NUMBER 13-20-00406-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

DOCTORS HOSPITAL AT RENAISSANCE, LTD., **Appellant,**

v.

REBECCA LUGO, INDIVIDUALLY AND AS NEXT FRIEND OF INGRID BANDA, A MINOR, **Appellee.**

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

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Hinojosa and Silva
Memorandum Opinion by Justice Silva

Appellee Rebecca Lugo, individually and as next friend of Ingrid Banda, a minor, filed suit against Michael Burke, M.D.[1] and appellant Doctors Hospital at Renaissance, Ltd. (DHR) alleging medical malpractice. DHR filed a motion to dismiss Lugo's suit, challenging Lugo's expert witnesses and their accompanying preliminary reports. The trial court denied DHR's motion, permitting the suit to continue. In this accelerated interlocutory appeal, DHR argues that the trial court abused its discretion by overruling DHR's objections to the expert reports and denying its motion to dismiss. We affirm.

I. BACKGROUND

According to the pleadings and expert reports, on February 9, 2018, Dr. Burke performed brain surgery on Banda at DHR in Edinburg, Texas. Following the surgery, Banda exhibited signs of brain damage, including paralysis to the left side of her body and weakness on the right side. Following an MRI, Dr. Burke determined the retractor used during surgery had "migrated and went into the brainstem," causing Banda's symptoms. Dr. Burke's final diagnosis included "brainstem injury during surgical procedure."

Lugo, Banda's mother, filed an original petition against Dr. Burke on May 15, 2019, alleging negligence by Dr. Burke. On November 30, 2018, Chris Taylor, M.D., a board-certified neurosurgeon and professor of neurosurgery at the University of New Mexico School of Medicine, wrote a preliminary expert report in support of Lugo's suit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351. In assessing the standard of care, Dr. Taylor opined that the placement and migration prevention of the retractor was the sole responsibility of the surgeon. Dr. Taylor opined that "[u]nintentional migration of a brain

[1] Dr. Burke is not a party to this appeal.

retractor . . . caused severe and permanent damage to [Banda's] brainstem" and "severe and permanent neurological impairment." To end the report, Dr. Taylor stated "[he] may change or supplement [his] opinions if [he] learn[ed] additional information."

Following the preliminary expert report, Lugo initiated discovery. During a deposition, Dr. Burke stated that, at some point during the surgery, he observed that the retractor had migrated into Banda's brainstem. Dr. Burke further stated the migration of the retractor may have been caused by physical contact by himself, physical contact by the surgical technician, or physical contact by surgical equipment, most likely the tube from a suction device, controlled by either Dr. Burke or the surgical tech. Dr. Burke further stated that he "did not recall contacting the retractor." On February 6, 2020, Lugo filed an amended petition, naming DHR, the employer of the surgical technician, as a defendant.

On January 7, 2020, Dr. Taylor wrote a supplemental preliminary expert report, identifying the standard of care, breach, and causation of Banda's injuries applicable to the surgical tech employed by DHR. A second preliminary expert report, dated May 11, 2020, was prepared by Rana Codrean[2], a certified surgical technologist and surgical technician instructor at American Career College. Both Dr. Taylor and Codrean opined that the surgical tech's standard of care includes "[p]reventing anything from happening that would cause the retractor to migrate." They further opined that, if the surgical tech physically contacted the retractor or caused surgical equipment to physically contact the retractor, then the surgical tech did breach the standard of care. As for causation, Dr. Taylor again noted that the "migration of the brain retractor during the elective surgical

[2] Codrean offered an opinion as to the surgical tech's standard of care and breach thereof, but did not offer an opinion on causation.

resection of Ms. Banda's right temporal AVM 2/9/18 caused severe and permanent damage to her brainstem resulting in severe and permanent neurological impairment."

DHR objected to both expert reports and filed a motion to dismiss the claim against it, arguing the reports did not constitute a good faith effort to comply with § 74.351. Specifically, DHR objected to Dr. Taylor's report alleging he is not qualified as an expert for surgical technician standards of care because he is not trained as a surgical technician nor has he ever practiced health care as a surgical technician.[3] DHR further objected to Dr. Taylor's report, on the grounds that his "opinions on causation are conclusory and speculative" and that he "fail[s] to explain how and why the alleged breaches [of the standard of care] by the surgical technicians were a substantial factor in causing the retractor migration." DHR objected to Codrean's report on the basis that her opinions on the cause of the retractor's migration "relie[d] on assumptions, conditions, and suppositions . . . ." DHR complained that both Dr. Taylor and Codrean assume Dr. Burke did not contact the retractor, causing its migration, solely based on Dr. Burke's statement that he "did not recall contacting the retractor." Both Dr. Taylor and Codrean opined that they would expect a surgeon to recall contacting the retractor, thus they ruled out that Dr. Burke directly contacted the retractor and opined that the surgical tech breached the standard of care.

