

REVERSE and REMAND and Opinion Filed June 16, 2020



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-19-00801-CV

**CHRISTY WASHINGTON WALKER, M.D., Appellant
V.
AMANDA ONUGHA, Appellee**

**On Appeal from the 219th Judicial District Court
Collin County, Texas
Trial Court Cause No. 219-06365-2018**

MEMORANDUM OPINION

**Before Justices Pedersen, III, Reichel, and Carlyle
Opinion by Justice Reichel**

In this interlocutory appeal, Christy Washington Walker, M.D. contends the trial court erred in denying her objections and motion to dismiss Amanda Onugha's claims under chapter 74 of the Texas Civil Practice and Remedies Code. In a single issue, Walker argues Onugha's expert report fails to meet the requirements of chapter 74 because it does not set forth (1) the expert's qualifications, (2) the standard of care applicable to Walker, (3) how that standard was breached, or (4) how Walker's conduct caused Onugha's injuries. We agree the expert report submitted by Onugha was deficient. We further conclude, however, that the

deficiencies in the report are curable. Accordingly, we remand the cause to the trial court to consider whether to grant Onugha a thirty-day extension within which to file an amended report curing the deficiencies.

Background

Onugha filed this suit against Walker alleging she suffered first-degree burns and permanent scarring as a result of an improperly administered intense pulsed light (“IPL”) procedure to remove hair from her face and neck. According to Onugha, Walker breached her duty of care by failing to properly administer the IPL and/or failing to properly train and supervise her employees. Onugha asserted claims for negligence and violations of the Texas Deceptive Trade Practices Act (“DTPA”).

In support of her claims, Onugha submitted the expert report of Dr. Daniel Kolder, a plastic surgeon. Kolder stated he had reviewed Onugha’s medical records and concluded “the care delivered falls below the standard of care.” Kolder classified Onugha as a “Fitzpatrick 6 skin type” who represented a “high risk.” He opined that Onugha’s “natural pigment increases her risk of having a burn following any light or laser treatment” and her treatment in this case “did not begin with a test spot to assess the risks involved.” Kolder noted that Onugha’s procedure was performed by “an aesthetician without any formal medical training” and there was “no direct supervision” of the treatment with “the end result being a partial thickness burn to the treated areas.” It was only in the follow-up period that Onugha interacted with Walker, an obstetrician, who immediately referred her to a dermatologist and

refunded her money. Kolder estimated that treatments to improve the appearance of Onugha's burned skin would cost approximately \$58,000. Attached to the report was Kolder's curriculum vitae showing he was board certified by the American Board of Plastic Surgery.

Walker filed a motion objecting to Kolder's report and requested the trial court dismiss Onugha's claims based on her failure to file an expert report meeting the requirements of chapter 74. Specifically, Walker contended Kolder's report did not constitute a good faith effort to provide a fair summary of the standard of care, how that standard was breached, or how any alleged breach by Walker caused Onugha's injuries. Walker further contended the report failed to demonstrate how Kolder was qualified to opine regarding the duties and responsibilities owed by Walker.

At the hearing on Walker's motion, Onugha's counsel conceded that Kolder's expert report was brief, but argued it was sufficient to meet the requirements of chapter 74. Counsel stated the simplicity of the case did not require anything further. The trial court stated he thought it was "close," but "on this particular report, I think you're okay for now." The court denied Walker's motion to dismiss and this appeal followed.

Analysis

When a party files a health care liability claim, they must file an expert report within 120 days of filing the petition. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351.¹ If the party fails to file an expert report showing their claims have merit within that time period, the claims are subject to dismissal. *Id.* The expert report need not marshal all the plaintiff's evidence, but it must provide “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.” *See id.* § 74.351(r)(6); *Abshire v. Christus Health Se. Tx.*, 563 S.W.3d 219, 223 (Tex. 2018) (per curiam).

The purpose of the expert report requirement is to deter frivolous claims, not dispose of claims regardless of their merits. *Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011). For this reason, if a report is found to be inadequate, chapter 74 authorizes a thirty-day extension within which a plaintiff may attempt to cure the report's deficiencies. *Id.* at 557. “All deficiencies, whether in the expert's opinions or qualifications, are subject to being cured before an appeal may be taken from the trial court's refusal to dismiss the case.” *Id.*

¹ Onugha does not dispute that her claims are health care liability claims subject to the requirements of chapter 74. *See Kanase v. Dodson*, 303 S.W.3d 846, 849 (Tex. App.—Amarillo 2009, no pet.) (claims arising out of IPL procedure were health care liability claims requiring service of expert report).

A trial court's ruling on the sufficiency of an expert report is reviewed for an abuse of discretion. *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015) (per curiam). Under that standard, we defer to the trial court's factual determinations if they are supported by evidence, but review legal determinations de novo. *Id.* A trial court abuses its discretion if it rules without reference to guiding rules or principles. *Id.*

In analyzing an expert report's sufficiency, we consider only the information contained within the four corners of the report. *Abshire*, 563 S.W.3d at 223. We may not "fill gaps" in a report by drawing inferences or guessing what the expert likely meant or intended. *Hollingsworth v. Springs*, 353 S.W.3d 506, 513 (Tex. App.—Dallas 2011, no pet.). In this case, Walker has asserted that virtually all aspects of Kolder's expert report were deficient. We begin by addressing Kolder's qualifications.

To qualify as an expert report, the report must be drafted by an "expert" as that term is defined in chapter 74. In a suit against a physician for injury to a patient, the expert must be a physician who:

- (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 ANN. § 74.401. The party offering the report must establish the expert has knowledge, skill, experience, training, or education regarding the *specific issue* before the court which would qualify the expert to give an opinion on that particular subject. *Broders v. Heise*, 924 S.W.2d 148, 152–53 (Tex. 1996); *see also Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001) (courts must ensure those that purport to be experts truly have expertise concerning actual subject about which they are offering opinion).

