AFFIRMED and Opinion Filed July 16, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-01191-CV

HENRY STEPHENSON BYRD, M.D., JOHN LANIER BURNS, JR., M.D., RICHARD YOUNGMIN HA, M.D., ALTON JAY BURNS, M.D., JASON KYLE POTTER, M.D., MATTHEW JOHN TROVATO, M.D., BRADLEY ALAN HUBBARD, M.D., AND BRYAN STAPP ARMIJO, M.D., Appellants
V.
ROLANDA HUTTON AND BRYAN HUTTON, Appellees

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-15886

MEMORANDUM OPINION

Before Justices Whitehill, Osborne, and Carlyle
Opinion by Justice Osborne

This is a health care liability case under Chapter 74 of the civil practice and remedies code. Appellees Rolanda Hutton and Bryan Hutton sued appellants Henry Stephenson Byrd, M.D., John Lanier Burns, Jr., M.D., Richard Youngmin Ha, M.D., Alton Jay Burns, M.D., Jason Kyle Potter, M.D., Matthew John Trovato, M.D., Bradley Alan Hubbard, M.D., Bryan Stapp Armijo, M.D., and others for personal injuries to Rolanda following a surgical procedure. The Huttons served an expert report to support their claims. Appellants filed a motion to dismiss, contending that

the Huttons' report did not satisfy Chapter 74's requirements. The trial court denied the motion, and appellants timely perfected this interlocutory appeal. We affirm the trial court's order.

BACKGROUND

We summarize the relevant facts alleged in the Huttons' operative petition. On January 16, 2017, Rolanda Hutton underwent surgical procedures including liposuction of the abdomen, bilateral flanks, and back, followed by autologous fat grafting to the buttocks of the suctioned fat, commonly known as a "Brazilian butt lift." The surgery was performed by Sameer Subhash Jejurikar, M.D. at Dallas Plastic Surgery Institute, Inc./Dallas Plastic Surgery Institute Management, P.A. and Dallas Day Surgery Center, Inc./Dallas Day Surgery of Texas North, Ltd. ("DDSTN").

Following the procedure, while in the post-anesthesia care unit, Hutton reported that she could not feel her feet or legs. Later, she complained of leg pain. Although Hutton had an IV in place and was "experiencing postoperative paralysis and paresthesia," she was discharged from the surgery center to The Cloister, PLLC d/b/a The Cloister at Park Lane, described in the petition as "a luxury postoperative hotel." While under the care of the nurses at The Cloister, Hutton experienced and was noted to have increased pain, paralysis, and paresthesias, as well as pink to dark-colored and decreased urine output. Forty-eight hours after her entry into The Cloister, Dr. Jejurikar ordered a non-emergent transfer to the Texas Health

Presbyterian Hospital of Dallas Emergency Room. At the time of admission to the emergency room, Hutton was noted to have severe rhabdomyolysis, acute renal failure, and weakness and loss of sensation to her bilateral lower extremities.

This appeal concerns only the claims against appellants in their capacity as managing partners or managing members of DDSTN or The Cloister, or both.[1] None of the appellants personally treated Hutton. The Huttons' claims are for negligence in the creation and implementation of policies and procedures relating to patient discharge from DDSTN and transfer to The Cloister.

In particular, the Huttons allege appellants were negligent in:

- Creating, implementing, and failing to change policies and procedures that allowed DDSTN patients with IV access and postsurgical complications to be discharged, particularly those like Hutton who needed to be emergently transferred to a hospital; and
- Creating, implementing, and failing to change policies and procedures that allowed patients discharged from DDSTN with IV access and postsurgical complications to be admitted to The Cloister, an unlicensed and improperly staffed and equipped facility for postsurgery patients, particularly those

[1] All of the appellants are managing members of The Cloister. Appellants Byrd, Ha, Potter, John Lanier Burns, Jr. and Alton Jay Burns are managing partners of DDSTN. Because all of appellants were managing members of The Cloister but not of DDSTN, we focus on the expert opinions regarding The Cloister. *See Certified EMS v. Potts*, 392 S.W.3d 625, 632 (Tex. 2013) (expert report that adequately addresses at least one pleaded liability theory satisfies statutory requirements).

like Hutton with IV access and postsurgical complications who emergently needed to go to a hospital.

