NUMBER 13-19-00321-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

PRADYUMNA CHARY MUMMADY, M.D., Appellant,

v.

ODILIA GALAN, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF FELIPA GALAN, DECEASED, AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES, Appellee.

On appeal from the 105th District Court of Nueces County, Texas.

MEMORANDUM OPINION

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

Appellant Pradyumna Chary Mummady, M.D. appeals the trial court's order denying his motion to dismiss a healthcare liability claim brought by appellee Odilia Galan,

individually and on behalf of the estate of Felipa Galan, deceased, and on behalf of all wrongful death beneficiaries. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9). By a single issue, appellant asserts that the trial court erred in denying his motion to dismiss because appellee's amended expert report fails to comply with § 74.351 of the Texas Civil Practice and Remedies Code. *See id.* § 74.351(a), (b). We affirm.

I. BACKGROUND

On January 25, 2017, Galan was transferred from Christus Spohn Hospital in Alice, Texas to Christus Spohn Shoreline in Corpus Christi, Texas, where she was diagnosed with "multifocal pneumonia with resistant Staphylococcus aureus (MRSA)."

On February 3, 2017, appellant performed a "percutaneous tracheostomy"[1] on Galan. Within hours of the procedure, Galan developed "severe subcutaneous emphysema"[2] and required additional surgery. During Galan's subsequent procedure, doctors noted a tear three to four centimeters in length in Galan's trachea. Galan alleges that appellant failed to use a bronchoscopy to visualize the trachea during the placement of the tracheostomy tube. Galan's treating surgeon opined that a "tracheal injury . . . in this patient with very severe lung disease is extremely difficult to treat."

Galan's tracheostomy tube was replaced, and the new tube became dislodged. Physicians resolved to medically paralyze Galan and place her on mechanical ventilation. Galan was unresponsive to treatment, and she was transferred to an acute specialty hospital.

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[1] Tracheostomy is a surgical procedure to create an opening through the front of the neck into the windpipe (trachea). *Tracheostomy*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/tracheostomy/about/pac-20384673 (last visited Apr. 8, 2020). "A tracheostomy provides an air passage to help you breathe when the usual route for breathing is somehow blocked or reduced." *Id.*

[2] A "subcutaneous emphysema" is a possible immediate complication of a tracheostomy, which occurs when air becomes "trapped in tissue under the skin of the neck." *Id.* If left untreated, it "can cause breathing problems and damage to the trachea or food pipe (esophagus)." *Id.*

On March 3, 2017, pulmonologists noted that Galan's tracheal wall tear remained "persistent," "significant," and "unhealing." Due to prolonged mechanical ventilation, Galan also developed internal "pressure injuries." Galan remained hospitalized until her death on March 19, 2017. Galan's reported cause of death was "respiratory failure due to ventilator dependent respiratory insufficiency due to MRSA."

On September 13, 2018, appellee filed "Plaintiff's Original Petition," alleging a health care liability claim against appellant for negligence and gross negligence. On January 15, 2019, appellee filed an expert report by Dr. Kyle I. Happel, M.D., in accordance with § 74.351. *See id.* § 74.351(a) ("In a health care liability claim . . . a claimant shall . . . serve on [a defendant physician] one or more expert reports, with a curriculum vitae of each expert listed in the report."). Appellant timely filed his objections to the expert report, contending, in part, that the expert report did not represent a "good faith" effort to comply with the statute. *Id.* § 74.351(l).

On February 12, 2019, appellee served appellant with an amended expert report. Dr. Happel opined, among other things, that appellant

> improperly performed [the percutaneous tracheostomy], resulting in a large tracheal wall tear. The presence of this tracheal tear complicated matters for [Galan] by greatly extending the time that [Galan] would require mechanical ventilation, and thus exposure to the complications that follow the need for prolonged mechanical ventilation.
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> . . . .
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> [I]n all reasonable medical probability, this tracheal injury caused her further complications, notably medical paralysis and long-term mechanical ventilation, which led to her death from MRSA pneumonia complicated by her failure to respond to medications.