DHR additionally complained that the reports failed to sufficiently explain (1) how or why migration of the retractor caused the brainstem injury, or (2) "how or why 'contact' with the retractor would cause the retractor to migrate." The trial court overruled DHR's objections and denied its motion to dismiss. This interlocutory appeal followed. *See id.*

[3] Although DHR challenged Dr. Taylor's qualifications in its original motion, it has not argued such on appeal.

§ 51.014(a)(9) (authorizing interlocutory appeal of the denial of a motion to dismissed filed under § 74.351(b))

II. STANDARD OF REVIEW

We review a trial court's ruling on a motion to dismiss for failure to comply with § 74.351's expert report requirements for abuse of discretion. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam). "A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex.1985)). "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." *Id.* (citing *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41–42 (Tex.1989)). The denial of a motion to dismiss under § 74.351(b) is interlocutory and may be appealed immediately. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9); *see Ogletree v. Matthews*, 262 S.W.3d 316, 319 (Tex. 2007). The trial court's decision must result in a "clear and prejudicial error" to be reversible. *Flores*, 777 S.W.2d at 41–42.

III. APPLICABLE LAW

A. Expert Report

A party who brings a health care liability claim shall, "not later than the 120th day after each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports . . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). The claimant must also serve the curriculum vitae of each expert who provided a report. *Id.* Each defendant must object to the sufficiency of the report within twenty-one days of

receiving the report or twenty-one days of the filing of the defendant's answer. *Id.* Failure to timely serve the expert report shall result in the trial court dismissing the suit with prejudice. *Id.* § 74.351(b)(2). Conversely, failure to timely object results in a waiver of any objections. *Id.* § 74.351(a) The court may grant one thirty-day extension to cure a report that is found to be deficient. *Id.* § 74.351(c). In general, "trial courts should err on the side of granting claimants' extensions." *Samlowski v. Wooten*, 332 S.W.3d 404, 411 (Tex. 2011). "The purpose of the expert report requirement is to deter frivolous claims, not to dispose of claims regardless of their merits." *Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011).

The report must "represent an objective good faith effort to comply" with the definition of an expert report. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l). To meet the requirements of a report, it must represent a "fair summary of the expert's opinions" of (1) the standard of care; (2) the manner in which the care rendered failed to meet the standards; and (3) the causal relationship between that failure and the injury, harm, or damages claimed. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001). At a minimum, "the report must inform the defendant of the specific conduct the plaintiff has called into question" and "provide a basis for the trial court to conclude that the claims have merit." *Id.* A report does not "constitute a good faith effort if it omits any of the statutory requirements." *Id.* However, the claimant is not required to present evidence in the report as if they were actually litigating the merits. *Id.*

Since the enactment of the Texas Medical Liability Act (the Act), codified in Chapter 74 of the Texas Civil Practice and Remedies Code, the Supreme Court of Texas has clarified what constitutes an adequate expert report. *See Abshire v. Christus Health*

Se. Tex., 563 S.W.3d 219, 226 (Tex. 2018) (per curium); *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625 (Tex. 2013); *Scoresby*, 346 S.W.3d at 549-50; *Samlowski*, 332 S.W.3d at 411; *Jelinek v. Casas*, 328 S.W.3d 526 (Tex. 2010); *Ogletree*, 262 S.W.3d at 322. The Court has recognized that the Act distinguishes between a deficient report and no report at all. *See Ogletree*, 262 S.W.3d at 320–21. The Court has also noted, though, that a report may be so deficient as to constitute no report at all. *See Scoresby*, 346 S.W.3d at 556 (concluding that a statement by an expert that the defendant violated the standard of care and as a result caused damages, without more, warranted an extension rather than dismissal, but noting that a sheet of paper with "expert report" written on it "would mock the Act's requirements"). A report that is deemed deficient should result in a thirty-day extension to cure the deficiencies, while a report so deficient as to constitute no report at all should result in dismissal. *See id.* at 557.

