IN THE
TENTH COURT OF APPEALS

No. 10-13-00248-CV

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

From the 13th District Court
Navarro County, Texas
Trial Court No. D12-21439 CV

MEMORANDUM OPINION

In this appeal, appellant, Navarro Hospital, L.P. d/b/a Navarro Regional Hospital, complains about the trial court's denial of its motion to dismiss a health-care liability claim brought by appellees, Charles Washington and Gwendolyn Washington, each individually and as next friends of Charles Donell Washington ("Donell"). In two issues, appellant challenges appellees' expert reports as not constituting a good faith

effort. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6) (West Supp. 2013). We affirm.

I. BACKGROUND

In their original petition, appellees asserted health-care liability claims against appellant and two doctors, Douglas B. Hibbs, M.D. and James Goodman, M.D., among others.[1] In particular, appellees alleged that Donell was an accomplished musician "who had a full and active life" when he was admitted to Navarro Regional Hospital on July 13, 2010. At the time, Donell complained of difficulty breathing, dizziness, nausea, vomiting, and pain in his throat and right ear. Appellees noted that Donell appeared depressed and had difficulty with verbal expression when he was admitted to the hospital. Nevertheless, Donell was stable at that time. Dr. Hibbs was the attending physician, and he ordered that Donell be given IV fluids, insulin, and medications to address his agitation and restlessness.

Donell was taken to the ICU, and he remained there the following day. Doctors noted that Donell became increasingly agitated and unresponsive to verbal stimuli. They also observed increases in Donell's blood pressure and heart rate.

At approximately 2:25 a.m. on July 15, 2010, Donell's heart rate and oxygen saturation dropped suddenly, and he was placed on 100% oxygen via mask. Five

[1] Drs. Hibbs and Goodman are not parties to this appeal.

minutes later, Donell's heart rate decreased to 39, and a Code Blue was called. Doctors commenced chest compressions, and an ambubag was used to ventilate Donell.

Drs. Hibbs and Goodman tried multiple times to intubate Donell, but they were unsuccessful in their attempts. According to appellees, no one tried to use the "'difficult airway' equipment that is standard and sometimes necessary to achieve intubation of a patient such as Donell." Appellees further asserted that this "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."

Approximately forty-five minutes after the Code Blue was called, a Dr. Stevener arrived and successfully intubated Donell. However, by the time that he was intubated, Donell suffered extensive and permanent brain damage.[2] Appellees argued that Donell's brain damage was caused by "the needless delay in getting Donell ventilated."

Based on these facts, appellees asserted negligence and gross-negligence causes of action against Drs. Hibbs and Goodman and appellant, among others. With respect to appellant, appellees contended that appellant "failed to have the difficult airway equipment readily available, and failed to have and/or enforce adequate policies related to such equipment. These failures resulted in Donell needlessly suffering severe, permanent brain damage." Appellant responded by filing an original answer denying

[2] At the hearing on appellant's motion to dismiss, counsel for appellees stated that Donell is now deceased.

each of the allegations contained in appellees' original petition and asserting special exceptions and numerous affirmative defenses.

Appellees subsequently filed expert reports from Edward Panacek, M.D. and Arthur S. Shorr, MBA, FACHE. Appellant filed objections to both expert reports and a motion to dismiss appellees' claims. Thereafter, the trial court conducted a hearing on appellant's motion to dismiss and ultimately denied the motion. The trial court also signed an order deeming appellees' expert reports adequate. This interlocutory appeal followed. *See id.* § 51.014(a)(9) (West Supp. 2013) (permitting the appeal of an interlocutory order from a district court that "denies all or part of the relief sought by a motion under Section 74.351(b)").

II. STANDARD OF REVIEW & APPLICABLE LAW

We review a trial court's denial of a motion to dismiss under section 74.351 for an abuse of discretion. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or without reference to any guiding rules or principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003); *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985).

Section 74.351 of the Texas Civil Practice and Remedies Code provides that within 120 days of filing a health-care liability claim, a claimant must serve a curriculum vita and one or more expert reports regarding every defendant against

whom a health-care claim is asserted. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a); *see also Hillcrest Baptist Med. Ctr. v. Payne*, No. 10-11-00191-CV, 2011 Tex. App. LEXIS 9182, at *6 (Tex. App.—Waco Nov. 16, 2011, pet. denied) (mem. op.). The expert report must contain,

> a fair summary of the expert's opinions as of the date of the report regarding the 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 ANN. § 74.351(r)(6); *see Palacios*, 46 S.W.3d at 877. If a plaintiff timely files an expert report and the defendant moves to dismiss because of the report's inadequacy, the trial court must grant the motion "only if it appears to the court, after hearing, that the report does not represent a good faith effort to comply with the definition of an expert report in [section 74.351(r)(6)]." *Wright*, 79 S.W.3d at 51-52; *see Palacios*, 46 S.W.3d at 878.