On April 1, 2019, appellant filed objections and a motion for sanctions. Three days later, appellant filed a motion to dismiss under the Texas Civil Practice and Remedies

Code, arguing "the amended report contains only conclusory statements regarding causation, and there are numerous analytical gaps in his amended report." *See id.* § 74.351(a), (b).

At a hearing on appellant's motion, the trial court overruled appellant's objections to the expert report and denied his motion to dismiss. This interlocutory appeal followed. *See id.* § 51.014(a)(9) (authorizing an appeal of an interlocutory order denying a motion to dismiss for failure to file a medical expert report under the Texas Medical Liability Act).

II. Discussion

In his sole issue on appeal, appellant argues that Dr. Happel's amended expert report did not provide a fair summary of the causation element of appellee's negligence claims. *See id.* § 74.351(r)(6).

A. Standard of Review and Applicable Law

Chapter 74 of the Texas Civil Practice and Remedies Code requires a plaintiff bringing a healthcare liability suit against a health care provider to timely file and serve an expert report providing:

> [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); *see Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011).

Should a defendant health care provider file a motion challenging the adequacy of an otherwise timely report, "the court may grant the motion 'only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the [Act's] definition of an expert report.'" *Baty v. Futrell*, 543 S.W.3d 689, 692–93 (Tex. 2018) (quoting Tex. Civ. Prac. & Rem. Code Ann. § 74.351(l)). To constitute a good

faith effort, the report must (1) inform the defendant of the specific conduct forming the basis of the claim and (2) provide an evidentiary foundation for the trial court to conclude that the claim has legal merit. *Baty*, 543 S.W.3d at 693–94; *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam).

A report meets the minimum requirements under the statute if it provides an explanation of "how and why" the defendant's alleged conduct is factually implicated in the injury in question; "*i.e.*, but for the act or omission—the harm would not have occurred." *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 460 (Tex. 2017) (quoting *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109, 113 (Tex. 2013) (per curiam)). "While the plaintiff is not required to prove her claim with the expert report, the report must show that a qualified expert is of the opinion she can." *Zamarripa*, 526 S.W.3d at 460. "No particular words or formality are required, but bare conclusions will not suffice." *Scoresby*, 346 S.W.3d at 556; *see Zamarripa*, 526 S.W.3d at 460. Courts review the sufficiency of the expert report by looking within the four corners of the report. *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 223 (Tex. 2018) (per curiam) (citing *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001)).

An appellate court reviews the trial court's ruling on the adequacy of an expert report and denial of a motion to dismiss for an abuse of discretion. *Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 512 (Tex. 2017). A trial court abuses its discretion when it makes a decision without using guiding rules or principles. *Id.* at 512–13.

B. Causation and Foreseeability

Appellant argues that the report is silent regarding causation and that there is "nothing . . . which would indicate that [Galan's] death was foreseeable, as result of an

alleged tracheal tear. . . Plaintiff's expert's reports don't even discuss the foreseeability requirement." Appellee counters that the "report explains a direct line of causality from the tear in the trachea to [Galan's] death." Moreover, appellee notes that appellant does not dispute that the report sufficiently links appellant's breach in the standard of care to several "severe injuries"[3] sustained, namely, "[Galan's] pain, pressure wounds, and torn trachea."

Appellant nonetheless urges this Court to find the same report deficiency found in three cases: *Fulp v. Miller*, 286 S.W.3d 501, 504 (Tex. App.—Corpus Christi–Edinburg 2009, no pet.) (en banc) (op. on reh'g); *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 859 (Tex. App.—Houston [1st Dist.] 2006, no pet.); and *Lockhart v. Guyden*, No. 01-08-00983-CV, 2009 WL 2050983, at *2–3 (Tex. App.—Houston [1st Dist.] July 16, 2009, no pet.). Expert reports in all three cases cited by appellant failed to relate the alleged breach in care with the alleged injury sustained; however, we find these cases to be distinguishable.

