

No. 10-13-00248-CV

IN THE COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

NAVARRO HOSPITAL, L.P. D/B/A NAVARRO REGIONAL HOSPITAL,
Appellant

vs.

CHARLES WASHINGTON AND GWENDOLYN WASHINGTON,
EACH INDIVIDUALLY AND AS NEXT FRIENDS OF CHARLES
DONELL WASHINGTON,
Appellees

Appeal of Cause No. D12-21439 CV,
In the 13th Judicial District Court,
Navarro County, Texas, Honorable James E. Lagomarsino

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ORAL ARGUMENT REQUESTED

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Appellees

Appeal of Cause No. D12-21439 CV,
In the 13th Judicial District Court,
Navarro County, Texas, Honorable James E. Lagomarsino

TO THE HONORABLE JUSTICES OF THE SECOND COURT OF TEXAS:

Appellants, Navarro Hospital, L.P. d/b/a Navarro Regional Hospital and the incorrectly named and/or improperly joined defendants CHS/Community Health Systems, Inc. individually and d/b/a Navarro Regional Hospital, Triad-Navarro Regional Hospital Subsidiary LLC, Navarro Regional LLC and Quorum Health Resources, LLC (hereinafter referred to as "Appellants"), submit this Appellate Brief and requests this Court reverse the Trial Court's denial of their Motion to Dismiss filed pursuant to Texas Civil Practice & Remedies Code §74.351 and render dismissal with prejudice of Appellees' claims and for such further relief as requested herein and that which Appellants may be entitled to at law or in equity.

CITATIONS TO THE RECORD

Citations to the Clerk's Record are to "CR__".

Citations to the Reporter's Record for the January 18, 2013 hearing on Defendants' Motion to Dismiss are to "RR__".

STATEMENT OF JURISDICTION

This is an interlocutory appeal of the denial of a Motion to Dismiss filed pursuant to Texas Civil Practice & Remedies Code §74.351(b) in a healthcare liability lawsuit pending in the 13th District Court of Navarro County, Texas. This Court has jurisdiction over Appellant's interlocutory appeal. Tex. Civ. Prac. & Rem. Code §51.014(a)(9); *Lewis v. Funderburk*, 235 S.W.3d 204 (Tex. 2008).

STATEMENT REGARDING ORAL ARGUMENT

This case involves interpretation of the expert report requirements in section 74.351 of the Texas Civil Practice and Remedies Code. Many courts of appeals have confronted questions of sufficiency of expert reports and the factors that must be analyzed to determine whether reports are deficient. Oral argument will assist the Court in sorting through the various cases interpreting Chapter 74 and how Appellees' reports in this case should be analyzed.

STATEMENT OF THE CASE

Nature of the Case. On July 13, 2012, Appellees sued Appellants for medical malpractice related to the care of Charles Donell Washington at Navarro Regional Hospital in July 2010. (CR 4).

Course of Proceedings. On August 15, 2012, Appellees filed an expert report (and accompanying curriculum vitae) by Edward Panacek, M.D. (CR 43). On September 6, 2012 Appellants timely filed objections to the sufficiency of Dr. Panacek's report. (CR 31). On November 8, 2012, Appellees filed the supplemental expert report of Arthur S. Shorr, MBA, FACHE (and accompanying curriculum vitae). (CR 102). On November 29, 2012, Appellants timely filed objections to the sufficiency of Arthur Shorr's report. (CR 120).

Trial Court's Disposition of the case. On June 20, 2013, the trial court overruled Appellants' Objections to the Appellees' Expert Reports (Appendix Tab A) and denied their Motion to Dismiss (Appendix Tab B). Appellants timely perfected this accelerated appeal challenging the trial court's denial of the Motions to Dismiss, pursuant to Texas Civil Practices and Remedies Code § 51.014(a)(9). (CR 573).

