

Affirmed and Memorandum Opinion filed June 23, 2020.



In The

Fourteenth Court of Appeals

NO. 14-19-00596-CV

SAMIRAN KUMAR DAS, M.D., Appellant

V.

YVONNE HESTER, Appellee

**On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2018-49926**

MEMORANDUM OPINION

In this health care liability case, the claimant served a physician with two expert reports, and then the physician moved to dismiss the case against him, arguing that the experts were not qualified to render their opinions and that the reports themselves were inadequate. The trial court denied the physician's motion to dismiss, and now the physician challenges that ruling in this interlocutory appeal. For the reasons explained below, we overrule the physician's legal arguments and affirm the trial court's order denying the motion to dismiss.

BACKGROUND

Yvonne Hester, the claimant below, elected to have a laparoscopic hysterectomy, which was performed by a surgeon who is not a party to this appeal. During the procedure, the surgeon committed an error that damaged a ureter, which is the tubular organ that carries urine from the kidney to the bladder. The surgeon failed to identify and correct this error.

As she recovered the following day, Hester exhibited a decrease in urine output and an increase in creatinine, both indicators of impaired kidney function. The surgeon did not investigate these symptoms or order diagnostic tests. Instead, he discharged Hester later that day.

Two days after her discharge, Hester presented at the emergency room, complaining of shortness of breath and swelling in her leg. Her vital signs included a very low blood pressure and a very high heart rate, which, when combined with her other symptoms, indicated that she was experiencing severe septic shock and multiple-organ failure. She was intubated and placed on vasopressors, which were medications that treated her low blood pressure by tightening her blood vessels. These medications also had the effect of redirecting blood from her extremities to her vital organs.

During her stay in the hospital, Hester's attending physician was the defendant, Dr. Samiran Kumar Das, who specialized in internal medicine. While caring for Hester, Dr. Das consulted with numerous other physicians, one of whom found that Hester had an acute kidney injury. This physician was an infectious disease specialist, not a urologist, and Dr. Das never followed up on that finding with a urologist.

After being in the hospital for more than two weeks, Hester developed a vaginal bleed, which prompted the taking of a CT scan. The scan revealed a large pelvic hematoma at the apex of the vagina. The scan also indicated that Hester was experiencing hydronephrosis, which is a condition characterized by swelling in the kidney due to the build-up of urine, as well as hydroureter, a condition characterized by swelling in the ureter. Dr. Das remarked that these conditions required immediate intervention, but rather than treat Hester himself, he transferred Hester to another facility.

Dr. Das did not mention in his discharge summary that Hester or her future health care providers should follow up with a urologist. As a result of that omission, Hester's kidney condition went untreated for nearly two years, until a urologist finally identified an obstruction in her ureter. In the meantime, Hester's kidney atrophied and became non-functioning. Also, as a result of the vasopressors, gangrene developed in Hester's extremities, which required the amputation of her hands and feet.

Hester filed this medical malpractice case against Dr. Das, including many other individuals and entities that were involved in her care. She alleged that Dr. Das breached his duty of care by, among other things, failing to order the appropriate diagnostic tests to determine the cause of her acute kidney injury, failing to order a consultation with a urologist after she was diagnosed with an acute kidney injury, and failing to recommend a follow-up plan and correct any injury related to her kidney.

In support of these claims, Hester timely served Dr. Das with two expert reports. The first report was authored by Dr. Matthew Karlovsky, a board certified urologist, and the second report was authored by Dr. Larry Borow, a board certified obstetrician and gynecologist. Both experts opined that Dr. Das was negligent.

Dr. Das objected that the experts were not qualified, and that their reports did not sufficiently address the standard of care, the breach of that care, or the causal relationship between the breach and Hester's injury. The trial court sustained these objections and granted Hester an extension to cure the deficiencies in the reports. Hester then served supplemental reports from Dr. Karlovsky and Dr. Borow. Dr. Das objected once again and moved to dismiss the claims against him, but the trial court denied that motion.

ANALYSIS

Dr. Das reasserts his trial objections in this interlocutory appeal, arguing that Dr. Karlovsky and Dr. Borow are not qualified to render an expert opinion, and that their individual reports are inadequate. We only address Dr. Das's arguments concerning Dr. Karlovsky. Because we determine that the trial court did not abuse its discretion in deciding that Dr. Karlovsky was qualified and that his report was adequate, we need not consider Dr. Das's arguments concerning Dr. Borow. *See Mem'l Hermann Health Sys. v. Heinzen*, 584 S.W.3d 902, 915 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (declining to address the defendant physician's challenges to two separate experts reports because one of the reports satisfied the minimum statutory requirements).