In support of their claims, the Huttons served the expert report[2] of Steve B. Lowenthal, M.D., M.P.H. Dr. Lowenthal is the Chief Medical Officer of Rush Copley Medical Center in Illinois, a position he has held since 2005. The trial court overruled appellants' objections to Dr. Lowenthal's report by order of August 29, 2019, finding that "the expert report and CV served and filed by Plaintiff constitutes a good faith effort and meets the requirements of Tex. Civ. Prac. & Rem. Code § 74.351." This appeal followed.

ISSUES

In three issues, appellants contend Dr. Lowenthal's report is deficient because:

1. Dr. Lowenthal is not qualified to opine "about the alleged breaches of standards of care and the alleged legal relationships underpinning them";
2. The report did not clearly identify appellants' breaches of standards of care; and

[2] The Huttons served an initial report by Dr. Lowenthal dated August 3, 2018 and supplemented on January 21, 2019, and an amended report dated March 22, 2019. Only the latter report is at issue in this appeal.

3. The report fails to explain, "in a non-conclusory manner," the causal connection between the alleged breaches in the standard of care and Hutton's injuries.

The Huttons have requested sanctions against appellants under rule of appellate procedure 45, arguing that this appeal is frivolous. *See* TEX. R. APP. P. 45 (damages for frivolous appeals in civil cases).

STANDARD OF REVIEW

We review a trial court's order on a motion to dismiss a health care liability claim for an abuse of discretion. *Nexion Health at Duncanville, Inc. v. Ross*, 374 S.W.3d 619, 622 (Tex. App.—Dallas 2012, pet. denied). A trial court abuses its discretion if it rules arbitrarily and without reference to guiding rules and principles. *Id.* The trial court has no discretion in determining what the law is or in applying the law to the facts. *Id.*

DISCUSSION

Chapter 74 of the civil practice and remedies code requires a claimant pursuing a health care liability claim to serve one or more expert reports no later than 120 days after the defendant's original answer is filed. TEX. CIV. PRAC. & REM. CODE § 74.351(a). A "health care liability claim" includes a cause of action for a claimed departure from accepted standards of "professional or administrative services directly related to health care." TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13).

An expert report is sufficient if it represents an objective good faith effort to comply with Chapter 74's requirements. TEX. CIV. PRAC & REM. CODE § 74.351(*l*). An expert report must provide a fair summary of the expert's opinions regarding applicable standards of care, the manner in which the care rendered by the health care provider failed to meet the standards, and the causal relationship between the failure and the injury, harm, or damages claimed. *Id.* § 74.351(r)(6).

The purpose of the expert report is to deter frivolous claims, not to dispose of claims regardless of their merits. *Loaisiga v. Cerda*, 379 S.W.3d 248, 258 (Tex. 2012). A report need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute. *Id.*

1. Dr. Lowenthal's qualifications

Appellants argue that Dr. Lowenthal "is simply not qualified to render opinions" on "legal issues of management" of entities such as DDSTN and The Cloister. They concede that he "might (or might not) be qualified to render opinions on medical decisions or even decisions of medical managers" in his position as a chief medical officer, but they contend he is not qualified to determine who is legally responsible for an entity's policies under applicable statutes or governing corporate documents. They further argue that Dr. Lowenthal has no legal expertise and is not qualified to interpret Texas statutes, and, in any event, appellants are not liable under the sections of the business organization code on which Dr. Lowenthal relies.

The Huttons respond that Dr. Lowenthal "is not opining on the law," nor is expert testimony about legal relationships required under Chapter 74. They concede that Dr. Lowenthal reviewed provisions from the Texas Business Organizations Code as part of the many reports, testimony, and other documents he reviewed in the course of developing his opinions. But they argue that his opinions are not legal opinions; they are opinions regarding "administrative departures from the standard of care that are directly related to the provision of health care." *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13) ("health care liability claim" includes "other claimed departure from accepted standards of . . . safety or professional or administrative services directly related to health care"); *Baylor Univ. Med. Ctr., Inc. v. Daneshfar*, No. 05-17-00181-CV, 2018 WL 833373, at *3 (Tex. App.—Dallas Feb. 12, 2018, pet. denied) (mem. op.) ("To be a health care liability claim, the cause of action for a claimed departure from accepted standards of professional or administrative services must be 'directly related to health care.'") (quoting statutory definition).

