Affirmed and Opinion filed September 13, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00917-CV

MELANIE A. BOBO, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF WILLIAM HENRY BOBO, JR., DECEASED, AND AS NEXT FRIEND OF SARA AND JOSHUA BOBO, MINORS, Appellants

V.

WILLIAM B. BERRY, M.D., AND PASADENA BAYSHORE HOSPITAL, INC., D/B/A COLUMBIA BAYSHORE MEDICAL CENTER, Appellees

---

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 1999-36791-A

O P I N I O N

This appeal stems from the trial court's dismissal with prejudice of a medical malpractice claim brought by appellants, Melanie A. Bobo, et. al. The trial court dismissed appellants' claim with prejudice because of their failure to comply with section 13.01 of the Medical Liability and Insurance Improvement Act ("4590i"). The trial court also refused appellants' motion to extend the time period to file an adequate expert report.

Pursuant to 4590i, within 180 days of filing suit, a plaintiff must either (1) furnish a statutorily sufficient expert report to counsel for each physician or healthcare providers

sued, or (2) voluntarily nonsuit the action against the physician or healthcare provider. On appeal, appellants contend that the trial court erred in dismissing its claims against Bayshore, or, alternatively, the trial court erred in refusing to grant them additional time to file an adequate expert report. Based on the reasoning below, we affirm the judgment of the trial court.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Mr. Bobo passed away during his second coronary artery bypass surgery. On July 19, 1999, appellants sued the physicians who performed the procedure, as well as appellee Bayshore Medical Center ("Bayshore"). In an attempt to comply with the requirements of 4590i, appellants' expert, Barry L. Fields, M.D., prepared an expert report. On October 22, 1999, Bayshore wrote to appellants' counsel, pointing out the deficiencies in Dr. Field's report . Bayshore then filed a Motion to Require Cost Bond and, later, an Amended Motion to Require Cost Bond. On January 25, 2000, appellants filed their response to Bayshore's First Amended Motion to File Cost Bond, and attached to their response their trial counsel's affidavit. In this affidavit, appellants' counsel swore that he was aware of article 4590i, section 13.01(d), and claimed his noncompliance with the statute was the result of "accident or mistake, and was not intentional disregard or the result of conscious indifference." The trial court granted appellants a 30-day extension of time to file an amended report, or post a cost bond of $7,500.00.

No amended report being filed, on April 14, 2000, Bayshore filed a Motion to Dismiss. Appellants responded to this motion on April 24, 2000, and filed a Motion to Extend their deadline. Appellants asked the court for another 30-day extension "due to accident or mistake." In its response, Bayshore pointed out to the court that appellants already received a 30-day extension based on "accident or mistake," and that, for the previous six months, appellants had actual knowledge the report was defective. The trial court, on May 10, 2000, granted the motion to dismiss. This appeal followed.

In their sole point of error[1], appellants complain that the trial court erred in granting Bayshore's motion to dismiss because the expert report was not inadequate, or, alternatively, that the trial court was required to grant a continuance under 4590i because appellants showed good cause for their failure to comply with subsection 13.01(d) of 4590i, or showed that the failure to comply with subsection 13.01(d) of 4590i was not the result of conscious indifference, but was due to accident or mistake. Bayshore responds that the trial court did not abuse its discretion in finding the expert report inadequate and did not err in refusing to grant a continuance.

DISCUSSION AND HOLDINGS

I. Standard of Review

The appropriate standard of review of a trial court's determination of the adequacy of an expert report is whether the trial court abused its discretion. *American Transitional Care v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). A trial court abuses its discretion if it acts without reference to any guiding rules or principles, or, in other words, acts in an arbitrary or unreasonable manner. *Pfeiffer v. Jacobs*, 29 S.W.3d 193, 196 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

II. The Expert Report

Article 4590i requires a medical malpractice plaintiff, within 180 days of filing suit, to file an expert report, or face sanctions, such as dismissal. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(d) (Vernon Supp. 2001); *Pfeiffer*, 29 S.W.3d at 195. Pursuant to the requirements in article 4590i, the 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 physician or health care provider failed to meet the standard of care, and the causal