ISSUES PRESENTED

ISSUE ONE: The Trial Court erred and abused its discretion in denying Appellants' Motion to Dismiss because Appellees' expert reports fail to establish the standard of care and alleged departures of the standard of care as to Appellants, thus requiring dismissal of Appellees' claims against Appellants

ISSUE TWO: Alternatively, The Trial Court Abused its Discretion by Denying Appellants' Motion to Dismiss, in Concluding the Reports of Appellees' Expert Witnesses Were Collectively Sufficient to Satisfy the Causal Relationship Requirement of Texas Civil Practice & Remedies Code §74.351(r)(6)

STATEMENT OF FACTS

The underlying lawsuit arises out of medical care provided to Charles Donell Washington by Navarro Hospital, L.P. d/b/a Navarro Regional Hospital and the

incorrectly named and/or improperly joined defendants CHS/Community Health Systems, Inc. individually and d/b/a Navarro Regional Hospital, Triad-Navarro Regional Hospital Subsidiary LLC, Navarro Regional LLC and Quorum Health Resources, LLC (“Appellants”). (CR 1-12).

Appellees filed suit for medical negligence against Appellants on July 13, 2012. (CR 4). Appellants were served with the Petition on July 18, 2012. The Appellees brought negligence and gross negligence claims against Appellants “directly, and by and through their employees or agents” as well as Douglas B. Hibbs, M.D. and James Goodman, M.D. (CR 8). The case is currently pending in the 13th Judicial District Court, Navarro County, Texas, Cause Number D12-21439CV, before the Hon. James E. Lagomarsino.

On August 15, 2012, Appellees filed an expert report (and accompanying curriculum vitae) by Edward Panacek, M.D. (CR 43). On September 6, 2012 Appellants timely filed objections to the sufficiency of Dr. Panacek’s report. (CR 31). On November 8, 2012, Appellees filed the supplemental expert report of Arthur S. Shorr, MBA, FACHE (and accompanying curriculum vitae). (CR 102). On November 29, 2012, Appellants timely filed objections to the sufficiency of Arthur Shorr’s report. (CR 120). The trial court considered Appellants’ Chapter 74 Objections to Appellees’ expert reports and Appellants’ Motion to Dismiss on January 18, 2013. On June 20, 2013, the trial court overruled Appellants’ Objections to the Appellees’ Expert Reports (Appendix Tab A) and denied their Motion to Dismiss. (Appendix Tab B). Appellants timely perfected this accelerated appeal challenging the trial court’s denial of the Motions to

Dismiss, pursuant to Texas Civil Practices and Remedies Code § 51.014(a)(9). (CR 281-87).

SUMMARY OF THE ARGUMENT

The Trial Court erred and abused its discretion in denying Appellants' Motion to Dismiss because Appellees' expert reports fail to establish the standard of care, alleged departures from the standard of care, and causal relationship as to Appellants, thus requiring dismissal of Appellees' claims against Appellants. Additionally, the expert reports of Dr. Panacek and Mr. Shorr do not establish their qualifications to offer opinions regarding the standard of care for Appellants regarding hospital administration, staffing, development of policies or protocols and/or education/training. Dr. Panacek and Mr. Shorr's purported standard of care and breach opinions as to Appellants are generic, boilerplate, and are based entirely on assumptions, speculation and conjecture, and thus are insufficient and do not meet the requirements of an expert report pursuant to Texas Civil Practice & Remedies Code §74.351(r)(6).

Alternatively, the Trial Court abused its discretion by denying Appellants' Motion to Dismiss in concluding the reports of Appellees' expert witnesses were collectively sufficient to satisfy the causal relationship requirement of Texas Civil Practice & Remedies Code §74.351(r)(6). The report of Mr. Shorr does not address the required element of causal relationship at all. Moreover, both Mr. Shorr and Dr. Panacek are unqualified to opine as to causal relationship in this case. Additionally, Dr. Panacek's opinions regarding causal relationship are merely conclusory, failing to link his

conclusions to the facts of the case and are therefore incapable of demonstrating to the Trial Court that Appellees' claims against Appellants have merit.

