse of discretion.[6] *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015) (per curiam). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to guiding rules or principles. *Id.*; *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011). 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. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam).

III. APPLICABLE LAW AND ANALYSIS

Under the Texas Medical Liability Act, "suits asserting health care liability claims must be supported by an expert report before litigation gets underway." *Scott v. Weems*, No. 17-0563, ___ S.W.3d ___, 2019 WL 1867916, at *3 (Tex. Apr. 26, 2019) (internal quotations omitted); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (requiring service of an adequate expert report within 120 days after the original answer is filed, absent a statutorily permitted extension). Upon a failure to produce an expert report, a trial court shall "dismiss[] the claim with respect to the physician or health care provider, with

[6] Dr. Phillips argues in his brief that a de novo review applies. Although a determination of "whether a claim is a health care liability claim under the Act is a question of law we review de novo[,]" a review of a trial court's denial of a motion to dismiss in this context is not. *Scott v. Weems*, No. 17-0563, ___ S.W.3d ___, 2019 WL 1867916, at *3 (Tex. Apr. 26, 2019); *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 223 (Tex. 2018) ("We review a trial court's decision to grant or deny a motion to dismiss based on the adequacy of an expert report for an abuse of discretion.").

prejudice to the refiling of the claim." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b)(2). On a motion challenging the adequacy of an otherwise timely report, the court may grant a motion to dismiss "only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report" as provided in the section. *Id*. § 74.351(l).

Under the Act, an "expert report" is defined as:

> 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.

Id. § 74.351(r)(6). Although it is not necessary that a claimant prove her case through the submitted expert report, the report must (1) show that an expert is of the opinion her claims are valid and (2) "explain, based on the facts set forth in the report, how and why" a health care provider's breach of the standard of care caused the injury. *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 460 (Tex. 2017).

The standard of care for a doctor or a health care provider is what an ordinarily prudent doctor or health care provider would do 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 is essential because a breach "cannot be determined without specific information about what the defendant should have done differently." *Id.* A plaintiff who cannot prove that his injury was proximately caused by the defendant's breach of the standard of care does not have a meritorious claim. *Baty v. Futrell*, 543 S.W.3d 689, 693–94 (Tex. 2018). Proximate cause is comprised of two elements: (1) foreseeability and (2) cause-in-fact. *Columbia Valley*, 526 S.W.3d at 460. A

physician's breach is a foreseeable cause of the plaintiff's injury if "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission." *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016) (internal quotations omitted). To have been a cause-in-fact of the harm, the act or omission "must have been a substantial factor in bringing about the harm." *Columbia Valley*, 526 S.W.3d at 460.

A. Dr. Phillips

Dr. Phillips argues that, according to one expert's report,[7] he met the standard of care by sending Montemayor to Dr. Lozano the same day he saw her and for recommending the J-tube to her other physicians. He further argues that the expert reports contain conclusory statements and contradictions, which create a fact issue where there should be none. Therefore, Dr. Phillips maintains that Montemayor failed to meet her burden under the Act. We disagree.

On this appeal, it is irrelevant to our analysis that Dr. Phillips may have met the standard of care according to one expert when another expert states the contrary. *See Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 226 (Tex. 2018) ("[T]he court's job at this stage is not to weigh the report's credibility."). With respect to alleged inconsistencies, the trial court resolved them when the court decided the report demonstrated a good faith effort as required by the Act. *See Van Ness*, 461 S.W.3d at 144 (holding that a trial court, in its discretion, may resolve conflicting statements as to the causal relationship between alleged negligence and injury sustained).

[7] Dr. Phillips bases this argument on Dr. John Mortin's report, which states that Dr. Hilmy breached the standard of care by failing to consider and employ alternative routes of nutrition, such as J-tube feeding.

