NO. 12-10-00405-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

WILLIAM CONNER, M.D., JEFF W. FIDONE, M.D., AND STEVEN HICKERSON, M.D., APPELLANTS	***§***	***APPEAL FROM THE 7TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
ELLEN LYNNE PATRICK, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DENNIS JAMES PATRICK, DECEASED, KRISTY L. PARKER AND JOSEPH P. PATRICK, APPELLEES	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

In this health care liability case, Appellants William M. Conner, M.D., Jeff W. Fidone, M.D., and Steven Hickerson, M.D. (collectively Appellants), filed a motion to dismiss with prejudice the claims of Ellen Lynne Patrick, individually and on behalf of the estate of Dennis James Patrick, deceased; Kristy L. Parker; and Joseph P. Patrick (collectively the Patricks) due to deficiencies in their expert report. The trial court ultimately issued an order denying Appellants' motion to dismiss. In their sole issue, Appellants contend that the trial court's order constitutes reversible error because the expert report fails to meet the requirements of Section 74.351 of the Texas Civil Practice and Remedies Code. We reverse the order of the trial court, dismiss in part, and remand in part.

BACKGROUND

Dennis James Patrick, a fifty year old male, went to the emergency room at Trinity Mother Frances Hospital on January 10, 2008. He reported having severe headaches and photophobia over

a three week period.[1] Dr. Connor admitted Patrick at the emergency room and diagnosed him with viral meningitis. Dr. Robert Boyne, a neurologist, was consulted, as was Dr. Hickerson, an infectious disease specialist.[2] Because of his condition, Patrick remained a patient in the hospital.

On January 13, Patrick developed a cough. A chest x-ray was performed, which revealed "mild infiltrates at the lung bases." Patrick's respiratory distress worsened, and he developed hypoxemia. This condition required Patrick to use supplemental oxygen, which was started on January 17. That same day, a CT scan showed that Patrick sustained "bilateral pulmonary infiltrative changes compatible with pneumonia, small reactive lymph nodes." It was also noted that his "heart and vascular structures [were] within normal limits." Also on January 17, Patrick's respiratory condition continued to worsen, and he was referred to Dr. Fidone, a pulmonary and critical care specialist, for a pulmonary consultation.

Dr. Fidone recommended a bronchoscopy, which was attempted on January 18. However, the procedure had to be aborted because of Patrick's "worsening respiratory distress, hypoxemia, and audible grunting." Patrick was transferred to the intensive care unit (ICU), and placed on noninvasive mechanical ventilation. His condition deteriorated even further, and he was intubated and placed on mechanical ventilation on January 20.

On January 24, Patrick was placed on deep venous thrombosis (DVT) prophylaxis, particularly Enoxaparin, which is an anticoagulant medication, and remained mechanically ventilated.[3] Patrick went into cardiac arrest and died three days later on January 27. An autopsy was performed and revealed "extensive thromboembolism in both pulmonary arteries, occluding the lumen of the left main pulmonary artery and the branching arteries of the right pulmonary artery," which is essentially a deadly pulmonary embolism (PE).

The Patricks filed a health care liability suit in 2010, alleging that Dr. Conner, Dr. Boyne, Dr. Hickerson, and Dr. Fidone were negligent in their treatment of Patrick.[4] Specifically, they

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[1] Patrick's medical history indicated that he suffered from rheumatoid arthritis, idiopathic thrombocytopenia purpura leading to a splenectomy, renal lithasis, and obesity.

[2] Dr. Boyne was a defendant in the lawsuit, but he did not object to the expert report, and is not a party to this interlocutory appeal.

[3] Appellants contend that on January 21, Patrick was placed on compressive devices, which is a prophylactic measure to prevent DVT/PE. They contend that this is readily ascertainable from a reading of the medical records, and that the Patricks' expert, Dr. Varon, failed to acknowledge this when he made his report.

[4] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (West Supp. 2011).

alleged that Appellants should have realized that Patrick would be on "bed rest" for more than twenty-four hours, and that the standard of care required prophylactic measures to prevent the formation of DVT. They alleged further that failure to implement these measures can lead to a deadly PE, as occurred with Patrick.