Accordingly, Appellants respectfully request the Trial Court's denial of their Motion to Dismiss be reversed and the Court render dismissal with prejudice as to Appellees claims against Appellants. Appellants would show they are also entitled to reasonable and necessary attorneys fees and costs as mandated by Texas Civil Practice & Remedies Code §74.351(b).

ARGUMENTS AND AUTHORITIES

ISSUE ONE: The Trial Court erred and abused its discretion in denying Appellants' Motion to Dismiss because Appellees' expert reports fail to establish the standard of care and alleged departures of the standard of care as to Appellants, thus requiring dismissal of Appellees' claims against Appellants

The definition of an "expert report" under § 74.351(r)(6) requires, as to *each defendant*, a fair summary of the expert's opinions about the applicable standard of care, the manner in which the care failed to meet that standard, and the causal relationship between that failure and the claimed injury. *Am. Transitional Care Centers of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001)(emphasis added). Here, Appellees' expert reports address only a theory of liability as to the defendant physicians but fail to support either a vicarious or direct liability claim against the Appellants.

Appellees' expert reports do not constitute a good-faith effort to inform the Court and Appellants of the applicable standard of care and alleged violations of the standard of care and causal relationship specifically as to Appellants. Thus, the Trial Court abused its discretion in refusing to dismiss Appellees' claims against Appellants. The Texas Supreme Court has stated that "*[i]dentifying the standard of care is critical*: 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.**" *Palacios* 46 S.W.3d at 880. (emphasis added). "It is not sufficient for an expert to simply state that he or she knows the standard of care and concludes it was [or was not] met." *Id* .(quoting *Chopra v. Hawryluk*, 892 S.W.2d 229, 233 (Tex. App.—El Paso 1995, writ denied).

Both of Appellees' expert reports have utterly failed to properly address the standard of care applicable to Appellants, alleged violations of the standard of care by Appellants separately and apart from any other Defendant, and the causal relationship between the alleged violations of the standard of care committed and/or omitted by Appellants and the injuries or harm being complained of. Moreover, the expert reports fail to establish the experts' qualifications and experience which they claim allows them to address these issues.

A. Dr. Panacek's report fails to adequately set forth the applicable standard of care; Nor is he qualified to do so.

Dr. Panacek's report does not constitute a good-faith effort to inform the Court and Appellants of the applicable standard of care being alleged. Dr. Panacek's recitation of the standard of care applicable to Appellants consists of three sentences of meaningless, boilerplate and generic language and thus has utterly failed to identify specifically what the standard of care is, or that he is familiar with the specific standard of care or that he is qualified to offer opinions regarding the specific standard of care for the Appellants in this case. Dr. Panacek opines that the standard of care requires that the hospital have "specialized intubation equipment immediately available" and that the hospital "have and/or enforce adequate protocols, or policies and procedures to assure that medical personnel and staff are aware of and trained to utilize this specialized intubation equipment." (CR 48). "While a 'fair summary' is something less than a full statement of the applicable standard of care and how it was breached, even a fair summary must set out what care was expected, but not given." *Palacios* 46 S.W.3d at 880. The use of such

generic terms without specification or further explanation renders them meaningless, and Dr. Panacek fails to make any specific connection to these generic “standards” and the facts or his opinions in this particular case. These non-descript statements do not specifically inform Appellants of the standard of care, nor are they helpful to the Court in determining if Appellees’ claims have merit.

B. Dr. Panacek’s opinions regarding Appellants’ alleged failure to meet the standard of care are inadequate and based entirely on speculation/conjecture.