To constitute a good faith effort, however, an expert must explain the basis of his statements and link his conclusions to specific facts. *Abshire*, 563 S.W.3d at 224. As shown above, the reports taken together set out the standard of care. Dr. Eisner was able to ascertain identifiable steps to ensure timely treatment of Montemayor and explained the alleged causational consequence. *See, e.g.*, *Puppala v. Perry*, 564 S.W.3d 190, 201 (Tex. App.—Houston [1st Dist.] 2018, no pet) (holding in an injury progression case where there was a multi-day delay in treatment that the causation opinions were adequate). Dr. Eisner opined that Dr. Phillips breached the standard of care when he failed to (1) monitor laboratory data, including thiamine and electrolyte levels, and (2) order nutritional supplementation. Although Dr. Phillips recommended nutritional supplementation via a J-tube in his discussions with Montemayor's other physicians, Dr. Eisner maintains that recommendation fell short of actively administering treatment—as Dr. Phillips was required to do to meet the standard of care. Dr. Eisner states that Dr. Phillips's "failure to recognize and treat Montemayor's nutritional deficiencies" each time he met with Montemayor throughout September and October resulted in her development of WE, a significant thiamine deficiency. *See Baty*, 543 S.W.3d at 694 (citing *Van Ness*, 461 S.W.3d at 144) (explaining that courts "must view the report in its entirety, rather than isolating specific portions or sections" to determine whether the report is adequate); *see also Naderi v. Ratnarajah*, 572 S.W.3d 773, 781 (Tex. App.—Houston [14th Dist.] 2019, no pet. h.) ("[T]he absence of an opinion stating with specificity at what point in the continuum of disease progression became irreversible or when an intervention would have proven timely does not cause an expert's causation opinion to be conclusory at this early stage of evaluation.").

At this stage of proceedings, an "adequate expert report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial." *Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 517 (Tex. 2017) (internal quotations omitted). Because Montemayor's experts' reports provided expert opinions regarding the applicable standard of care, a statement identifying the manner in which the care rendered by Dr. Phillips failed to meet the standard, and an explanation of the causal relationship between that failure and the injury claimed, the trial court did not abuse its discretion in denying Dr. Phillips's motion to dismiss. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *Miller*, 536 S.W.3d at 513. We overrule Dr. Phillips's sole issue on appeal.

B. APC

In its appeal, APC argues that the expert reports do not adequately address causation, namely, the reports "failed to explain how and why any alleged delay in diagnosis might have been avoided if [Montemayor's] physicians were notified again of the same symptoms of which they were already aware, but which did not result in a diagnosis or treatment of thiamine deficiency prior to November 9." We disagree.

In support of its position, APC cites to *Karkoutly v. Guerrero.* No. 13-17-00097-CV, 2017 WL 6379795, at *1 (Tex. App.—Corpus Christi–Edinburg Dec. 14, 2017, no pet.) (mem. op.). In *Karkoutly*, Guerrero alleged that had the physician arranged for surgery "promptly" and "within a few days" after the patient's initial surgery, it would have led to the discovery and correction of the patient's problem. *Id.* We held that the expert's report failed to "explain how the delay was a cause-in-fact of [the patient's] harm." *See id.* at *4. This case is distinguishable; here, Dr. Sanossian's report acknowledges

that, although Montemayor was likely already suffering from "some degree" of WE by the time she went into APC's care, it was under APC's care that she first exhibited persistent cognitive symptoms. He opines that had APC kept Montemayor's physicians abreast daily of her persistent symptoms, as the standard of care dictates APC should have, the progression of WE could have been halted, "spar[ing] [Montemayor] long-term damage and disability" because "days make a difference in treating this condition."

The case facts here more closely follow those in *Zamarripa*. *See Zamarripa v. Columbia Valley Health Care Sys., L.P.*, No. 13-18-00231-CV, 2019 WL 962085, at *7 (Tex. App.—Corpus Christi–Edinburg Feb. 28, 2019, pet. filed) (mem. op.). According to the expert report in *Zamarripa*, the nurses allegedly breached their standard of care when they "deprived" the physicians of information that was "necessary" to a decision regarding the patient's care. *Id.* We concluded in *Zamarripa* that although the parties disputed whether the physician was "in fact 'deprived' of the necessary information, and a trier of fact may eventually find that he was not," the credibility of the expert's opinion "is not at issue at this stage." *See id.* at *7; *see also Fortner v. Hosp. of the Sw., LLP*, 399 S.W.3d 373, 384–85 (Tex. App.—Dallas 2013, no pet.) (holding expert reports represented a good faith effort in a case where nurse was allegedly negligent in delaying communication to a physician regarding patient's vision changes).

Dr. Sanossian's report is a good faith effort for an explanation of causation. *See Columbia Valley*, 526 S.W.3d at 460; *see also Zamarripa*, at *7 (quoting *Abshire*, 563 S.W.3d at 226) ("[W]ith respect to causation, the [trial] court's role is to determine whether the expert has explained how the negligent conduct caused the injury. Whether this explanation is believable should be litigated at a later stage of the proceedings.").

Therefore, we conclude that the trial court did not abuse its discretion in denying APC's motion to dismiss. *Van Ness*, 461 S.W.3d at 144. APC's issue on appeal is overruled.

IV. CONCLUSION

The trial court's orders are affirmed.

GREGORY T. PERKES
Justice

Delivered and filed the
18th day of July, 2019.