The Patricks attempted to comply with the expert report requirements in health care liability suits by filing an expert report from Joseph Varon, M.D.[5] Appellants filed a motion to dismiss due to the insufficiency of the report, and the trial court granted the motion. The Patricks filed a motion to reconsider and requested a thirty day extension to file an amended report, which was also granted by the trial court. Appellants filed another motion to dismiss the Patricks' claims, primarily challenging Dr. Varon's opinions on causation. The trial court denied Appellants' motion to dismiss, and this interlocutory appeal followed.[6]

SUFFICIENCY OF EXPERT REPORT ON CAUSATION

In their sole issue, Appellants argue that the trial court abused its discretion when it denied their motion to dismiss the Patricks' health care liability claim against them because of the Patricks' failure to provide an adequate report on causation.

Standard of Review

We review a trial court's Section 74.351 ruling for an abuse of discretion. ***Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios***, 46 S.W.3d 873, 877 (Tex. 2001). A trial court abuses its discretion if it acts in an unreasonable or arbitrary manner, without reference to any guiding rules or principles. ***Walker v. Gutierrez***, 111 S.W.3d 56, 62 (Tex. 2003). A trial court acts arbitrarily and unreasonably if it could have reached only one decision, but instead reached a different one. *See* ***Teixeira v. Hall***, 107 S.W.3d 805, 807 (Tex. App.—Texarkana 2003, no pet.). To that end, a trial court abuses its discretion when it fails to analyze or apply the law correctly. ***In re Sw. Bell Tel. Co.***, 226 S.W.3d 400, 403 (Tex. 2007) (citing ***In re Kuntz***, 124 S.W.3d 179, 181 (Tex. 2003)).

Applicable Law

An "expert report" is a written report that provides a fair summary of the expert's opinions regarding applicable standards of care, the manner in which the defendant failed to meet those standards, and the causal relationship between the defendant's failure and the plaintiff's injury,

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[5] *See generally* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2011).

[6] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West Supp. 2011) (allowing interlocutory appeal from denial of a motion to dismiss under Section 74.351(b)).

harm, or damages claimed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6) (West 2011). In setting out the expert's opinions on each of the required elements, the report must provide enough information to fulfill two purposes if it is to constitute a good faith effort. ***Palacios***, 46 S.W.3d at 879. An objective good faith effort to comply with the statute is made if the report (1) informs the defendant of the specific conduct that the plaintiff has called into question and (2) allows the trial court to conclude that the claim has merit. ***Id.*** at 879. A report that merely states the expert's conclusions about the standard of care, breach, and causation does not provide the necessary information to fulfill the dual purposes. ***Id***. Rather, the expert must explain the basis of his statements to link his conclusions to the facts. ***Bowie Mem'l Hosp. v. Wright***, 79 S.W.3d 48, 52 (Tex. 2002). In our review of an expert report, we are limited to the report's contents, contained within the four corners of the report, in determining whether the report manifests a good faith effort to comply with the statutory definition of an expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(*l*); ***Palacios***, 46 S.W.3d at 878.

A causal relationship is established by proof that the negligent act or omission was a substantial factor in bringing about the harm and that absent this act or omission, the harm would not have occurred. ***Costello v. Christus Santa Rosa Health Care Corp.***, 141 S.W.3d 245, 249 (Tex. App.—San Antonio 2004, no pet.). Merely providing some insight into the plaintiff's claims does not adequately address causation. ***Wright***, 79 S.W.3d at 53. Accordingly, causation cannot be inferred; it must be clearly stated. ***Castillo v. August***, 248 S.W.3d 874, 883 (Tex. App.—El Paso 2008, no pet.). Indeed, we may not fill in gaps in a report by drawing inferences or guessing what the expert meant or intended. ***Austin Heart, P.A. v. Webb***, 228 S.W.3d 276, 279 (Tex. App.—Austin 2007, no pet.).