Dr. Panacek provides no basis for his opinion that Appellants breached the standard of care other than his mere assumption based on his review of the medical records, diagnostic studies, laboratory results and documents contained within the Navarro Regional Hospital chart. (CR 45). He opines that the hospital failed to have specialized intubation equipment immediately available for use, however he gives no reasonable basis for this assumption. (CR49). Therefore, he admits he has not reviewed other documents nor does he have knowledge of any facts to support his claim. Thus, his report is entirely incapable of demonstrating to this Court that Appellees’ claims against Appellants have merit. Moreover, he claims Appellants *either* failed to have or failed to enforce protocols, policies and procedures to assure that medical personnel and staff were aware of and trained to utilize specialized intubation equipment—proving he has no idea if Appellants in fact *had* the policies, procedures or protocols in place. (CR 49). He gives no basis for his opinion that Appellants either failed to have or failed to enforce these protocols, policies and procedures. He makes no mention of reviewing any hospital

policies, procedures, protocols or equipment checklists which would show the absence of the specific items he mentions.

Additionally, his assumption that Appellants breached the standard of care is based entirely on the defendant *doctors'* alleged acts or omissions in this case. Dr. Panacek failed to review any documents pertaining to policies, procedures, protocols or equipment available in the ICU or ER units, but yet assumes, given the doctors' alleged struggles to intubate Mr. Washington, that such polices and equipment must not have been in place. He fails to cite anywhere in the medical records or chart that indicate such equipment or policies were not present. His opinions in this regard are thus based on nothing more than his advocate assumptions and are not derived from his review of any actual documents supporting same.

Furthermore, Dr. Panacek's report states that Appellants allegedly breached the standard of care, but he does not delineate specifically how each individually acted negligently. 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 specifically breached the standard and how that breach caused or contributed to the cause or injury. *Taylor v. Christus Spohn Health Sys.*, 169 S.W.3d 241, 244 (Tex.App.—Corpus Christi 2004, no pet.).

Finally, the Trial Court did not limit its inquiry to the four corners of Dr. Panacek's report. *See Palacios*, 46 S.W.3d at 878. As stated by the Supreme Court, the "only information relevant to the inquiry is within the four corners" of the report. *Id.* In response to Appellants' motion and objections, Appellees filed their Response and

Motion for Extension of Time. (CR 164). In their response, Appellees inserted diagrams and descriptions of medical devices in support of their claims of the sufficiency of their expert's report. (CR 166-168). At the hearing on Appellant's motion, Appellees offered argument referencing the same. (RR 16:212). Appellees improperly injected matters outside the four-corners of the expert report.

C. Mr. Shorr's report fails to specify the applicable standard of care and alleged breaches of the standard of care.

Additionally, Mr. Shorr's statements regarding the alleged applicable standards of care and the alleged breaches of same are vague, conclusory, based entirely on assumption and thus wholly insufficient to inform the court and Appellants of the manner in which the care rendered by Appellants failed to meet the standard of care.

Mr. Shorr identifies a laundry list of items from various sources which Mr. Shorr claims are standards of care applicable to the Appellants. The "standards" identified are boilerplate, generic language that fail to identify specifically what the standard of care is. Mr. Shorr states broadly that Appellants owed a duty "to ensure the availability of supplies and equipment needed to intubate and resuscitate," "to ensure that Navarro Regional Hospital's nursing and physician staff members were able to recognize and respond to changes in Mr. Washington's condition in a timely manner," and "to ensure that its contracted physicians were competent to perform an intubation in a timely manner." (CR 49). The use of such generic terms without specification or further explanation renders them meaningless, and Mr. Shorr fails to make any specific connection to these generic "standards" and the facts or his opinions in this particular

case. These non-descript statements do not specifically inform Appellants of the standard of care, nor are they helpful to the Court in determining if Appellees' claims have merit.