In his report, Dr. Lowenthal explained his qualifications to render an opinion on administrative matters relating to the provision of health care:

> Following my career as a Urologist and in preparation to become a CMO [Chief Medical Officer], I obtained a Master of Public Health degree (Health Services Management concentration) from the Medical College of Wisconsin . . . . Some of my extensive responsibilities as a CMO include direct responsibility for quality/patient safety programs, Medical Staff affairs (including credentialing/privileging, bylaws, regulatory compliance), care management, utilization/risk management and physician peer review. In this role, I have reviewed (and authored) many hospital policies and procedures and have worked collaboratively

> with my fellow nursing and administrative executives to develop systems to ensure patient safety and quality of care. Additionally, in my previous role as intermittent consultant with Joint Commission Resources (the consulting arm of the Joint Commission), I had the opportunity to consult with hospitals throughout the country on medical staff issues particularly around their compliance with Joint Commission standards.
>
> Rush Copley Medical Center owns an ambulatory surgical center that complies with A4SF accreditation (American Association for Accreditation of Ambulatory Surgery Facilities), the gold standard in accreditation for ambulatory surgery centers. As CMO of Rush Copley Medical Center, I have senior executive oversight of this surgicenter, ensuring compliance between the policies and procedures of the surgicenter and the A4SF standards.

Dr. Lowenthal's report includes his opinion that, among other problems, The Cloister "was functioning as an acute care facility" where physicians' orders were carried out by licensed clinical professionals, even though the facility itself was not licensed or regulated. He explains that although patients were told that The Cloisters "is not a hospital" and they would be "ultimately responsible" for their own post-operative care contained in their discharge instructions, "the policies and procedures established at the Cloisters are designed to have care provided by nursing personnel and not by the patient or their family." Consequently, Hutton received clinical care at The Cloister "for days prior to the transfer to the hospital." Dr. Lowenthal explains:

> If care at the Cloister was the same as what the patient would have received in their own home, then when the patient initially encountered any problems whatsoever, 911 would have been called and Ms. Hutton would have been immediately transferred to the closest hospital emergency room. Instead, the nursing personnel at the unlicensed

> Cloister Hotel provided nursing care and treatment to Ms. Hutton at the hotel for days before transferring her to the hospital. It was beneath the standard of care and negligent to operate the Cloister Hotel as an unlicensed skilled nursing facility when standard of care for an unlicensed facility would have been to call 911, whereas standard of care for a licensed skilled nursing facility would never have written and implemented policies and procedures that would have allowed admittance of a patient with IV access and postsurgical complications like Ms. Hutton.

We conclude that Dr. Lowenthal's report reflects his opinions regarding departures from "accepted standards" for "professional or administrative services" that are "directly related to health care," not legal opinions. *See* TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). And although appellants argue that Dr. Lowenthal "might (or might not) be qualified to render opinions on medical decisions or even decisions of medical managers," Dr. Lowenthal's report and curriculum vitae provide information from which the trial court could have concluded that he is qualified to render the opinions included in his report. *See id.* §§ 74.401–74.403 (addressing qualifications of expert witnesses under Chapter 74).

We conclude the trial court did not abuse its discretion by overruling appellants' objections to Dr. Lowenthal's qualifications. Consequently, we decide appellants' first issue against them.

2. Breaches of the standards of care

In their second issue, appellants argue that Dr. Lowenthal "fails to support his legal opinions" that appellants "have a duty to a patient they did not treat to promulgate certain policies in the surgery center and the hotel that are

indeterminately related to the injury allegedly sustained." They contend, citing *Senior Care Centers, LLC v. Shelton*, 459 S.W.3d 753, 758–59 (Tex. App.—Dallas 2015, no pet.), that Hutton's injury alone does not establish a breach of the standard of care "because the doctrine of *res ipsa loquitur* does not generally apply in medical malpractice cases." They argue that the expert must "pinpoint where the alleged breach actually occurred."