1. Standard of Care & Breach

The standard of care relevant to a healthcare provider is what an ordinarily prudent healthcare provider would do under the same or similar circumstances. *Storm v. Mem'l Hermann Hosp. Sys.*, 110 S.W.3d 216, 222 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (citing *Palacios*, 46 S.W.3d at 880). "Whether a defendant breached the standard of care due [to] a patient cannot be determined without 'specific information about what the defendant should have done differently.'" *Id.* (quoting *Palacios*, 46 S.W.3d at 880). In *Palacios*, the specific language of the report called into question was: "[I]n my opinion, the medical care rendered to Mr. Palacios . . . was below the accepted standard of care which he could expect to receive." 46 S.W.3d at 879–80. Further, the plaintiffs argued that the trial court could infer what the expert intended from other statements, which cut

against the rule that the court "should look no further than the report in conducting a[n] . . . inquiry." *Id.* at 878, 880.

2. Causation

"[A] plaintiff asserting a health care liability claim based on negligence, who cannot prove that her injury was proximately caused by the defendant's failure to meet applicable standards of care, does not have a meritorious claim." *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 460 (Tex. 2017). "Proximate cause has two components: (1) foreseeability and (2) cause-in-fact." *Rodriguez-Escobar v. Gross*, 392 S.W.3d 109, 113 (Tex. 2013) (per curiam). "For a negligent act or omission 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, and absent the act or omission—i.e., but for the act or omission—the harm would not have occurred." *Id.* The preliminary report is not "required to rule out every possible cause of the injury, harm, or damages claimed . . . ." *Baylor Med. Ctr. at Waxahachie v. Wallace*, 278 S.W.3d 552, 562 (Tex. App.—Dallas 2009, no pet.). The expert report must sufficiently demonstrate that the behavior called into question caused the harm, without leaving too many analytical gaps for the trial court. *Abshire*, 563 S.W.3d at 226. However, a trial court should not review the explanation for *believability* at this stage of the proceeding—that is determined at a later stage in litigation. *Id.*

IV. DISCUSSION

DHR's sole argument is that the trial court abused its discretion by denying its motions to dismiss "because the expert reports served by appellee do not represent a 'good faith' effort to comply with § 74.351." In doing so, DHR challenges Dr. Taylor and

Codrean's statements on breach of the standard of care and Dr Taylor's statements on causation as "conclusory and speculative" and argues that they "fail[] to establish the required causal link between the surgical technician's alleged breaches of the standard of care and [a]ppellee's damages." DHR further cites to Dr. Taylor's initial report opining that the positioning and migration of the retractor is "solely a responsibility of the surgeon" as evidence that the surgical technician's actions were not a substantial factor in causing the injuries. Finally, DHR asserts that Dr. Taylor's report fails to explain how contacting the retractor could cause the retractor to migrate into Banda's brainstem and how the retractor's migration could cause severe and permanent damage.

A. Standard of Care & Breach

We first turn to DHR's assertions that Dr. Taylor and Codrean's opinions on the cause of the retractor's migration improperly relies on "speculation and conjecture." DHR specifically complains that Dr. Taylor and Codrean both base their conclusion that the surgical tech may have contacted the retractor on Dr. Burke's statement that he does not recall contacting the retractor. However, as noted in *Wallace*, a preliminary report is not "required to rule out every possible cause of the injury, harm, or damages claimed . . . ." *Wallace*, 278 S.W.3d at 562. To do so in this situation would require Lugo to meet an impossible standard: rule out the surgical tech as a cause of migration to exclusively implicate Dr. Burke, while simultaneously ruling out Dr. Burke as a cause of migration to implicate the surgical tech. This is particularly onerous when the Act prohibits discovery until the preliminary reports have been accepted. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s).

Further, the claimant is not required to present evidence in the report as if they were actually litigating the merits. *Palacios*, 46 S.W.3d at 879. Both Dr. Taylor and Codrean opine that the surgical tech's standard of care includes "[p]reventing anything from happening that would cause the retractor to migrate" and that physical contact by the surgical tech or surgical equipment constitutes a breach of that standard of care. Accordingly, DHR has been apprised of "specific information about what the defendant should have done differently." *See id.* at 880.

Insofar as DHR contends Dr. Taylor and Codrean rely on "impermissible assumptions, speculation, and inferences," DHR cites primarily three cases. *See Bowie Mem'l Hosp.*, 79 S.W.3d at 52 (concluding that the expert's report stating "*if* the x-rays would have been correctly read *and* the appropriate medical personnel acted upon those findings *then* [patient] would have had the *possibility* of a better outcome" did not represent good faith effort to establish causation) (emphasis added); *Murphy v. Mendoza*, 234 S.W.3d 23, 28 (Tex. App.—El Paso, 2007 no pet.) (concluding that the expert's conclusion is not supported by the facts because the expert relied on the assumption that recuts of tissue slides were accurate representations of original cuts *without explanation*) (emphasis added); *see also Cooper v. Arizpe*, No. 04-07-00734-CV, 2008 WL 940490, *4 (Tex. App.—San Antonio Apr. 9, 2008, pet. denied) (mem. op.) (concluding that the entire standard of care and breach were contingent on an assumption that emergency department charts and physician's notes were available to two other physicians). We find these cases inapposite. Here, both Dr. Taylor and Codrean limit the breach to three distinct possibilities: (1) Dr. Burke contacted the retractor; (2) the surgical tech contacted the retractor; and (3) surgical equipment, under the control of Dr. Burke or a surgical tech,