Mr. Shorr's report offers no basis for his opinion that Appellants breached any of the aforementioned standards of care other than his mere assumption based on his review of the "*circumstances* regarding the hospitalization of Charles "Donnell" Washington," Plaintiff's Petition, Hospital's response to Request for Production, Hospital's Answer's to Interrogatories, Dr. James Goodman's Answers to Interrogatories, and the report of Appellees' expert Dr. Edward Panacek. (CR 45) He opines that the hospital failed to meet the standards of care; however, he gives no reasonable basis for these assumptions. (CR 45). As such, Mr. Shorr *de facto* admits he has not reviewed other documents nor has knowledge of any facts to support his claim. Based on his report, Mr. Shorr did not review any documents which would indicate that supplies and equipment needed to intubate and resuscitate were *not* available to the doctors/staff at issue and/or that said doctors were not competent to perform an intubation in a timely manner. Mr. Shorr offers this opinion despite not being qualified to assess or opine on the defendant physicians' competency. He does not identify any specific piece of equipment which he claims was absent and needed. He makes no mention of reviewing any hospital policies, procedures, protocols, medical records, or equipment checklists which would show the absence intubation equipment. Nowhere does he opine as to the specific protocols or training of health care providers he claims should have been provided. Nowhere does he set forth specific training or supervision that he claims should have been provided, but was not. Moreover, Mr. Shorr offers nothing in support of his conclusory statement that

the hospital nursing and physician staff members failed to recognize and respond to changes in Mr. Washington's condition in a timely manner. His opinions in this regard are thus based on nothing more than his vague, unqualified advocate assumptions and are not derived from his review of any actual documents supporting same.

Furthermore, Mr. Shorr's assumption that Appellants breached the standard of care is based entirely on Dr. Edward Panacek's unsupported assertions about the doctor defendants' alleged acts or omissions in this case. Mr. Shorr failed to review any documents pertaining to policies, procedures, protocols or equipment available in the ICU or ER units, but yet assumes, given the doctors' alleged struggles to intubate Mr. Washington, that such policies and equipment must not have been in place. He fails to cite any documents that indicate such equipment was not present. Mr. Shorr failed to review the medical records, but yet still assumes that Appellants' nursing and physician staff members were not able to recognize and respond to changes in Mr. Washington's condition and that contracted physicians were not competent to perform intubations in a timely manner. His opinions in this regard (in addition to departing from "administrative standards") are based on his unqualified personal assumptions, are conclusory and nothing more than unsubstantiated advocacy and therefore fail the *Palacios* test. Therefore the Trial Court erred in determining that Mr. Shorr's report adequately states the manner in which Appellants allegedly breached the applicable standard of care.

Dismissal is required when a court would be required to infer what the standard of care is from the general statements of an expert witness. *Norris v. Tenet Houston Health System*, 2006 WL 1459958 at p. 7 (Tex. App. –Houston [14th Dist.] 2006, no pet.) (mem.

op.); *Russ*, 128 S.W.3d at 343 (dismissal of nurses proper when report set forth omissions of, but not standards of care for, the nurses). The Trial Court was and this Court would be required to infer what the specific standard of care is for Appellants from the general reports of Dr. Panacek and Mr. Shorr.

D. Dr. Panacek and Mr. Shorr are unqualified to opine regarding the standard of care applicable to Appellants or their alleged breach thereof.

Dr. Panacek opines regarding equipment which the hospital should make available in ICU and ER units as well as “protocols, policies and procedures to assure that medical personnel and staff are aware of and trained to utilize” said equipment. (CR 49) But Dr. Panacek fails to indicate his qualifications to even opine as the standards of care applicable to Appellants. He fails to indicate how his qualifications, experience, skill or education as a physician qualify him to testify regarding hospital administration, staffing, development of policies or protocols and/or education/training.

Additionally, Mr. Shorr is unqualified to opine on the standard of care that a hospital provides for patients in need of airway management and/or intubation or to discuss breaches in that standard of care in emergent, difficult airway scenarios like the one in Mr. Washington’s case. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.351(r)(5), 74.402(b), 74.403. There is nothing in Mr. Shorr’s report to indicate he has knowledge of accepted standards of care for health care providers in the “diagnosis, care or treatment” for airway management or intubation of a patient such as Mr. Washington, i.e. the *diagnosis, care, or treatment of the illness, injury, or condition* involved in this claim. There is nothing in Mr. Shorr’s report to show that he is qualified on the basis of training