I. Dr. Karlovsky's Qualifications

A health care liability claimant must serve each defendant with an expert report, together with the expert's curriculum vitae. *See* Tex. Civ. Prac. & Rem. Code § 74.351(a). The author of the report must be qualified to render an expert opinion about whether the defendant departed from the accepted standards of medical care. *See* Tex. Civ. Prac. & Rem. Code § 74.351(r)(5). If the claimant fails to supply an adequate report from a qualified expert, then on the motion of the defendant, the trial court must dismiss the claim. *See* Tex. Civ. Prac. & Rem. Code § 74.351(b).

As the proponent of the expert report, Hester had the burden of establishing that Dr. Karlovsky was qualified to render an expert opinion. *See Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996). By overruling Dr. Das’s qualification objections and denying his motion to dismiss, the trial court implicitly determined that Hester satisfied her burden. We review that determination for an abuse of discretion. *Id.*

In assessing whether the trial court abused its discretion, we consider whether the record contains any evidence that reasonably supports the trial court’s decision. *See Henry v. Cox*, 520 S.W.3d 28, 34 (Tex. 2017) (“No abuse of discretion exists if some evidence reasonably supports the court’s ruling.”). The scope of our review is limited to the four corners of the expert report and the curriculum vitae. *See Methodist Hosp. v. Addison*, 574 S.W.3d 490, 503 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

The qualification standard is set forth in Section 74.401 of the Civil Practice and Remedies Code, which applies to claims like this that are asserted against a physician. That section provides that the author of a report may qualify as an expert only if the author is a physician who satisfies the following three statutory requirements: (1) he is practicing medicine at the time that his testimony is given or was practicing medicine at the time that the claim arose; (2) he 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) he is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care. *See Tex. Civ. Prac. & Rem. Code* § 74.401(a).

There is no dispute that Dr. Karlovsky, a board certified urologist, is a physician. His curriculum vitae establishes that he has an active medical license in two states, that he is currently a faculty physician at the University of Arizona College of Medicine, and that he is affiliated with several hospitals in the state of

Arizona. From this evidence, the trial court could have reasonably concluded that Dr. Karlovsky was practicing medicine at the time he rendered his opinion testimony, thereby satisfying the first statutory requirement. *See* Tex. Civ. Prac. & Rem. Code § 74.401(b) (“practicing medicine” includes training residents or students at an accredited school of medicine).

Regarding the second requirement, Dr. Karlovsky explained that hydronephrosis is outside the scope of practice for internists, and that the standard of care for internists is to consult exclusively with urologists for the diagnosis, management, and treatment of that condition. Dr. Karlovsky likewise explained that he is familiar with the standard of care for identifying and treating ureteral obstructions, which can cause hydronephrosis, hydroureter, and permanent kidney damage.

As for the third requirement, Dr. Karlovsky asserted that he routinely provides care for women who experience hydronephrosis, hydroureter, and other complications arising from gynecological surgery. He stated that he has performed thousands of diagnostic procedures aimed at identifying and determining the cause of ureteral obstructions, including the type of obstruction that caused Hester’s hydronephrosis and hydroureter. He also stated that he has performed hundreds of procedures to correct the surgical errors of others who have injured the ureter. Finally, Dr. Karlovsky stated that he has worked with attending physicians and internists like Dr. Das who were responsible for coordinating and overseeing the medical care of patients like Hester who required collaboration between numerous health care providers and specialties. Based on this evidence, the trial court could have reasonably concluded that Dr. Karlovsky was qualified on the basis of his training and experience. *See* Tex. Civ. Prac. & Rem. Code § 74.401(c) (providing that the trial court shall consider whether a witness is board certified or has other

substantial training or experience in an area of medical practice relevant to the claim when deciding whether the witness is qualified on the basis of training or experience).

Dr. Das counters that Dr. Karlovsky is not qualified to render an expert opinion in this case because his report fails to establish that he has the knowledge, skill, training, or experience regarding the applicable standard of care owed by a general internist coordinating multi-level care. In furtherance of this argument, Dr. Das points out that Dr. Karlovsky has experience in responding to internists who order a urological consultation, but no such experience in ordering the consultation in the first place. Similarly, Dr. Das contends that Dr. Karlovsky did not establish “how he came by the training and experience relevant to the treatment that Dr. Das provided in this case.” All of these points suffer from a common flaw: they focus on the defendant physician’s area of expertise, when the relevant statutory criterion is “the illness, injury, or condition involved in the claim.” *See* Tex. Civ. Prac. & Rem. Code § 74.401(a)(2); *Heinzen*, 584 S.W.3d at 916 (“By its plain language, the statute does not focus on the defendant doctor’s area of expertise, but on the condition involved in the claim.”).