Dr. Lowenthal's report is not limited to a description of Hutton's injuries. In fact, Dr. Lowenthal relies in part on the reports of other medical experts for details of the injuries and the treatment that Hutton alleges she should have received to address her postsurgical complications. Instead, Dr. Lowenthal describes the standard-of-care policies that, in his opinion, appellants should have had in place to avoid injury to patients and would have resulted in Hutton's transfer "to an acute care hospital or another licensed facility to meet her medical needs" upon discharge from DDSTN.

Dr. Lowenthal points out, among other problems, that The Cloisters had no policy against accepting a patient who was on an IV, who was experiencing postsurgical complications, or who otherwise needed continued medical care. And although patients were instructed that they were responsible for their own post-operative care, Dr. Lowenthal opines that this was not the case in practice. Instead, patients received nursing care at an unlicensed hotel rather than transfer to a hospital emergency room. Dr. Lowenthal explains how his education and experience gave

him familiarity with policies for ambulatory surgery centers, and he opines that there should have been policies and procedures in place to prevent a patient with postsurgical complications like Hutton's from being discharged from the surgicenter and transferred to a hotel. Unlike the expert in *Shelton*, whose "report appear[ed] to conclude that there was a breach based only on a result," 459 S.W.3d at 758, Dr. Lowenthal focuses on what appellants' policies should have been, not on Hutton's resulting injuries.

We conclude that the trial court did not abuse its discretion by overruling appellants' objection that Dr. Lowenthal's report inadequately addressed the applicable standards of care and how appellants failed to meet those standards. We decide appellants' second issue against them.

3. Causation

An expert must explain, to a reasonable degree of medical probability, how and why the negligence caused the injury. *Jelinik v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010). Appellants argue that "Dr. Lowenthal simply never explains any connection at all between the absence of the policies he says should be there at [DDSTN] and The Cloister and an ultimate harm." They argue Dr. Lowenthal's opinions are conclusory because "Dr. Lowenthal never even explains the damage he thinks Mrs. Hutton suffered, let alone how it is even conceivably related to the claimed absence of a policy on IVs or release when the patient is not stable." Citing *Jelinek*, 328 S.W.3d at 536, appellants argue that Dr. Lowenthal failed to explain, to

a reasonable degree of medical probability, "how and why the negligence caused the injury." They conclude, "[t]here is simply no attempt to draw a coherent causal link between the alleged failure to promulgate certain policies and the ultimate injury claimed."

Regarding The Cloister, Dr. Lowenthal stated:

> If the Cloister Hotel had been properly licensed as a skilled nursing facility and had enacted policies and procedures to the standard of care, the skilled nursing facility would not have accepted transfer of Ms. Hutton or would have immediately transferred her to an acute care hospital for emergency surgery, since her condition was beyond the scope of a skilled nursing facility. If this had occurred, then as Drs. Anthony and Flanigan related in their reports, Ms. Hutton would likely have undergone emergency decompressive surgery and would have avoided the permanent paresthesia and paralysis that she still suffers today.

An expert report is not conclusory where it describes what the defendant should have done and what happened because he failed to do it. *Fagadau v. Wenkstern*, 311 S.W.3d 132, 139 (Tex. App.—Dallas 2010, no pet.). Dr. Lowenthal opines that had appellants enacted standard-of-care policies about transfer of patients suffering conditions "beyond the scope of a skilled nursing facility," Hutton would likely have avoided the permanent injuries described by her other experts. *See Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 513 (Tex. 2017) (per curiam) ("A trial court may read several reports in concert in determining whether a plaintiff has made a good-faith effort to comply with the Act's requirements.") (citing TEX. CIV. PRAC. & REM. CODE § 74.351(i) and *TTHR Ltd. P'ship v. Moreno*,

401 S.W.3d 41, 43 (Tex. 2013)); *Baylor Univ. Med. Ctr. v. Rosa*, 240 S.W.3d 565, 570 (Tex. App.—Dallas 2007, pet. denied) (Chapter 74 "does not require that a single expert address all liability and causation issues with respect to a health care provider.").

