TEXAS LAWYER
EXPERT OPINION

Opining on Sexual Abuse in a Nursing Home

Elisa Reiter and Daniel Pollack | September 3, 2021

A family's expectations for their loved one living in a nursing home are straightforward: high quality, personal care. Sadly, nursing home abuse – neglect, physical abuse, sexual abuse – is a serious issue across the country. Three physical signs of nursing home patient sexual abuse are:

- Unexplained vaginal or rectal bleeding
- Contusions or bruising around the genital area
- Sexually transmitted infections (STIs) or frequent urinary tract infections (UTIs)

When a nursing resident is alleged to have been sexually abused and a lawsuit follows, a key person for plaintiff attorneys to retain is a

competent expert witness. Naturally, that person must be properly credentialed and have the requisite experience. But there's more.

Earlier this year, in *Jacksboro Nursing Operations, LLC v. Norman,* (2021 Tex. App. LEXIS 2916, Court of Appeals of Texas, Second District, Fort Worth, April 15, 2021, Delivered No. 02-20-00262-CV), the court considered whether the appellees' failure to file an expert report that met the prerequisites of the Texas Medical Liability Act mandated dismissal of their claims. Here are the underlying facts: Ashley Norman was admitted to Faith Community Nursing and Rehabilitation ("FCNR"), where it was expected that she would be protected and given reasonable care. Instead, it was alleged that Ashley was raped by the "Doe Defendants" while she was in FCNR's care. Ashley was 30 years old, and suffered from Multiple Sclerosis. The plaintiff, Nadine Norman, acting individually and as representative of Ashley Norman's estate, and as next friend of E.N. and J.L, sought damages based on a number of causes of action, against the Doe defendants. These included "sexual assault, false imprisonment, assault and battery, offensive physical contact, intentional infliction of emotional distress, and gross negligence." Allegations against FCNR included "negligence, negligent hiring, negligent training, negligent supervision, and negligent retention."

A Rule 11 Agreement was filed in the case, extending the response date for the plaintiff to provide an expert report per TCPRC 74.351. Dr. David A. Smith was the expert. His report was timely filed, and a copy of his curriculum vitae was duly provided. The report alluded to Ashley contracting "trichomonas . . . thought to be due to sexual contact that [had] occurred at FCNR." The report detailed the standard of care to be expected for a patient like Ashley, outlining several breaches of the

standard of care by the Doe Defendants, and further breaches by FNCR for failing to investigate Ashley's outcries of sexual assault, to protect her, and to supervise its employees properly.

FCNR filed objections to the Smith report, challenging his credentials as to the standard of care due Ashley, as well as to FCNR. One of the key issues was that, while Ashley was a patient at FCNR, a urine test showed a negative result for any sexually transmitted disease. Another test, taken approximately one month after Ashley's admission, but after she had been transferred to another facility (only to be transferred back to FCNR), stated that she had trichomonas. FCNR filed a motion to dismiss, based on TCPRC 74.351. The trial court denied the motion.

Texas Civil Practice and Remedies Code 74.351, also known as the MLA, mandates that health care liability claimants serve an expert report on each defendant no later than 120 days after the defendant's answer is filed. By mandating such a report, the premise is "to weed out frivolous malpractice claims in the early stages of litigation, not to dispose of potentially meritorious claims."

What test is applied by a trial court as to an expert report? A challenge to an expert report should be granted "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." The Texas Supreme Court held that a good-faith effort occurs when such a report "(1) inform[s] the defendant of the specific conduct called into question and (2) provid[es] a basis for the trial court to conclude the claims have merit."

While an expert report does not need to include all of the claimant's proof, a report that merely states the expert's conclusions about the standard of care, breach and causation would not be satisfactory. Such a report need not meet the standards of summary judgment evidence. What would be adequate? The expert report should identify "specific information about what the defendant should have done differently." In regard to causation, the expert report must "explain 'how and why' the alleged negligence caused the injury in question. In lieu of conclusory observations, experts must connect their conclusions to facts specific to the case upon which they opine.