"[W]hen a plaintiff sues more than one defendant, the expert report must set forth the standard of care applicable to each defendant and explain the causal relationship between each defendant's individual acts and the injury." ***Tenet Hospitals Ltd. v. De La Riva***, 351 S.W.3d 398, 404 (Tex. App.—El Paso 2011, no pet.) (citing ***Doades v. Syed***, 94 S.W.3d 664, 671–72 (Tex. App.-San Antonio 2002, no pet.); ***Rittmer v. Garza***, 65 S.W.3d 718, 722–23 (Tex. App.–Houston [14th Dist.] 2001, no pet.)); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (r)(6) (claimant must provide each defendant with expert report that sets forth manner in which care rendered failed to meet standards of care and causal relationship between that failure and injuries claimed). An expert report may not assert that multiple defendants are all negligent for failing to meet the standard of care without providing an explanation of how each defendant breached the standard of

care and how that breach caused or contributed to the cause of injury. ***Taylor v. Christus Spohn Health Sys. Corp.***, 169 S.W.3d 241, 244 (Tex. App.—Corpus Christi 2004, no pet.). "Collective assertions of negligence against various defendants are inadequate." ***Id.***

However, a plaintiff need not present evidence in the report as if it were actually litigating the merits. ***Palacios***, 46 S.W.3d at 879. The report can be informal, meaning that it does not have to meet the same requirements as the evidence offered in a summary judgment proceeding or at trial. ***Id.***

Discussion

As part of their sole issue, Appellants implicitly assert in their brief, and contended with more clarity at oral argument, that Dr. Varon's report was ambiguous as to the specific treatment that would have saved Patrick's life. They also argue that Dr. Varon's report does not satisfy the statutory requirements for expressing an opinion on causation.

1. Treatment that would have saved Patrick's life

We start with the conclusion that Dr. Varon's report does not clearly state exactly what treatment was required to save Patrick's life. Dr. Varon states in the standard of care section of his report that "[t]he measures that can be used to prevent DVT and ultimately PE include: pharmacological agents (unfractionated heparin, low molecular weight heparin, fondaparinux) *and/or* mechanical methods (intermittent pneumatic compression)." (Emphasis added).

Most of the causation section of the report focuses on pharmacological anticoagulant therapy. For example, Dr. Varon states in that section that "[f]ailure to consider DVT/PE in a patient such as Mr. Patrick led to [Appellants'] not prescribing anticoagulant medication." He states further that "had the standard of care been met, anticoagulant therapy would, more likely than not, have prevented the formation of blood clots that created the emboli that led to his death[.]" And Dr. Varon also expresses his opinion that "[i]t is the absence of the use of anticoagulant medication that leads to the formation of these blood clots that become fatal pulmonary emboli."

However, in another part of the causation section, Dr. Varon seems to suggest that both compression devices and anticoagulant medications should have been used, and that both were necessary to prevent Patrick's DVT/PE that led to his death. Specifically, he stated that "[h]ad [Appellants] timely ordered compression devices for Mr. Patrick, along with anticoagulation medication, the DVT that ultimately became the emboli that traveled to his lungs would not have

developed."[7] Indeed, at oral argument, the Patricks' counsel contended that the proper interpretation of Dr. Varon's report was that both treatments were required together in order to have saved Patrick's life, and not necessarily that either method alone would have prevented Patrick's death. Keeping this ambiguity in mind, we turn to whether Dr. Varon's report satisfies the statutory requirement for expressing an opinion on causation.

2. Causation

Dr. Varon stated in the standard of care section that health care providers such as Appellants should use measures "to prevent DVT/PE when [the patient] is expected to remain in bed rest for more than 24 hours." According to Dr. Varon, this is "particularly true for patient[s] with additional risk factors for DVT such as obesity." He also identifies pharmacological agents such as anticoagulant drugs and mechanical methods such as intermittent pneumatic compression as the measures that should be used to prevent DVT/PE. Finally, he states that a temporary vena cava filter could be used if the patient has a high risk of developing DVT/PE, and the clinician is concerned about the use of anticoagulant medications in a particular patient.