or experience to render an opinion on the medically necessary supplies and equipment that he alleges are needed/required for proper, timely airway management or more specifically because of the allegations in this case, intubation of patients such as Mr. Washington; whether nursing and physician staff members are able to recognize and respond to specific changes in patient condition in a timely manner; or to evaluate the competency of physicians or nursing staff who participated in caring for Mr. Washington. (CR 102). Mr. Shorr's report does not indicate he has any experience supervising health care providers, supervising care givers, or any basis to opine as to training and/or competency of health care providers. Mr. Shorr's opinions go beyond mere hospital administration and offer criticism of medical care under the guise that it is "administrative standards." Opinions on "diagnosis, care or treatment of the condition at issue," which is a black letter requirement of Texas Civil Practice & Remedies Code §74.402, are clearly beyond his alleged area of expertise as outlined in his report. This renders him unqualified to serve as an "expert witness in a suit against a health care provider" and thus further renders his report insufficient to meet the requirements of Texas Civil Practice & Remedies Code §74.351 as a matter of law. His opinions on these issues are simple advocacy, and barred as unqualified, unsubstantiated assumptions.

Given the above, the Trial Court abused its discretion by not dismissing Appellees' claims against Appellants. Accordingly, Appellants respectfully request the Court reverse the decision of the Trial Court denying its Motion to Dismiss, render dismissal with prejudice of Appellees' claims against Appellants, and remand only for the limited purpose of consideration of the pro rata amount of reasonable attorneys' fees

and costs to be awarded against Appellees as required by Texas Civil Practice & Remedies Code §74.351(b)(1).

ISSUE TWO: The Trial Court Abused its Discretion by Denying Appellants' Motion to Dismiss in Concluding the Reports of Appellees' Expert Witnesses Were Collectively Sufficient to Satisfy the Causal Relationship Requirement of Texas Civil Practice & Remedies Code §74.351(r)(6).

Appellees, through their expert witnesses, failed to establish a causal relationship between any alleged breach of the standard of care by Appellants and the injuries and damages alleged in this case.

An "expert report" within the statute means:

[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.*

Tex. Civ. Prac. & Rem. Code §74.351(r) (Vernon 2010) (emphasis added).

Appellees' expert reports do not, individually or collectively, establish any causal relationship between any alleged violations of the standards of care by Appellants and the injuries and damages claimed in this case. At best, the reports offer only conclusory and global assertions about causal relationship without attributing them to any specific alleged breaches from the standards of care.

A. Dr. Panacek's report fails to meet the causation requirement of CPRC §74.351(r)(6) nor is he qualified to opine regarding same.

Dr. Panacek, while arguably incapable of meeting the causal relationship requirement because he is not licensed to practice medicine in Texas, lacks proper

qualifications to opine as to Appellants as he has indicated no experience, training or education regarding hospital administration, staffing or training.

Dr. Panacek's lack of qualification renders his report defective and insufficient with respect to the element of causal relationship. A physician is qualified to submit an expert report on causation when he would otherwise be qualified to address causation under TRE 702. *Collini v. Pustejovsky*, 280 S.W.3d 456, 465 (Tex.App.—Fort Worth 2009, pet. denied). According to TRE 702, an expert must have knowledge, skill, experience, training, or education regarding the specific issue before the court that would qualify the expert to give an opinion on that particular subject. Here, Dr. Panacek provides no indication he satisfies the Rule 702 requirements as to the Appellants' alleged deviation from the standard of care with regard to the standard equipment available in ICU and/or ER units or hospital policies, procedures or protocols.

Moreover, Dr. Panacek attempts, with the use of conclusory language on page 6 of his report, to opine that the "negligent acts" of Appellants "were each a proximate cause of Mr. Washington's profound brain damage and related sequelae." (CR 50). Dr. Panacek gives an explanation of how lack of oxygen can result in brain injury, but fails to indicate how the alleged "negligent acts" of Appellants caused Mr. Washington's alleged brain injury other than merely stating the Defendants were "negligent in their care and treatment of Donell Washington." (CR 50). Dr. Panacek's conclusory insights are insufficient as they fail to link his conclusions to the facts of the case as to Appellants. "It is not enough for a report to contain conclusory insights about the plaintiff's claims. Rather, the expert must explain the bases of the statements and link his or her conclusions

to the facts.” *Titus Hosp. Dist.*, 128 S.W.3d at 340. The use of such conclusory language without specification or further explanation renders them meaningless.

