



NUMBER 13-20-00053-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

**MARIA GUERRERO, INDIVIDUALLY
AND AS REPRESENTATIVE OF THE
ESTATE OF OTILIA ESTRADA,**

Appellant,

v.

AHMAD KARKOUTLY, M.D.,

Appellee.

**On appeal from the 138th District Court
of Cameron County, Texas.**

MEMORANDUM OPINION

**Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Longoria**

This is the second appeal from the underlying suit brought by appellant Maria Guerrero against appellee Ahmad Karkoutly, M.D., alleging Karkoutly's medical negligence led to her mother's death. By a single issue in the instant appeal, Guerrero

argues that the trial court abused its discretion by implicitly denying her motion for a thirty-day extension to cure her expert report. We reverse and remand.

I. BACKGROUND

Guerrero filed suit for medical negligence against two hospital entities and nine physicians, including Karkoutly. Guerrero's petition alleged that on October 9, 2013, her mother Maria Otilia Estrada was admitted to Valley Regional Medical Center, a hospital in Brownsville, Texas. She complained of abdominal pain, nausea, and vomiting, and she had a history of colon ailments. Various defendants treated her for several weeks and performed multiple surgeries. However, Estrada died, allegedly because the defendants' substandard care caused Estrada to suffer septic shock and respiratory failure.

To support her claim against Karkoutly, Guerrero filed an expert report authored by David H. Miller, M.D. In the report, Miller made the following observations and assertions:

Dr. Karkoutly clearly understood the nature of the surgery (colon re-section with ileostomy and anastomosis-reconnection of the colon). The question is why the patient had apparent infectious process going on before and after the surgery. The likely causes are either a rupture of the colon or the early failure of the anastomosis or both.

...

The only chance to survive the patient has in circumstances like this is to undergo exploratory surgery to correct the problem. This was not done or apparently even considered by Dr. Karkoutly until approximately ten days post-operatively and as explained below, that is below the standard of care.

...

As explained below, developing peritonitis caused by perforation of intestinal tissue, if treated surgically early on, is fairly easy to arrest and mortality and complication rates are low. When there is a significant delay in diagnosis or treatment, the patient is in severe danger and that danger of complications or death increases as the condition is left untreated.

...

The delay in diagnosing and treating this patient between the time she was operated on October 15, 2013 and finally examined surgically around ten days later definitely harmed the patient because the longer this condition is untreated, the more it progresses to sepsis and septic shock which can lead to generalized or specific organ failure and death.

...

3. Standard of care applicable to Dr. Karkoutly:

The standard of care applicable to Dr. Karkoutly assessing a patient after intestinal surgery is to continually assess the patient and to consider the causes or differential diagnoses for a persisting condition of sepsis, a well-known complication of surgeries and a condition this patient likely had prior to surgery. . . . The standard requires that the physician following the patient confer with the surgeon and others when infectious or inflammatory processes persist or worsen post-surgery and at least consider timely intervention.

4. Causation—how failure of Dr. Karkoutly to follow standards of care caused harm and death:

...

Dr. Karkoutly appropriately saw the patient almost every day in the ICU and he documents the steady deterioration. But he failed to recommend to surgeons or other specialists or to the family that the patient needed exploratory surgery to examine the area of the initial surgery and the colon to see if there was a compromise in the anastomosis or a perforation or puncture of the colon from the colonoscopy that would explain the reason for deterioration after surgery that was supposed to alleviate the condition.

...

This patient was continually in the hospital for about three weeks post-operatively and had she had evaluation by exploratory surgery in the first few days after her surgery, the problem (apparent compromise of the anastomosis or other leakage from the colon from a perforation) would have been discovered and successfully treated surgically and the patient would not have needlessly suffered and died.

Karkoutly filed a motion to dismiss Guerrero’s claims, asserting that Miller’s report did not satisfy the requirements of the Texas Medical Liability Act (TMLA). See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351. More specifically, Karkoutly complained that Miller’s report contained conclusory statements and logical inconsistencies. Following a hearing, the trial court denied Karkoutly’s motion to dismiss. Karkoutly appealed the trial court’s denial of the motion to dismiss, and we agreed that Miller’s report was deficient as to causation. See *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.). However, we remanded to the trial court because

[w]hile Dr. Miller’s report does not advance a valid, factual explanation of causation, the deficiencies in his report are not so overwhelming that a valid explanation “would be impossible.” Accordingly, the “trial court here must be given the opportunity to consider an extension” or dismissal with prejudice, in its sound discretion.

Id. (internal citations omitted).

Upon remand, Guerrero filed a motion requesting a thirty-day extension to cure the expert report. Karkoutly filed another motion to dismiss with prejudice. The trial court granted Karkoutly’s motion to dismiss, thereby implicitly denying Guerrero’s motion for a thirty-day extension. This appeal followed.

II. DEFICIENT EXPERT REPORT

In her sole issue, Guerrero argues that the trial court abused its discretion by implicitly denying her motion for a thirty-day extension to cure Miller’s expert report and, instead, dismissing her claim.