contacted the retractor. In each of the cases DHR cites, the possibility of breach was conditioned on the base assumptions; whereas in the present case, the only "assumption" is as to which individual breached the standard of care—a question properly left to a factfinder at trial. *See Abshire*, 563 S.w.3d at 226. With regard to the breach of the standard of care, both reports "inform the defendant of the specific conduct the plaintiff has called into question" and "provide a basis for the trial court to conclude that the claims have merit." *Palacios*, 46 S.W.3d at 879.

B. Causation

Next, we consider DHR's assertions that Dr. Taylor "fails to explain how or why 'contact' with the retractor would cause the retractor to migrate or how the migration caused the injuries." DHR cites our decision in *Christus Spohn Health Sys. Corp. v. Trammell*, No. 13-09-00199-CV, 2009 WL 2462899 (Tex. App.—Corpus Christi–Edinburg Aug. 13. 2009, no pet.) (mem. op.), in support of its arguments. In *Trammell*, we concluded that an expert report that assumed a hospital employee generated discharge instructions and that the information in the instructions were an essential component of the damages suffered was insufficient. *Id.* at *3. In our analysis, we noted that:

> [The expert]'s report is insufficient with respect to causation. [The expert] makes no attempt in her report to identify the person, office, or department that is responsible for hospital discharge orders. She does not positively state that the discharge summary in this case was, in fact, generated by Spohn employees.

Id. at *3. We further noted that "[t]here is no actual factual basis within the four corners of the report for this assumption." *Id.* Again, we find this case inapposite. Here, Dr. Taylor's conclusions are based on Dr. Burke's deposition as well as the medical records and imaging. Specifically, Dr. Taylor notes that during surgery Dr. Burke "observed that the retractor had migrated into the brainstem" and later determined "there was no question

that [the abnormal signal track through the brainstem] was the cause of [Banda's] significant neurological compromise . . . ." Dr. Taylor further opines, based on Dr. Burke's deposition, that the retractor's migration could have been caused by one of three possible explanations, all of which include physical contact by either Dr. Burke or the surgical technician. Dr. Taylor's report sufficiently explains how the behavior called into question caused Banda's injuries, and does not require the trial court to fill in analytical gaps. *See Abshire*, 563 S.W.3d at 226 .

DHR urges us to rely on Dr. Taylor's initial report to conclude that the report conclusively rules out possible liability by DHR through the surgical tech, but we are not persuaded. As noted, Dr. Taylor indicated that "[he] may change or supplement [his] opinion if [he] learn[ed] additional information." Nothing in § 74.351 prevents an expert from amending or refining his or her opinion upon learning of new information during discovery. *See* TEX. CIV. PRAC. & REMEDIES CODE ANN. § 74.351.

C. Summary

We conclude that Dr. Taylor and Codrean's reports "represent an objective good faith effort to comply" with the requirements of an expert report. *See Id.*§ 74.351(l). The reports here "inform the defendant of the specific conduct the plaintiff has called into question" and "provide a basis for the trial court to conclude that the claims have merit." *See Palacios*, 46 S.W.3d at 880. The reports represent a "fair summary of the expert's opinions" on (1) the standard of care (preventing contact to and migration of the retractor); (2) the manner in which the care rendered failed to meet the standards (Dr. Burke, the surgical tech, or surgical equipment under the control of Dr. Burke or the surgical tech contacted the retractor); and (3) the causal relationship between that failure and the injury,

harm, or damages claimed (the contact to the retractor caused it to migrate into Banda's brainstem, causing "significant neurological impairment"). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). We conclude that the trial court did not abuse its discretion when it overruled DHR's objections to the expert reports and denying DHR's motion to dismiss. *See Bowie Mem'l Hosp.*, 79 S.W.3d at 52. DHR's sole issue is overruled.

V. CONCLUSION

The trial court's judgment is affirmed.

CLARISSA SILVA
Justice

Delivered and filed on the
11th day of February, 2021.