The Trial Court therefore abused its discretion in concluding that Dr. Panacek’s report, taken collectively with Mr. Shorr’s, satisfied the causal relationship element mandated by Texas Civil Practice & Remedies Code §74.351(r)(6), and in denying Appellants’ Motion to Dismiss.

B. Mr. Shorr’s report fails to address the causation requirement of CPRC §74.351(r)(6), nor is he qualified to opine regarding same.

Mr. Shorr’s report is insufficient as a matter of law because it **completely fails to address the causal relationship** between the alleged failures to meet the standards of care and the injury, harm, or damages claimed. Appellants object to the conclusory language regarding causation, *i.e.*, that all of Appellants’ alleged breaches of the standards of care caused a lack of oxygen for an extended period of time, which caused brain damage. (CR 110). As discussed below, Mr. Shorr is not a physician and thus cannot opine on the causal relationship under 74.351(r)(5). Assuming *arguendo*, that Mr. Shorr could offer such opinions, Mr. Shorr offers no explanation for how Appellants’ alleged breach of the standard of care “resulted in a lack of oxygen” to the patient or how this supposed lack of oxygenation was of a type or severity to cause “brain damage” in Donnell Washington. The report does not address how the unavailability of unspecified equipment caused this lack of oxygen or how the equipment that was available would have been insufficient to meet the standard of care. Similarly, the report does not address how any alleged inability to recognize and respond to changes in Mr. Washington’s

condition resulted in a lack of oxygen. Mr. Shorr's report is wholly deficient in providing a summary of the causal relationship between the failure to meet the standard of care and the injuries claimed.

Moreover, Mr. Shorr is patently unqualified to offer any opinion on the causal relationship between breaches in the standard of care and Donnell Washington's injuries, and is explicitly prevented from doing so under Texas state law.¹ Chapter 74 specifically requires that a person "giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim [be a] physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence." TEX. CIV. PRAC. & REM. CODE §§ 74.351(r)(5), 74.403. As such, Mr. Shorr, who is not a physician, can offer no statements attempting to attribute alleged breaches in the standard of care to injuries suffered by Donnell Washington.

Lastly, and based on the same reasoning as above, Mr. Shorr is unqualified to opine or make assumptions as to the physician defendants' competency, which seemingly comprise the sole, unsubstantiated basis of some or all of the opinions set forth in his report. *See* TEX. CIV. PRAC. & REM. CODE §§ 74.351(r)(5), 74.401. Chapter 74 specifies that only a physician can qualify as an expert on how a "physician departed from accepted standards of medical care." TEX. CIV. PRAC. & REM. CODE § 74.401. Mr. Shorr

¹ Appellants maintained that Mr. Shorr's report is inadequate as to causal relationship on basis of content, as well as his lack of qualifications.

opines that contracted physicians were not competent to perform an intubation in a timely manner. (CR 110).

The Trial Court abused its discretion to the extent it determined, based on his curriculum vitae and report, that Mr. Shorr is qualified to opine on causal relationship in this case, i.e. connect the alleged injury to any specifically alleged violation of the standard of care to any Appellant, either by temporal relationship or character. The Court should not consider any statements an expert, such as Dr. Panacek or Mr. Shorr, is not qualified to make. *Ehrlich v. Miles*, 144 S.W.3d. 620, 626 (Tex. App.—Fort Worth 2004, pet. denied)(after excluding opinions the expert was not qualified to make, all that was left was an opinion that the Defendant's negligence caused the patient's pain and suffering, which is not sufficient and dismissal was required).