A. Standard of Review & Applicable Law

We review a trial court's ruling on a motion for a thirty-day extension under § 74.351(c) of the Texas Civil Practice and Remedies Code for abuse of discretion. *Henry v. Kelly*, 375 S.W.3d 531, 535 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). “The trial court abuses its discretion if it acts unreasonably or arbitrarily or without reference to any guiding rules or principles.” *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003). The court of appeals cannot reverse a decision committed to the trial court's discretion if the court of appeals simply disagrees with the trial court's judgment. *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41–42 (Tex. 1989) (orig. proceeding). The trial court's decision must result in a “clear and prejudicial error” to be reversible. *Id.*

The TMLA, codified in Chapter 74 of the Texas Civil Practice and Remedies Code, governs the process of serving expert reports in health care liability suits. See TEX. CIV. PRAC. & REM. CODE ANN. § 74.351. Section 74.351(a) states that the plaintiff in a medical liability suit has 120 days to serve each defendant with an expert report. *Id.* § 74.351(a). Chapter 74 defines an expert report 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).

If no report is filed, then the trial court shall enter an order dismissing the suit and awarding the affected physician or health care defendant with attorney's fees and costs. *Id.* § 74.351(b). However, “if an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient,” then the court may grant a thirty-day extension for the plaintiff to cure the deficiencies. *Id.*

§ 74.351(c). As the Supreme Court of Texas has noted, the TMLA's purpose is to strike a delicate balance between deterring frivolous lawsuits without needlessly disposing of meritorious claims. *See Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008).

A string of Texas Supreme Court cases has clarified what constitutes an adequate expert report and when a thirty-day extension should be granted. *See Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 631 (Tex. 2013); *Scoresby v. Santillan*, 346 S.W.3d 546, 549 (Tex. 2011); *Samlowski v. Wooten*, 332 S.W.3d 404, 411 (Tex. 2011); *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010); *Ogletree v. Matthews*, 262 S.W.3d 316, 320 (Tex. 2007). In *Ogletree*, the Court noted that the TMLA “do[es] not mandate dismissal for deficient, but curable, reports.” 262 S.W.3d at 320. The court recognized that the TMLA differentiates between a nonexistent report and a report that is filed in good faith but ultimately falls short of the statutory requirements, such as failing to address causation. *Id.* Nonexistent reports lead to dismissal whereas merely deficient reports may lead to a thirty-day extension to allow an opportunity for deficiencies to be cured. *Id.*

The *Scoresby* Court noted that § 74.351 simply requires “an objective good faith effort to comply” with the statutory requirements. 346 S.W.3d at 555. Based on this understanding of the TMLA, the *Scoresby* Court created a three-prong test to determine whether an expert report is adequate: the report must (1) “be served by the statutory deadline”; (2) “inform the defendant of the specific conduct the plaintiff has called into question”; and (3) “provide a basis for the trial court to conclude that the claims have merit.” *Id.* at 555-57 (citing *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001)). Accordingly, a trial court should grant a defendant's motion to dismiss only if it appears to the court “that the report does not represent a *good faith effort*

to comply with the definition of an expert report.” *Jelinek*, 328 S.W.3d at 539 (emphasis in original). Thus, trial courts should generally “err on the side of granting claimants’ extensions.” *Samlowski*, 332 S.W.3d at 411; see *Potts*, 392 S.W.3d at 631 (holding that as long as there is “at least one viable liability theory, as evidenced by an expert report,” the claim is not frivolous and should proceed forward); *Scoresby*, 346 S.W.3d at 554 (“For these reasons, we have held that trial courts should be lenient in granting thirty-day extensions and *must do so* if deficiencies in an expert report can be cured within the thirty-day period.” (emphasis added)).

III. ANALYSIS

According to Guerrero, the trial court abused its discretion because Miller’s expert report was timely filed, contains the opinion of an individual with expertise declaring that the claim has merit, and implicates Karkoutly’s conduct. On the other hand, Karkoutly asserts that the trial court did not abuse its discretion because “Dr. Miller’s report does not implicate Dr. Karkoutly and, thus, does not allege that he committed malpractice.” We agree with Guerrero.

Even though the report is lacking in some regards, Miller very clearly implicates Karkoutly’s conduct and provides a basis for the trial court to conclude that the claim has merit. In his report, Miller explained that the applicable standard of care required “that the physician following the patient confer with the surgeon and others when infectious or inflammatory processes persist or worsen post-surgery and at least consider timely intervention.” According to Miller, Karkoutly saw the patient almost every day but failed to recommend the necessary exploratory surgery. Furthermore, Miller asserts that

[t]he delay in diagnosing and treating this patient between the time she was operated on October 15, 2013 and finally examined surgically around ten

days later definitely harmed the patient because the longer this condition is untreated, the more it progresses to sepsis and septic shock which can lead to generalized or specific organ failure and death.

The report establishes a theory of liability that could allow appellees to prevail. See *Potts*, 392 S.W.3d at 631. A report like this is not considered “no report” under § 74.351. See *Ogletree*, 262 S.W.3d at 320 (finding that an expert report that was only deficient as to causation was not so deficient as to constitute “no report”).

Thus, we conclude that Miller’s report meets the “minimal standard” of implicating Karkoutly’s conduct and containing the opinion of an individual with expertise that the claim has merit. See *Potts*, 392 S.W.3d at 631; *Scoresby*, 346 S.W.3d at 557; *Samlowski*, 332 S.W.3d at 411; *Jelinek*, 328 S.W.3d at 539; *Ogletree*, 262 S.W.3d at 320. Accordingly, the trial court abused its discretion by denying Guerrero’s motion for a thirty-day extension to cure the deficient report. See *Scoresby*, 346 S.W.3d at 554. We sustain Guerrero’s sole issue.

IV. CONCLUSION

We reverse the trial court’s order granting Karkoutly’s motion to dismiss and remand to the trial court for further proceedings in accordance with this opinion.

NORA L. LONGORIA
Justice

Delivered and filed the
27th day of August, 2020.