The conditions involved in this case include hydronephrosis and hydroureter, which resulted from surgical complications relating to Hester’s laparoscopic hysterectomy. As explained above, Dr. Karlovsky has extensive experience with the diagnosis, care, and treatment of those conditions. Therefore, we cannot say that the trial court abused its discretion by determining that Dr. Karlovsky was qualified to render an expert opinion.

II. Adequacy of Dr. Karlovsky’s Report

An expert report must provide a fair summary of the expert’s opinions regarding the applicable standard of care, the manner in which the care rendered by

the defendant failed to meet that standard, and the causal relationship between that failure and the injury claimed. *See* Tex. Civ. Prac. & Rem. Code § 74.351(r)(6). If a report does not represent an objective “good faith effort” to comply with these requirements, then the trial court must grant a motion challenging the report’s adequacy. *See* Tex. Civ. Prac. & Rem. Code § 74.351(l).

A report is a good faith effort so long as it provides sufficient information to inform the defendant of the specific conduct the plaintiff has called into question, it provides a basis for the trial court to conclude that the claims have merit, and it does not contain a material deficiency. *See Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 141–42 (Tex. 2015) (per curiam). The report need not marshal all of the plaintiff’s proof, but it must contain the factual basis for the expert’s opinions. *See Bowie Mem’l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam). Bare conclusions will not suffice. *See Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011).

As with the trial court’s assessment of the expert’s qualifications, we review the trial court’s decision as to the adequacy of an expert report for an abuse of discretion. *See Rosemond v. Ah-Lahiq*, 331 S.W.3d 764, 766 (Tex. 2011) (per curiam).

A. Standard of Care and Breach

To adequately identify the standard of care, the expert report must set forth specific information about what a health care provider should have done under the same or similar circumstances. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 880 (Tex. 2001). And to show breach, the expert report must establish what the defendant did instead. *Id.*

Dr. Karlovsky opined that a health care provider should adhere to the following standard of care when a patient is diagnosed with hydronephrosis and hydroureter: (1) verify there is no obstruction preventing urine from proceeding from the kidney through the ureter to the bladder; (2) consult with a urologist to determine the cause and extent of a possible ureteral injury; and (3) inform the patient as to any need for a follow-up with a urologist.

Dr. Karlovsky asserted that Dr. Das did none of these things. After receiving the results of the CT scan, Dr. Das consulted with a gynecologist instead of a urologist. Even though the gynecologist recommended a renal ultrasound and possible placement of a ureteral stent, Dr. Das did not order the ultrasound, which would have shown the obstruction causing the hydronephrosis, nor did he order the stent, which would have treated the obstruction. Dr. Das could have also ordered the placement of a nephrostomy tube, which is a catheter that drains urine from the kidney, but he failed to do that as well. According to Dr. Karlovsky, Dr. Das believed that the hydronephrosis was caused by the pelvic hematoma, which explains why Dr. Das transferred Hester to another facility without informing her or her health care providers of the immediate need to follow up with a urologist. Because of these omissions, Dr. Karlovsky opined that Dr. Das had breached the applicable standard of care.

Dr. Das counters that the report is inadequate because it treats Hester's kidney condition "as an isolated incident independent of a larger medical picture." He then faults the report for ignoring whether the standard of care required a urology consultation in the specific circumstance of Hester's vaginal bleeding. This line of argument fails for two reasons.

First, Dr. Karlovsky addressed the larger medical picture. He opined in his report that the hematoma and its relationship to the vaginal bleeding would be

adequately covered by a gynecologist, but he further opined that the hematoma and its relationship to the hydronephrosis required a consultation from a urologist, which Dr. Das failed to obtain.

Second, even if Dr. Karlovsky did not address Hester's other medical problems, Dr. Das's argument merely represents a disagreement about what the applicable standard of care should be, which "is a matter to be determined at summary judgment and beyond." *See Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 226 (Tex. 2018) (per curiam). At this preliminary stage of the litigation, the question is whether Dr. Karlovsky's opinion constitutes an objective good faith effort, and we conclude that it does. *See Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 516–17 (Tex. 2017) (per curiam) ("At this preliminary stage, whether those standards appear reasonable is not relevant to the analysis of whether the expert's opinion constitutes a good-faith effort.").

B. Causation

To adequately establish causation, the expert report must explain, to a reasonable degree of medical probability, "how and why" the defendant's negligence caused the injury in question. *See Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010). In satisfying this "how and why" requirement, the report need not prove the entire case or account for every known fact; the report is sufficient if it simply makes a good faith effort to explain, factually, how proximate cause is going to be proven. *See Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 460 (Tex. 2017).