To constitute a "good faith effort," the report must provide enough information to fulfill two purposes: (1) it must inform the defendant of the specific conduct the plaintiff has called into question; and (2) it must provide a basis for the trial court to conclude that the claims have merit. *Wright*, 79 S.W.3d at 52-53 (noting that "magical words" are not necessary to provide a fair summary of the standard of care, breach of that standard, and causation); *see Palacios*, 46 S.W.3d at 879 ("A report that merely states the expert's conclusions about the standard of care, breach, and causation does not

fulfill these two purposes. Nor can a report meet these purposes and thus constitute a good-faith effort if it omits any of the statutory requirements."). The trial court should look no further than the report itself, because all the information relevant to the inquiry should be contained within the document's four corners. *Wright*, 79 S.W.3d at 52 (citing *Palacios*, 46 S.W.3d at 878).

An expert report, however, does not need to marshal all of the plaintiff's proof; it may be informal, and the information presented need not meet the requirements of evidence offered in summary-judgment proceedings or in trial. *See Spitzer v. Berry*, 247 S.W.3d 747, 750 (Tex. App.—Tyler 2008, pet. denied); *see also Bakhtari v. Estate of Dumas*, 317 S.W.3d 486, 496 (Tex. App.—Dallas 2010, no pet.). Moreover, "[e]xpert reports can be considered together in determining whether the plaintiff in a health[-]care liability action has provided adequate expert opinion regarding the standard of care, breach, and causation." *Salais v. Tex. Dep't of Aging & Disability Servs.*, 323 S.W.3d 527, 534 (Tex. App.—Waco 2010, pet. denied); *see Walgreen Co. v. Hieger*, 243 S.W.3d 183, 186 n.2 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(i).

III. APPELLEES' EXPERT REPORTS

In its first issue, appellant contends that the trial court erred in denying its motion to dismiss because appellees' expert reports failed to establish the standard of care and alleged departures from the standard of care. More specifically, appellant

argues that: (1) Dr. Panacek and Shorr are not qualified to render opinions as to the standards of care and the alleged departures from the standards of care; (2) Dr. Panacek's report fails to adequately set forth the applicable standard of care; (3) Dr. Panacek's opinions about the breach of the standard of care are inadequate and based on speculation and conjecture; and (4) Shorr's report fails to specify the applicable standard of care and breach. In its second issue, appellant asserts that Dr. Panacek and Shorr are unqualified to opine as to causation and that their reports do not adequately explain the causation element.

a. The Qualifications of Experts in Health-Care Liability Claims

Section 74.351(r)(5) of the Texas Civil Practice and Remedies Code provides that an "expert" in a health-care liability claim is:

> (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 . . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(5)(B)-(C). Section 74.402 states the following, in pertinent part:

> (b) In a suit involving a health care liability claim against a health care provider, a person may qualify as an expert witness on the issue of

whether the health care provider departed from accepted standards of care only if the person:

(1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time, the testimony is given or was practicing that type of health care at the time the claim arose;

(2) has knowledge of accepted standards of care for health care providers 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 health care.

(c) In determining whether a witness is qualified on the basis of training or experience, the court shall consider whether, at the time the claim arose or at the time the testimony is given, the witness:

(1) is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other substantial training or experience, in the area of health care relevant to the claim; and

(2) is actively practicing health care in rendering health care services relevant to the claim.

Id. § 74.402(b)-(c) (West 2011). Moreover, section 74.402(a) describes the following as "practicing health care":

(1) training health care providers in the same field as the defendant health care provider at an accredited education institutional; or

(2) serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider.

Id. § 74.402(a).

In light of the foregoing statutes, the Texas Supreme Court has stated that a professional need not be employed in the particular field about which he is testifying so long as he can demonstrate that he has knowledge, skill, experience, training, or education regarding the specific issue before the court that would qualify him to give an opinion on that subject. *Broders v. Heise*, 924 S.W.2d 148, 153-54 (Tex. 1996); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402 (West 2011) (listing the requirements for an expert to be considered qualified in a suit against a health-care provider); *see also* TEX. R. EVID. 702 (allowing experts to testify based on their "knowledge, skill, experience, training, or education"). "[W]hen a party can show that a subject is substantially developed in more than one field, testimony can come from a qualified expert in any of those fields." *Broders*, 924 S.W.2d at 154.