In this case, the appellate court notes FCNR's argument that Dr. Smith was incompetent to opine on the standard of care "turns a blind eye to the qualifications that Dr. Smith listed in his report. His report establishes his qualifications to opine not only on the standard of care for a physician treating a patient such as Ashley but also on the standard of care for a health care provider such as FCNR." Dr. Smith's report noted that he is a geriatrician, duly licensed to practice medicine in Texas, board certified by the American Board of Family Practice. His practice includes consulting for community dwelling elders and long-term care residents. Dr. Smith served as a Professor of Family & Community Medicine at Texas A&M University, and prior to that position, he held a tenured position at the University of South Dakota School of Medicine. In addition to his practice and teaching positions, Dr. Smith was Associate Editor of the Journal of American Medical Directors Association, a Managing Editor of the Annual of Nursing Home Medicine, and served on the Editorial Board of the Journal of Long-Term Care and Administration. Dr. Smith's work history included many healthcare and rehabilitation centers, and membership in all the societies and associations one would

expect from someone of his experience (American Medical Directors Association, Society for Post-Acute and Long-Term Care, the American Geriatrics Society, the Texas Medical Association, and the Texas Medical Directors Association).

Dr. Smith specifically addressed his familiarity with the standard of care that a nursing facility owed Ashley, versus the care she actually received. Dr. Smith was not merely a physician who treated patients in facilities like FCNR.

"Here, Dr. Smith's report and CV show that he has training and experience . . . Dr. Smith is not only a physician who had treated patients in a long-term setting, but he also had actually been employed as an administrator of those type of facilities and wrote and lectured on the administration of such facilities . . .[he] specifically states in his report that he has 'dedicated [his] life to treating people like Ashley' and is 'well aware of the standard of care required of physicians, nurses, and nursing facilities that provide treatment to patients with such conditions.' The appellate court rejects FNCR's argument that the case should be dismissed for the failure of Dr. Smith's report to state that a breach of the standard of care was the proximate cause of Ashley's death. "The Texas Supreme Court was clear in Certified EMS, Inc. v. Potts that an expert report meets the requirements of the MLA if the report supports at least one theory of recovery." The appellate court concludes that "if Plaintiff filed an adequate report to support the claim of a breach of the standard of Ashley's care and her survival claim, then the report need not go further and support the wrongful-death claim to avoid dismissal."

The Court of Appeals Second Appellate District of Texas at Fort Worth in FCNR remanded the case "to allow the trial court to decide whether an amended report may be filed . . . Thus, it is premature to deal with the argument that we should hold that the claim should be dismissed because it fails to support a theory of vicarious liability." The appellate court agreed that Dr. Smith's report was deficient in regard to its statements that there was a breach of the standard of care as to FCNR; provided, however, that it reversed the trial court's order denying the motion to dismiss and remands the matter to the trial court for the trial court to determine whether or not to grant plaintiff a thirty-day extension to cure any deficiencies in Smith's report. The appellate court added that no matter how simply stated TCPRC 74.351(l) appears to be, there has been an inconsistent application of the rule to cases involving the sexual assault of patients. Quoting lengthy portions of the Smith report, the appellate court nonetheless found the report inadequate, notwithstanding consistent themes attributable to the quoted language:

1. Many of the quoted sections address the Doe Defendants, propounding that "no persons should be sexually assaulted." There is however, no connection between that sound proposition and "how FCNR breached a standard of care that it owed directly to Ashley."
2. The relevance of FCNR's internal investigation of what happened to Ashley while she was a patient at FCNR. Failure to investigate after the fact does not prevent the initial assault; however, Ashley's report of the initial assault did not prevent authorities at FCNR from taking steps to assure that she was not again sexually assaulted.
3. The report does not address "why the actions or policies of a health care provider, such as FCNR, breached the standard of care and caused the continued assaults." What could have been done to assure that additional assaults on Ashley were thwarted?
4. The report lacks "a description of what FCNR should have done differently."
5. The report:

[i]s deficient because it is conclusory. For a sexual-assault-of-a-patient claim, a report must describe what the health care provider should have done to forestall an assault, or it does not serve the purpose of ensuring that only meritorious health care claims survive dismissal.

The appellate court concluded that rendering judgment is atypical. Instead, the appropriate cure, when a report meets the minimal standards, is to remand for the trial court to determine whether to grant a thirty-day extension. And that's just what the court did, on the basis of granting one out of five points of error presented.

The moral of the story for attorneys: Declare your experts on time and review their reports to determine if the expert complied with the requirements of the TCPRC.

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