In the deviation from the standard of care portion of the report, Dr. Varon states that Appellants "failed to initiate measures to prevent DVT/PE on admission to the hospital," and "failed to provide DVT/PE prophylaxis until 14 days after admission to the hospital." He also states that Appellants "had the opportunity to provide DVT/PE prophylaxis to Mr. Patrick," and that if they were concerned about the use of anticoagulants at the time Mr. Patrick had "respiratory failure and a 'negative' CT scan of the chest, then the insertion of a temporary inferior vena cava filter was indicated."

The causation section of Dr. Varon's report reads as follows:[8]

> It is my opinion that the deviations from the standard of care of Dr. William Conner, Dr. Robert Boyne, Dr. Steven Hickerson and Dr. Jeff Fidone were a direct and foreseeable cause of Mr. Patrick's ultimate demise.
>
> Failure to consider DVT/PE in a patient such as Mr. Patrick led to Drs. Conner, Boyne, Hickerson, and Fidone not prescribing anticoagulant medication. By their very nature, anticoagulant medications have been proven time and time again to be effective in preventing the formation of blood clots in the deep veins[ ] that can break loose and become pulmonary emboli.

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[7] Dr. Fidone suggests that this statement is a recognition by Dr. Varon that compression devices were actually provided. Although that is a possibility, we conclude from reviewing the entire report that it is not entirely clear what Dr. Varon meant.

[8] Since the primary issue on appeal is the adequacy of Dr. Varon's opinion on causation, we quote the entire causation section.

> In Mr. Patrick's case had the standard of care been met, anticoagulant therapy would, more likely than not, have prevented the formation of blood clots that created the emboli that led to his death. It is the absence of the use of anticoagulant medication that leads to the formation of these blood clots that become fatal pulmonary emboli. Anticoagulant medications interrupt the clotting cascade and allow blood to flow without the formation of clots. The formation of clots is dangerous because the clots can, as they did in Mr. Patrick, accumulate to a size that if they enter the vascular system of the lung they can cause failure [sic] pulmonary embolus by total occlusion of the vessel with a blood clot.
>
> Had the above listed physicians timely ordered compression devices for Mr. Patrick, along with anticoagulation medication, the DVT that ultimately became the emboli that traveled to his lungs would not have developed. The compression devices are designed [to] "exercise" the legs to prevent the blood from clotting while the patient is bedbound.
>
> The use of a temporary inferior vena cava filter, if ordered, would have prevented Mr. Patrick's DVTs from reaching his pulmonary vessels. The filter traps the emboli that break free from the lower extremity and catches the clot(s) before it can create blockage in the pulmonary vessels. Use of a filter in Mr. Patrick would have prevented the clots from reaching the lungs (pulmonary emboli) that ultimately caused his death.
>
> In conclusion, based upon a reasonable medical probability, the care of Mr. Patrick by Dr. William Conner, Dr. Robert Boyne, Dr. Steven Hickerson and Dr. Jeff Fidone were a direct and foreseeable cause of Mr. Patrick's ultimate demise.

It is clear that, based on Dr. Varon's assessment in his report, Appellants should have started some form of DVT/PE prophylactic therapy when they knew or should have known that Patrick would be on bed rest for at least twenty-four hours. But it does not necessarily follow that Patrick would die if the treatment was administered at a later time, or that the failure of each appellant to administer prophylactic therapy when he began treating Patrick was a substantial factor in Patrick's death. In other words, the "DVT/PE prophylaxis upon twenty-four hours of bed rest rule" is the standard of care. But the crucial component of the causation analysis in this multiprovider case is when the failure to comply with that rule became critical.

Dr. Varon states in his report that if any of the appellants had provided the care that was required, Patrick would have survived. Yet, we know from the four corners of the report that anticoagulant therapy was actually provided on January 24, but Patrick still died.[9] Thus, the report is not sufficiently specific as to what point in time the treatments would have saved Patrick's life. Moreover, as we have stated, causation must be set out separately as to each health care provider. However, Dr. Varon fails to demonstrate how the negligence of any specific appellant(s) caused Patrick's death. Consequently, we cannot determine whether the alleged negligence of any appellant was a substantial factor in Patrick's death, especially since Dr. Varon's report is not entirely clear about what course of treatment would have been necessary to prevent his death.