Qualifications of an expert must appear in the expert reports and curriculum vitae and cannot be inferred. *See Salais*, 323 S.W.3d at 536; *see also Estorque v. Schafer*, 302 S.W.3d 19, 26 (Tex. App.—Fort Worth 2009, no pet.) (citing *Olveda v. Sepulveda*, 141 S.W.3d 679, 683 (Tex. App.—San Antonio 2004, pet. denied)). Analysis of the expert's qualifications under section 74.351 is limited to the four corners of the expert reports and the expert's curriculum vitae. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a); *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 463 (Tex. 2008) (considering an expert's curriculum vita and report in determining whether the expert was qualified to opine

about plaintiff's negligent-credentialing cause of action); *Polone v. Shearer*, 287 S.W.3d 229, 238 (Tex. App.—Fort Worth 2009, no pet.); *see also Lewis v. Funderburk*, No. 10-05-00197-CV, 2008 Tex. App. LEXIS 9761, at *6 (Tex. App.—Waco Dec. 31, 2008, pet. denied) (mem. op.).

Merely being a physician is insufficient to qualify as a medical expert. *See Broders*, 924 S.W.2d at 152; *see also Hagedorn v. Tisdale*, 73 S.W.3d 341, 350 (Tex. App.—Amarillo 2002, no pet.) ("Every licensed doctor is not automatically qualified to testify as an expert on every medical question."). But we defer to the trial court on close calls concerning an expert's qualifications. *See Larson v. Downing*, 197 S.W.3d 303, 304-05 (Tex. 2006); *see also Broders*, 924 S.W.2d at 151 ("The qualification of a witness as an expert is within the trial court's discretion. We do not disturb the trial court's discretion absent clear abuse.").

1. Dr. Panacek's Qualifications

On appeal, appellant complains that Dr. Panacek is not qualified to render an opinion in this case because he failed to explain his qualifications for rendering an opinion about the equipment which a 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" such equipment. As noted above, this case involved a patient that required advanced airway management and equipment in

response to a Code Blue. In the qualifications section of his expert report, Dr. Panacek stated the following:

> I am a physician licensed to practice medicine by the state of California. I received the MD degree at the University of South Alabama College of Medicine in Mobile AL in 1981. I am a Diplomate of the American Board of Internal Medicine, the National Board of Medical Examiners, the American Board of Emergency Medicine and am a Diplomate in Critical Care Medicine. I am an instructor in Advanced Cardiac Life Support, and Advanced Trauma Life Support. I am a past Program Director of the Emergency Medicine Residency program at the University of California Davis Medical Center in Sacramento CA. I am a Professor of Emergency Medicine at that same facility. My CV is attached to this report and is incorporated by reference. I have extensive experience in establishing and maintaining airways in patients, responding to Code Blues, and using standards of care related to airway management during Code Blue situations in the hospital setting, and these standards of care are common to internal medicine, emergency medicine, and critical care medicine. I am familiar with the medical treatment of a patient similar to Charles "Donell" Washington in 2010 and am qualified by training and experience to render opinions regarding the appropriateness of his medical treatment.

The language above demonstrates that Dr. Panacek is a practicing doctor with a medical license from California and describes his expertise in critical-care and emergency medicine, especially with regard to airway management and responding to Code Blue situations—the type of expertise involved in the claims asserted in this case. Additionally, Dr. Panacek opines that he is familiar with the medical treatment of a patient similarly situated as Donell in this case. As such, Dr. Panacek asserts that he is qualified to render his opinion in his expert report based on experience, as well as knowledge, skill, and education. Other language in his expert report, including his

description of the standards of care involved in this case, indicates that he is familiar with the actions and equipment necessary for the advanced airway management involved here. Therefore, based on the language contained in Dr. Panacek's expert report, we cannot say that the trial court clearly abused its discretion by implicitly concluding that Dr. Panacek is qualified to give an opinion on the subject matter involved in this case. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.402; *see also Broders*, 924 S.W.2d at 153.

