

ORAL ARGUMENT CONDITIONALLY REQUESTED

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,

v.

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

On Accelerated Appeal from Cause No. D12-21439 CV,
In the 13th Judicial District Court of Navarro County, Texas
Honorable James L. Lagomarsino, Presiding Judge

APPELLEES' BRIEF

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STATEMENT ON ORAL ARGUMENT

Appellees believe the matter is adequately presented in the Briefs and that the Court should simply affirm the trial court's decision denying the motion to dismiss and overruling the objections to the expert reports. Should the Court grant oral argument, Appellees respectfully requests that they be permitted to participate in the argument.

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STATEMENT OF THE CASE

Nature of the case: Appellees sued Appellant and others for medical malpractice and seek damages caused by their negligence.

Course of proceedings and Trial court disposition: On July 13, 2012, Appellees, filed their Original Petition, Request for Disclosure, and Request for Production in the 13th District Court of Navarro County, Texas against Navarro Regional LLC, Navarro Hospital LP d/b/a Navarro Regional Hospital,); Douglas B. Hibbs, M.D., and James Goodman M.D. (CR 4). Appellees alleged that Appellant was both directly and vicariously negligent in its treatment and care of Charles Donell Washington. (CR 4.) On August 15, 2012, Appellees filed their Chapter 74 expert report/CVs by Dr. Edward Panacek, a critical care, internal medicine physician, timely. (CR 43.) On September 6, 2012 Appellants filed their Objections to Dr. Panacek's expert report. (CR 31). On November 8, 2012, Appellees filed the supplemental Chapter 74 expert report/CV of Arthur Shorr, MBA, (CR 102). On November 29, 2012, Appellants filed objections to the sufficiency of Arthur Shorr's report. (CR120).

On June 20, 2013, the Honorable trial court overruled the objections. Appellant has sought an accelerated appeal challenging the trial court's denial of the Motion to Dismiss. (CR573) .

ISSUE PRESENTED

1. Did the Trial Court Properly Exercise Its Discretion by Denying Appellant's Motion to Dismiss Because the Reports Constitute a Good Faith Effort to Comply With the Requirements of § 74.351?

STATEMENT OF FACTS

In 2010, Charles “Donell” Washington was a 34-year old male, who had a full and active life and was an accomplished musician. On July 13, 2010, he was taken to Navarro Regional Hospital by his parents because Donell complained of difficulty breathing, dizziness, nausea and vomiting, and pain in his throat and right ear. Donell appeared depressed and had difficulty with verbal expression. Donell was stable and was admitted to the hospital. Dr. Hibbs was the attending physician. Donell was given IV fluids, insulin, and medications to address his agitation and restlessness. Throughout the next day, Donell remained in the ICU. He was noted to be increasingly agitated and unresponsive to verbal stimuli. He was noted to have an increase in both blood pressure and heart rate. At approximately 2:25 AM on July 15, 2010, Donell’s heart rate and oxygen saturation suddenly dropped. He was placed on 100% oxygen via mask. At 2:30 AM, Donell’s heart rate was only 39, and a Code Blue was called. Chest compressions were started and a rubber bag [“ambubag”] was used to ventilate the patient.

The Defendant physicians attempted to intubate Donell, which is one of the most basic medical skills. They were unable to accomplish this. At no time did they use the “difficult airway” equipment that is standard and sometimes necessary to achieve intubation of a patient such as Donell. Such equipment was unavailable or was otherwise not brought to the room. The responsibility for having such equipment and assuring hospital staff bring it to the room rests with the corporate defendants. At 3:16 AM, Dr. Stevener arrived and successfully intubated Donell. By this time, Donell had suffered extensive and permanent brain damage due to the needless delay in getting Donell ventilated. Donell’s brain damage was caused by the defendants’ needless delay in getting Donell ventilated.