The Trial Court therefore abused its discretion in concluding that Dr. Panacek's report, taken collectively with Mr. Shorr's, satisfied the causal relationship element mandated by Texas Civil Practice & Remedies Code §74.351(r)(6), and in denying Appellants' Motion to Dismiss. Accordingly, Appellants respectfully request the Court reverse the decision of the Trial Court denying their Motion to Dismiss, render dismissal with prejudice of Appellees' claims against Appellants in their entirety, and remand only for the limited purpose of consideration of the amount of reasonable attorneys' fees and costs to be awarded against Appellees as required by Texas Civil Practice & Remedies Code §74.351(b)(1).

CONCLUSION AND PRAYER

Appellees' expert reports failed to sufficiently identify the applicable standard of care, the alleged breach of the standard of care and causal relationship between the alleged breach and the resulting injuries as to Appellants. Thus, Appellees expert reports, even taken collectively, do not represent an objective good faith effort of an expert report required by Texas Civil Practice & Remedies Code §74.351. As such, the Trial Court abused its discretion in denying Appellants' Motion to Dismiss.

Alternatively, the Trial Court erred and abused its discretion by denying Appellants' Motion to Dismiss in concluding the reports of Appellees' expert witnesses were collectively sufficient to satisfy the causal relationship requirement of Texas Civil Practice & Remedies Code §74.351(r)(6). Neither Dr. Panacek no Mr. Shorr are qualified to opine as to causal relationship in this case. Additionally, Dr. Panacek's causal relationship opinions are merely conclusory without specific connection between the generic standards of care offered and the alleged breach and injuries or harm alleged, and therefore are incapable of demonstrating to the Trial Court that Appellees' claims have merit. The Trial Court therefore abused its discretion in concluding that Appellees' expert reports satisfied the causal relationship element mandated by Texas Civil Practice & Remedies Code §74.351(r)(6), and in denying Appellants' Motion to Dismiss.

Accordingly, Appellants respectfully pray that this Court reverse the decision of the Trial Court denying their Motion to Dismiss, render dismissal with prejudice of Appellees' claims against Appellants in their entirety, or as alternatively sought herein and remand only for the limited purpose of consideration of the amount of reasonable

attorneys' fees and costs to be awarded against Appellees as required by Texas Civil Practice & Remedies Code §74.351(b)(1). Finally, Appellant requests any other and further relief to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to TEX. R. CIV. P. 21a and TEX. R. APP. P. 25.1 (e), I hereby certify that a true and correct copy of the foregoing instrument has been served upon the following:

BY THE FOLLOWING:

 x Certified Mail/Return Receipt Requested (Court and All Counsel)

DATE: August 26, 2013.

Jeffrey F. Wood
Jeffrey F. Wood







C**Effective: September 1, 2005**

Vernon's Texas Statutes and Codes Annotated Currentness

Civil Practice and Remedies Code (Refs & Annos)

Title 4. Liability in Tort

▣ Chapter 74. Medical Liability (Refs & Annos)

▣ Subchapter H. Procedural Provisions (Refs & Annos)

→→ § 74.351. Expert Report

(a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

(1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

(2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

(d) to (h) [Subsections (d)-(h) reserved]

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as

issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Subject to Subsection (t), an expert report served under this section:

(1) is not admissible in evidence by any party;

(2) shall not be used in a deposition, trial, or other proceeding; and

(3) shall not be referred to by any party during the course of the action for any purpose.

(l) A court shall grant a motion challenging the adequacy of an expert report 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 in Subsection (r)(6).

(m) to (q) [Subsections (m)-(q) reserved]

(r) In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim.

(3) [reserved]

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401;

(B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402;

(C) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence;

(D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or

(E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.

(6) "Expert report" means 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.

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

(1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;

(2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and

(3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(t) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection (a), the restrictions imposed by Subsection (k) on use of the expert report by any party are waived.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).

CREDIT(S)

Added by Acts 2003, 78th Leg., ch. 204, § 10.01, eff. Sept. 1, 2003. Amended by Acts 2005, 79th Leg., ch. 635, § 1, eff. Sept. 1, 2005.

Current through the end of the 2011 Regular Session and First Called Session of the 82nd Legislature

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