2. Shorr's Qualifications

Appellant also contends that Shorr is unqualified to opine on the standard of care and causation in this case. In his report, Shorr states that he is Board Certified in Hospital and Healthcare Administration and is a Fellow of the American College of Healthcare Executives. He further states that he has worked as a healthcare administrator for forty years, of which includes a sixteen-year stint in senior executive management of acute-care hospitals. Additionally, Shorr recounts numerous executive and academic positions he has held in the healthcare industry. Shorr also notes that he has published numerous articles in peer-reviewed professional healthcare-administration journals and that he has authored a textbook on administrative issues in the healthcare industry. Furthermore, Shorr's report reflects that he has been a provider of consulting services to physicians and hospitals, "first as Arthur S. Shorr & Associates,

Inc.: Consultants to Healthcare Providers, and currently as Shorr Healthcare Consulting."

Based on Shorr's extensive experience in healthcare administration, and given that Shorr is Board Certified in Hospital and Healthcare Administration and provides consulting services to hospitals regarding administration services, we conclude that Shorr is qualified to opine as an expert as to the standards of care and the corresponding departures from the standards of care involving appellant's alleged failure to have difficult airway equipment available and appropriate policies in place to ensure that such equipment is available to treating physicians and that hospital personnel are trained how to use such equipment. *See id.* § 74.402(a)-(c); *see also* TEX R. EVID. 702; *Broders*, 924 S.W.2d at 153-54. However, we do agree with appellant that Shorr, a non-physician, is not qualified to opine as to causation in this matter. *See id.* § 74.403(a) (West 2011) (stating that only a physician is qualified to render causation opinions in health-care liability claims); *see also Petty v. Churner*, 310 S.W.3d 131, 134 (Tex. App.—Dallas 2010, no pet.); *Hieger*, 243 S.W.3d at 186 n.2. We will now address the adequacy of the expert reports.

b. Adequacy of the Expert Reports

With regard to the standard of care applicable to appellant, Dr. Panacek stated the following:

> Airway management is one of the most critically important skills for an emergency or critical care practitioner to master because failure to secure

> an adequate airway can quickly lead to death or disability. Endotracheal intubation using rapid sequence intubation (RSI) is the cornerstone of emergency airway management.
>
> . . . .
>
> The relevant standards of care for hospitals treating Donell Washington during the admission of July 13, 2010 are such that the hospital must have specialized intubation equipment immediately available in all ICU and ER units, as well as available to each code blue. Such equipment includes endotracheal tubes of various sizes, a laryngoscope with blades of various sizes, Laryngeal Mask Airways, and naso- and oro-pharyngeal airways. Difficult airway equipment must be quickly available as well. Further, minimal standards of care require 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 during code situations so that no patient goes without oxygen for an inordinate amount of time.

Thereafter, Dr. Panacek described how appellant departed from the applicable standard of care and caused Donell's injuries. Specifically, Dr. Panacek noted that appellant's actions,

> 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 failing to have, or failing to enforce, protocols, polices, and procedures to assure that medical personnel and staff were aware 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.

And as a result of appellant's alleged departures from the applicable standards of care, Dr. Panacek stated the following, among other things:

> Had applicable standards of care been used on Donnell Washington, the hospital would have had the equipment identified above in a crash cart on

the unit where Donell Washington was located. When the Code Blue was called the crash cart would have been rolled into the room very quickly by the nurses as the Code Team was arriving. Drs. Goodman and Hibbs would have taken steps to assure that an adequate airway was established and maintained during the Code Blue. These physicians would have intubated Donell Washington as soon as possible after they arrived at Washington's bedside by taking a laryngoscope from the crash cart, putting the appropriate blade on it, and then putting the blade into the patient's mouth and into his larynx, visualizing his vocal cords and inserting the plastic endotracheal tube into the patient's throat. . . . At that point, these physicians should have gone to an LMA or naso- or oro-pharyngeal mask. An LMA is simply a tube with an inflatable mask on one end that is inserted into the patient's throat to achieve a seal over the tracheal opening so that oxygen can be forced into the patient's lungs. Almost certainly, these physicians would have been able to adequately ventilate this patient at that point. If for some reason, they could not accomplish this, then the physicians should have used a scalpel and made an incision in the anterior surface of Washington's neck, identified and cut through the cricothyroid membrane and intubated the patient through this opening. At this point, Washington would have been ventilated adequately until a definitive airway could be established. Brain damage due to lack of oxygen would more likely than not have been avoided.

In order to comply with applicable standards of care, CMS/Community Health Systems d/b/a Navarro Regional Hospital and the operator of that hospital, which I understand to be Quorum Health Resources, would have had specialized intubation equipment, to specifically include the intubation equipment listed above, immediately available in the ICU unit where Mr. Washington was being maintained at the time the Code Blue was called. Moreover, Navarro Regional Hospital should have had and/or enforced protocols or policies and procedures assuring that the medical personnel and staff (including Drs. Goodman and Hibbs) were aware of and trained to utilize this specialized intubation equipment during a Code Blue. 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's injury.