SUMMARY OF ARGUMENT

The Trial Court did not abuse its discretion by overruling Appellant's objections to the three expert reports. Expert reports are sufficient for purposes of Chapter 74 when they provide a fair summary of the expert's opinions regarding the applicable standards of care, defendant failed to meet the standards, and causation. *See Baylor Univ. Med. Ctr. v. Rosa*, 240 S.W.3d 565, 570 (Tex. App. – Dallas 2007, pet. denied) (expert reports are to be read together). The reports are very detailed and very specific. The Appellant was identified by name or collectively where appropriate, the experts are qualified by expertise, experience, education, and knowledge, each individual defendant is linked to the applicable standard of care, each individual defendant is identified in connection with how that standard was breached, and Dr. Panacek and Arthur Shorr connect everything together for purposes of causation. All reports detail the links between the Appellant's negligence and Charles Donell Washington's injuries, and when the reports are read together, as required, they sufficiently address causation. The trial court properly concluded that Appellant's objections were meritless.

Appellant's arguments on appeal are an attempt to impose upon Appellees requirements that are not part of a Chapter 74 analysis. Appellant states the Chapter 74 reports are deficient by failing to state Navarro Regional Hospital's breach of standard of care proximately caused harm to Charles Donell Washington. However, the Panacek report states at pages 5 and 6, "based on reasonable medical probability, CMS/Community Health Systems d/b/a Navarro Regional Hospital and the operator of that hospital, which I understand to be Quorum Health Resources, fell below applicable standards of care by failing to have specialized intubation equipment immediately available for use on Donell Washington. Further, they fell below applicable standards of care by either failing to have, or failing to enforce, protocols, policies and

procedures to assure that medical personnel and staff were aware of and trained to utilize specialized intubation equipment during code situations. Had such equipment been available it more likely than not would have been used on Donell Washington at the beginning of his Code Blue. Under the definitions listed above, I must conclude that Navarro Regional Hospital was negligent in its care and treatment of Donell Washington during his July 2010 admission for these reasons. * * * Had this occurred, then all of the equipment listed above would have been physically present in Donell Washington's room and available for use by Drs. Goodman and Hibbs. Unfortunately, the hospital failed to take these actions, thereby proximately causing Mr. Washington injury.” Panacek, who is triple-board certified in Internal Medicine, Emergency Medicine and Critical Care, also explains the rationale for his conclusions connecting the specific facts, the physiology, the standards of care, and proximate cause.¹

Appellees also served the report and CV of hospital administrator expert Arthur Shorr, who opined:

My review of the circumstances regarding the hospitalization of Mr. Washington in July 2010 leads me to conclude, based on reasonable administrative probability that the above-described Hospital Entities fell below the administrative standards of care in the following ways:

I The hospital entities failed to ensure the availability of supplies and equipment needed to intubate and resuscitate Mr. Washington in a timely manner. This failure contributed to the delay in intubating Mr. Washington, resulting in lack of oxygen for an extended period of time. Lack of oxygen for an extended period of time is known to be a cause of brain damage.

II The hospital entities failed 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, resulting in lack of oxygen for an extended period of time. Lack of oxygen for an extended period of time is known to be a cause of brain damage.

III The hospital entities failed to ensure that its contracted physicians were competent to perform an intubation in a timely manner, resulting in lack of oxygen

¹ Appellees have pleaded vicarious liability, which is a legal issue to be decided at a later time. *See Christus v. Curtis*, No. 06-13-00052-CV, n. 5 (Tex.App. - Texarkana, August 30, 2013, no writ)

for an extended period of time. Lack of oxygen for an extended period of time is known to be a cause of brain damage. 7

In summary, it is my opinion beyond a reasonable administrative probability, based on my training, education, and experience, that the hospital entities were negligent in their operation and supervision of the hospital, and that each act of negligence contributed to the delay in intubating Mr. Washington and thereby were each proximate causes of his injuries. In addition, it is my opinion that the hospital entities are responsible for the negligence of their contracted physicians, if such negligence is determined.