We conclude that the trial court did not abuse its discretion by overruling appellants' objection that Dr. Lowenthal's report lacked a causation opinion. We decide appellants' third issue against them.

4. Request for sanctions

In their cross-issue, the Huttons request sanctions, contending that this appeal is frivolous. The Huttons argue that this appeal was one of several attempts to delay discovery and trial, asserting that "[t]he current appeal is the fourth time the defendants in this case have brought proceedings in this Court."[3] They argue that this Court may award damages when an appeal is objectively frivolous and injures the appellee.

Rule of appellate procedure 45 provides:

> If the court of appeals determines that an appeal is frivolous, it may—on motion of any party or on its own initiative, after notice and a

[3] We note that these appellants were parties to only one of the mandamus proceedings in this Court. *See In re John Lanier Burns, Jr., M.D.*, No. 05-19-01352-CV, 2020 WL 881018 (Tex. App.—Dallas Feb. 24, 2020, orig. proceeding) (mem. op.) (petition for writ of mandamus dismissed). The other original proceedings were brought by other defendants in the trial court who are not parties to this appeal. *See In re Dallas Plastic Surgery Inst., Inc.*, No. 05-18-01390-CV, 2019 WL 1578251 (Tex. App.—Dallas April 12, 2019, orig. proceeding) (mem. op.) (mandamus denied); *In re Rodney James Rohrich, M.D.*, No. 05-19-00578-CV, 2019 WL 2171243 (Tex. App.—Dallas May 20, 2019, orig. proceeding) (mem. op.) (mandamus denied). All of these proceedings were discovery disputes.

> reasonable opportunity for response—award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals.

TEX. R. APP. P. 45. "An appeal is frivolous if, at the time asserted, the advocate had no reasonable grounds to believe judgment would be reversed or when an appeal is pursued in bad faith." *Njuku v. Middleton*, 20 S.W.3d 176, 178 (Tex. App.—Dallas 2000, pet. denied); *see also Am. Paging of Tex., Inc. v. El Paso Paging, Inc.*, 9 S.W.3d 237, 240 (Tex. App.—El Paso 1999, pet. denied) (appellate sanctions imposed only if the record clearly shows the appellant has no reasonable expectation of reversal and has not pursued the appeal in good faith). We impose sanctions only under circumstances we find truly egregious. *D Design Holdings, L.P. v. MMP Corp.*, 339 S.W.3d 195, 205 (Tex. App.—Dallas 2011, no pet.). Although we have rejected appellants' arguments, an issue's lack of merit does not necessarily equate to bad faith. *Cedacero-Guamancela v. Sustaita-Salazar*, No. 05-18-00083-CV, 2019 WL 289663, at *4 (Tex. App.—Dallas Jan. 23, 2019, no pet.) (mem. op.). On this record, we do not conclude that the circumstances of this appeal were truly egregious. *See id.* We decide appellees' cross-point against them.

CONCLUSION

We affirm the trial court's order denying appellants' motion to dismiss.

/Leslie Osborne/
LESLIE OSBORNE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

HENRY STEPHENSON BYRD, M.D., JOHN LANIER BURNS, JR., M.D., RICHARD YOUNGMIN HA, M.D., ALTON JAY BURNS, M.D., JASON KYLE POTTER, M.D., MATTHEW JOHN TROVATO, M.D., BRADLEY ALAN HUBBARD, M.D., AND BRYAN STAPP ARMIJO, M.D., Appellants

No. 05-19-01191-CV V.

ROLANDA HUTTON AND BRYAN HUTTON, Appellees

On Appeal from the 14th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-17-15886. Opinion delivered by Justice Osborne; Justices Whitehill and Carlyle participating.

In accordance with this Court's opinion of this date, the trial court's order of August 29, 2019 overruling appellants' objections to the expert report of Dr. Steve B. Lowenthal is **AFFIRMED**.

It is **ORDERED** that appellees Rolanda Hutton and Bryan Hutton recover their costs of this appeal from appellants.

Judgment entered July 16, 2020