> It is my opinion beyond a reasonable medical probability, based on my training and education and experience, that the negligent acts of Dr. Goodman, Dr. Hibbs, and Navarro Regional Hospital . . . outlined above were each a proximate cause of Mr. Washington's profound brain damage and related sequelae. It is well accepted in the medical community at large that the brain requires a constant flow of oxygen to function normally. When the flow of oxygen is cut-off—and in a patient who is unconscious and not breathing—the blood oxygen levels drop. At a certain point, the low oxygen state causes the cells of the body to go into anaerobic respiration, rather than aerobic respiration based on the oxygen supply. This produces lactic acid as a by-product of anaerobic respiration. The lactic acid builds up and brain cells begin to die. A hypoxic-anoxic injury occurs when the flow of blood is disrupted, essentially starving the brain and preventing it from performing vital biomechanical processes. With complete cessation of oxygenation, the cells of the brain begin to die in approximately 4 to 6 minutes. Brain-cell death is not reversible. When oxygen deprivation is severe enough, a profound hypoxic-anoxic brain injury results via this mechanism of injury. This is what happened to Donell Washington as a result of his being without an adequate airway for approximately 46 minutes during the Code Blue. Subsequent workup confirmed this diagnosis of hypoxic-anoxic encephalopathy. Specifically, an MRI on July 16, 2010 showed extensive cortical and deep gray abnormalities, and overall configuration and findings suspicious for hypoxic ischemic injury or global anoxic event. On July 28, 2010, CT of Mr. Washington's head showed abnormalities involving bilateral lentiform and caudate nuclei consistent with anoxic brain injury, with subacute petechial hemorrhage. EEG findings were deemed to show a pattern that was "consistent with our diagnosis of hypoxic encephalopathy." The brain damage is permanent and quite severe.

Shorr, on the other hand, mentioned that appellant is directly responsible for providing safe and effective healthcare services and are liable for the negligence of Drs. Goodman and Hibbs. Shorr stated that the relevant standards of care for hospitals are to ensure that its staff are competent and adequately trained to appropriately manage Donell's airway during a Code situation and that it should have and/or enforce

protocols, policies, or procedures to assure that medical personnel and staff "are aware of and trained to utilize this specialized intubation equipment during code situations so that no patient goes without oxygen for an inordinate amount of time." In support of his opinion on the standard of care, Shorr cites to numerous regulations and accreditation standards for hospitals, including those pertaining to hospital accountability for patient care, hospital requirements to have supplies and equipment needed for patient care readily available, duties of hospital staff to recognize and respond to changes in a patient's condition, and duties of the hospital to ensure that all staff are competent to carry out patient treatment.

After reviewing the four corners of the proffered expert reports, we conclude that the reports inform appellant of the specific conduct that appellees have called into question—appellant's failure to: (1) have specialized intubation equipment readily available at the time the Code Blue was called; and (2) have or enforce protocols, policies, or procedures for ensuring that personnel are aware of and trained to utilize such equipment—and provide the trial court with a basis to conclude that the claims have merit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6); *Wright*, 79 S.W.3d at 52-53; *Palacios*, 46 S.W.3d at 879; *see also Salais*, 323 S.W.3d at 534; *Hieger*, 243 S.W.3d at 186 n.2. And to the extent that appellant complains that certain aspects of the expert reports are deficient, we emphasize that the reports need not marshal all of appellees'

proof or meet the same requirements as evidence offered in summary-judgment proceedings or in trial. *See Bakhtari*, 317 S.W.3d at 496; *see also Spitzer*, 247 S.W.3d at 750.

Based on the foregoing, we cannot say that the trial court acted in an arbitrary or unreasonable manner or without reference to guiding rules and principles when it denied appellant's motion to dismiss. *See Walker*, 111 S.W.3d at 62; *see also Downer*, 701 S.W.2d at 241-42. Accordingly, we cannot conclude that the trial court abused its discretion in denying appellant's motion to dismiss. *See Wright*, 79 S.W.3d at 52; *see also Palacios*, 46 S.W.3d at 875. We overrule both of appellant's issues on appeal.