Read together, these reports satisfy § 74.351. Therefore, the Trial Court's decision should be affirmed. In the alternative, should the Court conclude that the reports are somehow insufficient under § 74.351, the Court should exercise its authority to grant a thirty-day extension to cure any deficiencies.

ARGUMENT

A. Standard of Review

Courts of appeals “apply an abuse of discretion standard in reviewing a trial court’s decision” with respect to Chapter 74 expert reports. *See American Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *see also Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) (“we review a trial court's decision about whether a report constitutes a good-faith effort to comply with the Act under an abuse-of-discretion standard”); *Kelly Ryan Cook, P.A. v. Spears*, 275 S.W.3d 577, 579 (Tex. App. – Dallas 2008, no pet.) A trial court abuses its discretion when it acts arbitrarily or unreasonably without reference to any guiding rules and principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex.2003). “When reviewing matters committed to the trial judge’s discretion, an appellate court may not substitute its judgment for that of the trial judge.” *Baylor University Med. Ctr. v. Rosa*, 240 S.W.3d 565 (Tex. App. – Dallas 2007, pet. denied). Under § 74.351:

- The reports cannot each be read in isolation, as Appellant suggests by attacking the reports individually. They must be read together in determining whether the requirements of Section 74.351 have been met. *Rosa*, 240 S.W.3d at 570.
- The reports collectively must inform the defendant of the specific conduct called into question and provide a basis for the court to conclude the claims have merit. The reports are not to be judged by the standards of a summary judgment hearing and are not required, at this stage of the proceedings, to meet the *Daubert/Robinson* test for admissibility at trial. *Christian Care Centers, Inc. v. Golenko*, 328 S.W.3d 637, 641 (Tex. App. – Dallas 2010, n.p.h.); *American Transitional Care Centers of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

At this stage of the proceedings, the expert reports are not to be measured by whether or not they are trial-worthy. Under Civil Practice & Remedies Code § 74.351:

To constitute a good faith effort to comply with the statutory requirements, an expert report must inform the defendant of the specific conduct called into question and provide a basis for the trial court to determine that the claims have merit. It does not need to marshal all of the plaintiff's proof, but it must include a fair summary of the expert's opinion on each of the elements identified in the statute: the applicable standard of care, the breach or deviation from the standard of care, and the causal relationship between the breach and the injury.

Golenko, 328 S.W.3d at 647.

Point I The Trial Court Properly Exercised its Discretion by Overruling Appellant's Objections to the Expert Reports Because the Reports Constitute a Good Faith Effort to Comply With the Requirements of § 74.351 and Provide a Fair Summary of the Experts' Opinions Regarding the Standards of Care, Breach of Those Standards, and Causation.

The trial court properly exercised its discretion in rejecting the challenges made to the reports because the reports constitute an objective good-faith effort to comply with § 74.351,

providing a fair summary of each expert's opinions regarding the applicable standards of care, how Appellant's conduct failed to meet those standards, and causation.

A. An Expert Report is Sufficient Under § 74.351 When it Provides a Fair Summary of the Expert's Opinions Regarding the Applicable Standards of Care, Defendant's Failure to Meet the Standards, and Causation.

The Court should affirm the trial court's conclusion that the expert reports met the standards imposed by Civil Practice & Remedies Code § 74.351. To constitute a valid report under § 74.351, the expert report must provide 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)(6). Appellees' experts are not required to use "any particular 'magic words'" to pass muster under the statute. *Wright*, 79 S.W.3d at 53 (Tex. 2002). Instead, when a plaintiff timely files an expert report and a defendant objects to the report and/or seeks dismissal because of the report's purported inadequacy, the trial court may grant the motion "only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (r)(6)."

Tex. Civ. Prac. & Rem. Code § 74.351(l) (emphasis added). Accordingly, this Court may not grant a motion to dismiss or sustain objections to the sufficiency of the report when presented with such a good faith effort.

Plaintiffs may satisfy their statutory requirements by filing reports from multiple experts. "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." Tex. Civ. Prac. & Rem.