[9] Appellants also contend that compressive devices were ordered on January 21, 2008, a fact not mentioned by Dr. Varon in his analysis.

3. Conclusion[10]

Although we recognize that the Patricks are not required to marshal all of their proof as if they were actually litigating their claim, we can only speculate as to what Dr. Varon meant or intended in his report. The report says that all three physicians should have provided DVT/PE prophylactic measures when it became apparent that the patient would be on bed rest for twenty-four hours or more. However, the report does not clearly specify what treatment would have been the appropriate method, does not specify when the treatment would have saved Patrick's life, and does not link the harm to any specific physician. Therefore, the trial court abused its discretion when it overruled Appellants' motion to dismiss.

The trial court or a court of appeals may grant a thirty day extension in which to amend a timely filed but deficient report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c); ***Leland v. Brandal***, 257 S.W.3d 204, 207-08 (Tex. 2008). However, the statute allows only a single extension. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c). Once an extension has been granted by the trial court, the court of appeals is without authority to grant another extension. *See* ***id.*** Because the trial court previously granted the Patricks an extension to amend their report, we must dismiss. Accordingly, Appellants' sole issue is sustained.

DISPOSITION

We ***reverse*** the order of the trial court, ***render*** judgment that the Patricks' claims against Dr. Conner, Dr. Hickerson, and Dr. Fidone be ***dismissed with prejudice***, and ***remand*** the cause for a determination of the amount of attorney's fees to be awarded to Appellants, and for further proceedings pertaining to the remaining defendant, Robert Boyne, M.D.[11]

BRIAN HOYLE
Justice

Opinion delivered April 4, 2012.

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[10] As part of their sole issue, Appellants argue that Dr. Varon's report ignores Patrick's medical records, which state that he received compression devices beginning on January 21. *See* ***Mettauer v. Noble***, 326 S.W.3d 685, 691-92 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (tracking development of this area in the case law). However, we need not address this argument, because the report is deficient on its face, even assuming, as the Patricks contend, that we review only the facts as alleged in the report itself. *See* TEX. R. APP. P. 47.1.

[11] *See* TEX. CIV. PRAC. & REM. CODE ANN. 74.351(b).

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

(PUBLISH)

COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT OF TEXAS
JUDGMENT

APRIL 4, 2012

NO. 12-10-00405-CV

WILLIAM CONNER, M.D., JEFF W. FIDONE, M.D.,
AND STEVEN HICKERSON, M.D.,
Appellants
V.
ELLEN LYNNE PATRICK, INDIVIDUALY AND ON BEHALF
OF THE ESTATE OF DENNIE JAMES PATRICK, DECEASED,
KRISTY L. PARKER AND JOSEPH P. PATRICK,
Appellees

Appeal from the 7th Judicial District Court
of Smith County, Texas. (Tr.Ct.No. 10-0844-A)

THIS CAUSE came on to be heard on oral arguments, the appellate record, and the briefs filed herein, and the same being considered, it is the opinion of this Court that there was error in the trial court's order overruling the motions to dismiss with prejudice filed by Appellants William Conner, M.D., Jeff W. Fidone, M.D., and Steven Hickerson, M.D., and that the same should be reversed.

It is therefore ORDERED, ADJUDGED and DECREED by this Court that the trial court's order is **reversed**, judgment is **rendered** that the claims of Appellees Ellen Lynne

Patrick, individually and on behalf of the estate of Dennis James Patrick, deceased; Kristy L. Parker; and Joseph P. Patrick against Appellants William Conner, M.D., Jeff W. Fidone, M.D., and Steven Hickerson, M.D., are **dismissed with prejudice**, and the cause is **remanded** for a determination of the amount of attorney's fees to be awarded to Appellants William Conner, M.D., Jeff W. Fidone, M.D., and Steven Hickerson, M.D., and **for further proceedings** pertaining to the remaining defendant, Robert Boyne, M.D.

Brian Hoyle, Justice.

Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.