Here, the report and curriculum vitae submitted by Onugha showed Kolder was board certified in plastic surgery. The documents did not, however, demonstrate that Kolder had any knowledge, skill, education, experience, or training concerning IPL procedures or any other type of laser or light treatment. Kolder’s certification in plastic surgery is not, by itself, sufficient to show he has expertise in the subject matter on which he was giving his opinion. *See Broders*, 924 S.W.2d at 153 (citing *O’Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1390 (C.D. Ill. 1992) (“[N]o medical doctor is automatically an expert in every medical issue merely because he or she has graduated from medical school or has achieved certification in a medical specialty.”)). We conclude Kolder’s report was insufficient to show he was qualified as an expert for the purposes of chapter 74 on the IPL treatment made the subject of this suit.

Walker also contends Kolder’s report was deficient in that it failed to set forth the standard of care applicable to Walker and how she breached that standard. To

adequately identify the standard of care, an expert report must include “specific information about what the defendant should have done differently.” *Abshire*, 563 S.W.3d at 226. The report must do more than merely state the expert’s conclusions about the standard of care, breach, and causation; it must explain the basis of the expert’s statements and link his conclusions to the facts. *Fortner v. Hosp. of the Sw., LLP*, 399 S.W.3d 373, 379 (Tex. App.—Dallas 2013, no pet.).

Kolder stated in his report that “the care delivered [fell] below the standard.” But nowhere in the report did Kolder state what the applicable standard of care was or how Walker’s conduct fell below that standard. Although Kolder noted that Onugha’s treatment “did not begin with a test spot,” he did not opine that the standard of care required this action. As explained above, we may not “fill gaps” in a report by drawing inferences or guessing what the expert likely meant or intended. *See Hollingsworth*, 353 S.W.3d at 513. Additionally, it is clear from the report that the IPL procedure was performed by an aesthetician, not Walker. Although Kolder observed that the aesthetician “had no direct supervision,” he did not go on to explain what the standard of care was with respect to supervision or what specific supervisory actions Walker should have taken that she did not. In short, Kolder provided no specific information about what Walker should have done differently.

Finally, with regard to causation, the expert must explain, based on facts set out in the report, how and why the asserted breach of the standard of care caused the alleged injury. *Van Ness*, 461 S.W.3d at 142. The report must specifically link the

expert's conclusions on causation to the facts. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam). Causation may be shown by explaining a chain of events that begins with the defendant physician's negligence and ends in injury to the plaintiff. *Nexion Healthcare Mgmt., Inc. v. Sosa*, No. 05-15-01083-CV, 2016 WL 1457069, at *4 (Tex. App.—Dallas April 12, 2016, no pet.) (mem. op.); *McKellar v. Cervantes*, 367 S.W.3d 478, 485 (Tex. App.—Texarkana 2012, no pet.).

In this case, Kolder's report stated that an aesthetician, without any formal medical training or direct supervision, performed the IPL procedure on Onugha "with the end result being a partial thickness burn to the treated areas." The report made no connection between any action or omission by Walker and Onugha's injuries. As a result, the report failed to demonstrate a causal relationship between Walker's alleged negligence and the injuries Onugha purportedly suffered. Because Kolder's report did not sufficiently address Kolder's qualifications, the standard of care applicable to Walker, how Walker breached that standard, or how any alleged breach caused Onugha's injuries, the trial court abused its discretion in determining the report met the requirements of chapter 74.

When a court of appeals determines that an expert report deemed sufficient by the trial court is, in fact, deficient, the court of appeals may remand the cause to the trial court for a determination of whether the plaintiff is entitled to a thirty day extension to cure the deficiencies. *Leland v. Brandal*, 257 S.W.3d 204, 207 (Tex.

2008). Walker contends this Court should not remand the case, but instead render judgment dismissing Onugha's claims, because Kolder's report was so deficient with respect to the required statutory elements that it was not a good faith effort and constituted no report at all. But a court must grant an extension if a report's deficiencies are curable. *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 461 (Tex. 2017). The Texas Supreme Court has admonished that courts should be "lenient" in granting thirty-day extensions where the expert report does not demonstrate the plaintiff's claims are frivolous. *See Scoresby*, 346 S.W.3d at 554. Although deficient, Kolder's report contained enough information to identify the basis of Onugha's claims and to implicate Walker's conduct. We cannot say that it would be impossible for the deficiencies in the report to be cured. Accordingly, the trial court must be given an opportunity to consider an extension. *Zamarripa*, 526 S.W.3d at 461.

We reverse the trial court's order denying Walker's objections and motion to dismiss and remand the case to the trial court for further proceedings consistent with this opinion.

/Amanda L. Reichel/
AMANDA L. REICHEK
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

CHRISTY WASHINGTON
WALKER, M.D., Appellant

No. 05-19-00801-CV V.

AMANDA ONUGHA, Appellee

On Appeal from the 219th Judicial
District Court, Collin County, Texas
Trial Court Cause No. 219-06365-
2018.

Opinion delivered by Justice
Reichek.

Justices Pedersen, III and Carlyle
participating.

In accordance with this Court's opinion of this date, the order of the trial court denying CHRISTY WASHINGTON WALKER's objections to the chapter 74 expert report of Daniel G. Kolder, M.D. and motion to dismiss is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant CHRISTY WASHINGTON WALKER, M.D. recover her costs of this appeal from appellee AMANDA ONUGHA.

Judgment entered June 16, 2020