Code § 74.351(i); *see also Packard v. Guerra*, 252 S.W.3d 511, 527 (Tex. App. – Houston [14th Dist.] 2008, pet. denied); *Palafox v. Silvey*, 247 S.W.3d 310, 314 (Tex. App. – El Paso 2007, no pet.). Accordingly, the Court must read reports from multiple experts together in determining whether the Chapter 74 standards have been satisfied. In this case, the reports collectively provide the required information under Chapter 74.

B. The Reports Sufficiently Establish the Qualifications of the Experts to Opine Regarding the Standard of care Applicable to Appellants, Breaches of the Standard of Care, and Causation.

All experts are qualified to give an opinion regarding the standard of care applicable to them. Under § 74.401(a), a person may qualify as an expert with respect to medical standards of care when the person:

- (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;
- (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and
- (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

Tex. Civ. Prac. & Rem. Code § 74.401(a). A court may also consider whether the witness is board certified in an area relevant to the claim and whether the physician is actively practicing medicine in areas relevant to the claim. Tex. Civ. Prac. & Rem. Code § 74.401(c).

When evaluating an expert’s qualifications under Chapter 74, “the proper inquiry concerning whether a physician is qualified to testify is not the physician’s area of practice but the stated familiarity with the issues involved in the claim before the court.” *Concentra Health Serv., Inc. v. Everly*, 2010 WL 1267775, *4 (Tex. App. – Fort Worth 2010, no pet.). A physician with practical knowledge of what is customarily and usually done under the circumstances

confronting the defendant is competent to testify. *Id.* The reports here are 1) by a triple-board certified physician whose certifications are directly related to patients such as Donell Washington who suffered from respiratory collapse, and 2) a hospital administrator who is qualified to talk about direct administration issues involved with a hospital's provision of medical equipment. They have practical knowledge regarding what is customarily and usually done under these circumstances, and they therefore easily comply with this standard. As laid out in Dr. Panacek and Mr. Shorr's reports, the duty to secure an airway and the hospital's provision of equipment to accomplish that are directly related to their qualifications.

The facts and opinions related to causation are also well-described in the two reports read together. Moreover, the vicarious allegations are sufficient alone to satisfy the statute. *See Christus*, at *9.

Alternative Request for Thirty-Day Extension

Should the Court find the reports deficient, the Court should grant an extension under § 74.351(c). *See Leland v. Brandal*, 257 S.W.3d 204, 207 (Tex. 2008); *Ogletree v. Matthews*, 262 S.W.3d 316 (Tex. 2007). The reports represent a good faith effort to comply with the statute. If the Court does not agree, Appellees request the Court grant a thirty-day extension to cure any deficiency. Indeed because the reports are, if deficient, clearly not "absent," the only appropriate remedy is a thirty-day extension to cure the deficiencies.

CONCLUSION AND PRAYER

FOR THESE REASONS, Appellees ask this Court to affirm the trial court's order denying Appellant's motion to dismiss and overruling its objections to the expert reports and remand this case for trial, or in the alternative grant a 30-day extension to cure any deficiencies, and grant Appellees such other and further relief to which they are justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned counsel - in reliance upon the word count of the computer program used to prepare this document - certifies that this brief contains 3,748 words, excluding the words that need not be counted under Texas Rule of Appellate Procedure 9.4(i)(1).



CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all counsel of record via electronic filing, or certified mail, return receipt requested, on this 11th day of September, 2013 as follows:

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ORAL ARGUMENT IS NOT REQUESTED OR NECESSARY

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**APPELLEES' BRIEF
APPENDIX TO APPELLEES' BRIEF**

In compliance with rule 38.1(j) of the Texas Rules of Appellate Procedure, Appellees submit this
Appendix to their brief containing the following items:

TAB A: Expert Report and CV of Edward Panacek, M.D.

TAB B: Expert Report and CV of Arthur Shorr

APPENDIX TAB A

APPENDIX TAB B