In *Fulp*, Miller suffered complications from an elective hip surgery performed by Fulp. *Fulp*, 286 S.W.3d at 504. Miller remained in Fulp's care for several months following the surgery, and Miller alleged nothing was done to alleviate his persistent pain and limited mobility complaints. *Id.* Miller sought a second expert opinion and was told he needed a second hip replacement surgery to correct wires which "had indeed broken in the intervening period [post-surgery] and the prosthesis [which] was totally loose." *Id.* Miller subsequently filed suit against Fulp, alleging he had "incurred additional expenses for medical care, endured physical pain[,] as well as mental anguish, permanent

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[3] Appellee's petition does not exclusively plead negligence resulting in death.

impairment, and disability." In an expert report filed pursuant to chapter 74, Miller's expert claimed that Fulp breached the standard of care when Fulp: (1) "failed to perceive that the condition of the femur and femoral prosthesis was deteriorating;" and (2) "failed to undertake corrective surgery to prevent further destruction and deterioration of the femur." *Id.* at 508. The Court observed apparent inferences to the alleged causation based on Miller's pleadings but noted that courts "are precluded from filling gaps in a report by drawing inferences or guessing as to what the expert likely meant or intended." *Id.* (citing *Austin Heart P.A. v. Webb*, 228 S.W.3d 276, 279 (Tex. App.—Austin 2007, no pet.). Ultimately, this Court held that though the report adequately established the standard of care and how that standard was breached, the report did not adequately establish "a causal link between Fulp's alleged breaches of the standard of care and the injuries Miller sustained." *Id.*

In *Gray,* the plaintiff sued an operating physician and a hospital for a leg injury sustained during surgery. *Gray*, 189 S.W.3d at 859. The plaintiff claimed the injury, caused by the flexing of her left leg, could have been prevented had the doctor or hospital nursing staff properly monitored Gray's extremities during the operation. *Id.* The plaintiff's expert report in *Gray* provided *no* specific information concerning what actions appellees should have taken. *Id.* Our sister court thereby resolved that "[b]y not fleshing out how appellees' failure to monitor Gray's extremities caused her injury, the report does not convincingly tie the alleged departure from the standard of care to specific facts of the case." *Id.*

In *Lockhart*, the plaintiff died from urosepsis before a physician was able to evaluate or treat the plaintiff for sepsis or procure the plaintiff's transfer to an acute care facility. *Lockhart*, 2009 WL 2050983, at *2–3. In evaluating the expert report, the appellate

court concluded that the report was without expert opinion to explain the nexus between the physician's alleged inaction and the plaintiff's death. *Id.*

In the instant case, we observe that Dr. Happel unequivocally articulates the prescribed applicable standard of care and appellant's alleged breach of care:

> [T]he standard of care requires direct fiberoptic bronchoscopy visualization of the trach tube as it is being placed in order to ensure that the tube is safely placed within the tracheal lumen and not penetrating through the posterior tracheal wall. . . . [Appellant's operative report] confirms that no bronchoscopic visualization (via the endotracheal tube) was performed during passage of the tracheostomy tube. . . .
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> It was foreseeable . . . that a tracheal wall tear could occur during percutaneous tracheostomy placement without direct bronchoscopic visualization. . . . It was also foreseeable that a tear to the trachea would be a significant complication with the reasonable likelihood of significantly complicating or preventing [Galan's] recovery. . . .

Unlike the expert reports in *Fulp, Gray*, and *Lockhart*, Dr. Happel's explanation also provides a straightforward, detailed link between appellant's alleged breach of the standard of care and Galan's injuries—including Galan's tracheal wall tear, pressure injuries, and death:

> In all reasonable medical probability, but for [appellant's] failure to properly visualize the placement of [Galan's] percutaneous tracheostomy with bronchoscopy, the tube would not have perforated the tracheal wall and become lodged. . . . [and] directly complicated [Galan's] recovery from MRSA.
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> The presence of this tracheal tear complicated matters for [Galan] by greatly extending the time that [Galan] would require mechanical ventilation, and thus exposure to the complications that follow the need for prolonged mechanical ventilation.[4]

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[4] According to Dr. Happel, prolonged mechanical ventilation complications include, but are not limited to:

> In the presence of a tracheal wall tear, it is critical that positive air pressure not be allowed to escape through this tear. This is for two reasons. First, pressurized air leaving the tracheal [wall] will enter into the mediastinum and cause extensive subcutaneous emphysema (i.e. air in soft tissues). This is precisely the reason that [Galan] had developed significant subcutaneous emphysema prior to the recognition of the tracheal tear. Secondly, in order to attempt tracheal healing, there must not be any pressure on the tracheal wall tear, or it will not heal. For these reasons, it was appropriate that a long tracheostomy tube was placed following tracheal injury—so that her caregivers could provide positive pressure to the lungs without allowing pressurized air to escape the tracheal tear or complicate the tracheal healing.
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> Because of the presence of the tracheal tea[r], however, it was necessary for [Galan] to remain on prolonged mechanical ventilation. This need for prolonged mechanical ventilation precluded the otherwise likely scenario of progressive liberation from mechanical ventilation that [Galan] would have likely enjoyed had the tracheal tear not have occurred. In other words, but for the presence of her tracheal tear, the extralong tracheal tube would not have been placed, [Galan] would not have required weeks of medical paralyzation, and in my opinion would have recovered from her pneumonia.
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> . . . .
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> In evaluating the care that Dr. Mummady provided (and/or failed to provide) to [Galan] it is my opinion, based upon my education, training, and experience, that Dr. Mummady was negligent, and that this negligence was a proximate cause, in reasonable medical probability, of the development and deterioration of [Galan's] medical condition, leading to her death, all as set forth above in this review.

Having reviewed Dr. Happel's amended expert report, we conclude the report was sufficient to explain the connection between the alleged breach (appellant's performance

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> . . . ventilator associated pneumonia, need for prolonged sedation and/or paralysis, pressures ulcer formation, neuromuscular weakness, and gastrointestinal bleeding.
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> As a result of the tracheal tear and required ventilation, [Galan] was restricted from movement and from being frequently turned and repositioned. This limitation increased [Galan's] risk of pressure injuries. Indeed, [Galan] developed pressure injures that were classified as unstageable. These pressure injuries likely caused Ms. Galan pain and were unable to heal due to her present condition.

of a percutaneous tracheostomy without bronchoscopy) and Galan's claimed injuries (a torn tracheal wall, pressure injuries, and death). *See Abshire*, 563 S.W.3d at 226 (holding that with respect to causation, our "role is to determine whether the expert has explained how the negligent conduct caused the injury"); *Palacios*, 46 S.W.3d at 880 ("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."); *see, e.g.*, *Miller,* 536 S.W.3d at 512 (holding that that there was a "more-than-adequate summary" of causation where the expert explained how the physician's breach—failing to identify the illness—delayed timely removal, which in turn caused the patient to aspirate); *see also Haddad v. Marroquin*, No. 13-08-00139-CV, 2009 WL 2192737, at *3 (Tex. App.—Corpus Christi–Edinburg July 23, 2009, pet. denied) (mem. op.) ("[B]y offering an explanation of the medical effect of leaving a cotton sponge in the patient's body, the amended expert report demonstrated the basis of [the expert's] statement linking [the defendant's] breach to [the plaintiff's] chronic abdominal pain and second invasive surgery.").

We are mindful of the low threshold that a § 74.351 medical expert report must cross and observe that the report is simply a preliminary method to show that a plaintiff has a viable cause of action that is not frivolous or without expert support. *See Baty*, 543 S.W.3d at 697 (explaining how challenged expert report met the statutory requirements and noting that "additional detail is simply not required at this stage of the proceedings."); *see McAllen Hosps., L.P. v. Gonzalez*, 566 S.W.3d 451, 456 (Tex. App.—Corpus Christi–Edinburg 2018, no pet) (observing the preliminary threshold standard before the court) (citing *Loaisiga v. Cerda*, 379 S.W.3d 248, 264 (Tex. 2012)). We hold that the trial court did not abuse its discretion when it denied appellant's motion for dismissal under chapter 74. *See Miller*, 536 S.W.3d at 512.

III. CONCLUSION

The trial court's order is affirmed.

GREGORY T. PERKES
Justice

Delivered and filed the
9th day of April, 2020.