Dr. Karlovsky determined that Hester's ureter was damaged during a laparoscopic hysterectomy—more particularly, during the cautery and cutting of the uterine vessels. This damage was caused by a surgeon, not by Dr. Das. But soon after the surgery, Hester came under the care of Dr. Das, and Dr. Karlovsky opined

that Dr. Das should have suspected a ureteral injury when he learned that Hester was experiencing hydronephrosis, as ureteral injuries are well-known complications of laparoscopic hysterectomies and they often lead to hydronephrosis.

Dr. Karlovsky explained that there were several actions that Dr. Das could have taken in response to the diagnosis of hydronephrosis. He could have consulted with a urologist, a specialist who is uniquely trained to treat hydronephrosis. Alternatively, he could have ordered a renal ultrasound, which would have revealed the ureteral obstruction that was causing the hydronephrosis. Or he could have ordered the placement of a nephrostomy tube, which would have temporarily relieved the swelling on the kidney until a urologist examined it later. By not taking any of these actions, and by believing instead that the hydronephrosis was caused by a pelvic hematoma, Dr. Das allowed the kidney condition to worsen. Dr. Karlovsky also explained that kidney failure was a foreseeable consequence of these omissions because kidney damage becomes irreversible if a ureteral obstruction is left untreated for twelve weeks. Permanent damage could have been avoided in this case, Dr. Karlovsky reasoned, because Dr. Das received the diagnosis of hydronephrosis nearly three weeks after Hester's hysterectomy, which was well within that twelve-week window.

Dr. Das responds with several points, arguing first that Dr. Karlovsky failed to explain how Hester's damages were caused by Dr. Das, as opposed to the surgeon initially responsible for the ureteral injury. This argument fails to appreciate that there may be more than one proximate cause, and that the defendant's act or omission need not be the sole cause of an injury so long as it is a substantial factor in bringing about the injury. *See Bustamante v. Ponte*, 529 S.W.3d 447, 457 (Tex. 2017). And here, Dr. Karlovsky explained how Dr. Das's omissions were a substantial factor in her ultimate kidney failure. As explained above, Dr. Das knew

that Hester had been diagnosed with hydronephrosis, but he did not consult with a urologist, order a renal scan, or order the placement of a nephrostomy tube, any one of which would have prevented kidney failure to a reasonable degree of medical probability.

Dr. Das argues next that Dr. Karlovsky did not explain how a consultation with a urologist would have led to a different outcome, or relatedly, how informing Hester of the need to follow-up with a urologist caused her injury. Neither point has merit. Dr. Karlovsky explained that urologists are specially trained to diagnose and treat hydronephrosis, and his report established that the ureteral injury that caused Hester's hydronephrosis was identified some two years after her hysterectomy by a urologist. That urologist determined that the ureteral injury was "iatrogenic," meaning "due to the activity of a physician or therapy." The urologist also eliminated other potential causes of the hydronephrosis, like the pelvic hematoma and a separate bladder distention that also occurred. Because those other conditions were resolved whereas the kidney condition was not, the urologist determined that the ureteral injury was the cause of the hydronephrosis. Dr. Karlovsky explained these findings in his report, and he showed how Dr. Das's failure to identify or treat the ureteral injury was a substantial factor in Hester's eventual kidney failure.

Dr. Das also contends that Dr. Karlovsky did not explain why ordering a consultation with a urology or the placement of a nephrostomy tube needed to be done more urgently than treating Hester's internal bleeding. This point merely repeats Dr. Das's challenge to the applicable standard of care, which is not appropriate at this stage. Moreover, Dr. Karlovsky asserted that Dr. Das should have informed Hester or her future health care providers about the need to consult with a urologist so that, after her transfer, the hydronephrosis could still be treated before the kidney damage became irreversible.

Dr. Karlovsky's report constitutes a good faith effort to establish causation because the report draws a line from Dr. Das's failure to identify and treat the cause of Hester's hydronephrosis (or consult with a urologist who could better treat that condition) to the ultimate injury, which was permanent kidney damage. *Cf. Owens v. Handyside*, 478 S.W.3d 172, 188–91 (Tex. App.—Houston [1st Dist.] 2015, pet. denied) (holding that an expert report was sufficient where it showed how certain omissions led to complications and the patient's ultimate injury). We therefore conclude that the trial court did not abuse its discretion by denying Dr. Das's motion to dismiss.

CONCLUSION

The trial court's order denying the motion to dismiss is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Wise, and Zimmerer.