IV. CONCLUSION

Having overruled both of appellant's issues on appeal, we affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed May 8, 2014
[CV06]

TENTH COURT OF APPEALS

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May 8, 2014

In accordance with the enclosed Memorandum Opinion, below is the judgment in the numbered cause set out herein to be entered in the Minutes of this Court as of the 8th day of May, 2014.

10-13-00248-CV NAVARRO HOSPITAL, L.P. D/B/A NAVARRO REGIONAL HOSPITAL v. CHARLES WASHINGTON AND GWENDOLYN WASHINGTON, EACH INDIVIDUALLY AND AS NEXT FRIENDS OF CHARLES DONELL WASHINGTON - ON APPEAL FROM THE 13TH DISTRICT COURT OF NAVARRO COUNTY - TRIAL COURT NO. D12-21439 CV - AFFIRMED - Memorandum Opinion by Justice Scoggins:

"This cause came on to be heard on the transcript of the record, and the same being considered, because it is the opinion of this Court that there was no error in the judgment of the court below; it is therefore ordered, adjudged and decreed that the judgment of the court below be, and hereby is, affirmed. It is further ordered that appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

ORAL ARGUMENT CONDITIONALLY REQUESTED

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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

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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)(l).

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

No. 10-13-00248-CV

IN THE COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

NAVARRO HOSPITA, L.P. D/B/A NAVARRO REGIONA HOSPTIAL,
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
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

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

BRIEF OF APPELLANT, NAVARRO HOSPITAL, L.P. D/B/A NAVARRO REGIONAL HOSPITAL

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ORAL ARGUMENT REQUESTED

IDENTITY OF THE PARTIES AND COUNSEL

Appellant certifies that the following is a complete list of the parties, attorneys, and any other person who has any interest in the outcome of this lawsuit:

Appellant	Navarro Hospital, L.P. d/b/a Navarro Regional Hospital
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Appellees	Charles Washington and Gwendolyn Washington, Each Individually and as Next Friends of Charles Donell Washington
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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

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 polices 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,

JONES CARR M^{c} GOLDRICK, L.L.P.

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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

CAUSE NO. D12-21439-CV

CHARLES WASHINGTON and GWENDOLYN WASHINGTON, Each Individually and as Next Friend of CHARLES DONNELL WASHINGTON	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	NAVARRO COUNTY, TEXAS
CHS/ COMMUNITY HEALTH SYSTEMS, INC. individually and d/b/a NAVARRO REGIONAL HOSPITAL, TRIAD-NAVARRO REGIONAL HOSPITAL SUBSIDIARY LLC, NAVARRO REGIONAL LLC, NAVARRO HOSPITAL LP d/b/a NAVARRO REGIONAL HOSPITAL, NAVARRO REGIONAL HOSPITAL by its common name, QUORUM HEALTH RESOURCES, LLC, DOUGLAS B. HIBBS, M.D., and JAMES GOODMAN M.D.,	§	
Defendants.	§	13TH JUDICIAL DISTRICT

ORDER DEEMING PLAINTIFFS' CHAPTER 74 EXPERT REPORTS ADEQUATE

The Court finds that Plaintiffs' Chapter 74 Expert Reports of Edward Panacek, M.D. and Arthur Shorr are adequate pursuant to TCPRC §74.351.

ENTERED this 20th day of June, 2013.

PRESIDING JUDGE

CAUSE NO. D12-21439-CV

CHARLES WASHINGTON and GWENDOLYN WASHINGTON, Each Individually and as Next Friend of CHARLES DONNELL WASHINGTON	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	NAVARRO COUNTY, TEXAS
CHS/ COMMUNITY HEALTH SYSTEMS, INC. individually and d/b/a NAVARRO REGIONAL HOSPITAL, TRIAD-NAVARRO REGIONAL HOSPITAL SUBSIDIARY LLC, NAVARRO REGIONAL LLC, NAVARRO HOSPITAL LP d/b/a NAVARRO REGIONAL HOSPITAL, NAVARRO REGIONAL HOSPITAL by its common name, QUORUM HEALTH RESOURCES, LLC, DOUGLAS B. HIBBS, M.D., and JAMES GOODMAN M.D.,	§	
Defendants.	§	13TH JUDICIAL DISTRICT

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

CAME ON TO BE HEARD on January 18, 2013, Defendants Navarro Hospital, L.P. d/b/a Navarro Regional Hospital, 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's Motion to Dismiss. After considering the Motion, the law, hearing argument of counsel and being otherwise fully advised, the Court DENIES Defendants' Motion to Dismiss.

ENTERED this 20th day of June, 2013.

PRESIDING JUDGE

Order

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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