[1] Appellants have combined numerous complaints regarding their argument that the trial court abused its discretion by dismissing with prejudice their claim against Bayshore. *Bell v. Texas Dep't of Criminal Justice – Institutional Div.*, 962 S.W.2d 156, 157 n.1 (Tex. App.—Houston [14th Dist.] 1998, no pet.). When a court concludes an issue for review is multifarious, it may refuse to review it, or may consider the issue if it can determine, with reasonable certainty, the error of which appellant complains. *Id*. In the interest of justice, we will address those issues in appellants' brief which we can reasonably construe. *Id*.

relationship between that failure and the injury, harm, or damages claimed. 4590i, § 13.01(r)(6); *Pfeiffer*, 29 S.W.3d at 196. If a plaintiff tenders an expert report to the defending physician or healthcare provider, under section 13.01, that defendant is entitled to challenge the report's adequacy. *Id*. at § 13.01(e) & (l). The court must grant the defendant's motion challenging the report only if it appears to the court, after conducting a hearing, that the report does not represent a good-faith effort to comply with the requirements of an expert report. *Id*. at § 13.01(l).

In this case, appellants' entire expert report applicable to Bayshore reads as follows:

> It is my opinion that Columbia Bayshore Medical Center failed to meet the requisite standard of care in cardiac surgery by having a documented mortality of Medicare patients from 1995 to 1997 which is the lowest 10% of hospitals in the country. Based on the information available to me at this time, it is my concern that Columbia Bayshore Medical Center is not treating coronary artery patients at an acceptable standard of care. Such concerns, in my opinion, are a contributing cause to the death of Mr. Bobo.

According to Dr. Fields, for the type of surgery performed on Mr. Bobo, the standard of care is for Bayshore not to be in the bottom 10% of hospitals nationwide. Dr. Fields states that this standard was breached because Bayshore had a documented mortality rate from 1995 to 1997 in the lowest 10% of hospitals in the country. These statistics, according to Dr. Fields, were a contributing cause of Mr. Bobo's death.

On a very superficial level, Dr. Fields' analysis contains the statutory elements of an expert report. However, the report is too superficial and sketchy. The reason the Legislature requires an expert report is not so an expert can fill in the blanks about standard of care, breach, and causation, with uninformative general information, but so the defendant is informed of the specific conduct the plaintiff has called into question, and the trial court is provided with a basis to conclude that the claims have merit. *See Palacios*, 46 S.W.3d at 880. This report fails to (1) provide any specificity as to the applicable standard of care, (2) detail how Bayshore failed to meet the applicable standard of care, or (3) establish a causal connection between Bayshore's alleged breach of the standard of care, and the injuries, harm, or damages claimed in this case.

"Identifying 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." *Id*. In reviewing an expert report, the question for the trial court is whether the report itself represents a good-faith effort to provide a fair summary of the expert's opinions by complying with the statutory definition of an expert report. *Id*. at 878. While the expert report need not set out a full statement of the applicable standard of care, and how Bayshore breached it, for it to constitute a good-faith effort to provide a fair summary of the standard of care, the report must, at least, "set out what care was expected but not given." *Id*. at 880. The statements that Bayshore "failed to meet the requisite standard of care in cardiac surgery by having a documented mortality . . . [in] the lowest 10% of hospitals in the country . . . [and] Bayshore . . . is not treating coronary artery patients at an acceptable standard of care," are not statements of a standard of care. Neither statement fairly or adequately sets out what care was expected and not given. Neither statement is sufficiently specific to inform Bayshore of what conduct appellants have called into question, nor to ensure the trial court this claim has merit.

When the expert report's conclusory statements fail to notify the defendant and the trial court of the conduct complained of, the report does not represent a good-faith effort to comply with the statutory requirements, and the trial court has no discretion but to dismiss the claim. *Id*. Therefore, we hold that the trial court did not did not abuse its discretion in dismissing appellants' claim because this report does not constitute a good-faith effort to set out a fair summary of the expert's opinions on liability and causation. We overrule that portion of appellants' first issue for review.

III. Refusing to Reconsider Adequacy of Expert Report

Appellants complain that the trial court erred in refusing to reconsider its ruling that the expert report was inadequate. In our review of the record in this case, and the applicable case law, we find nothing in the expert report to reflect that the trial court erred in determining that the expert report did not represent a good-faith effort to comply with the statutory requirements. As a result, we find that the trial court correctly refused to

reverse itself. This portion of appellants' point of error is overruled.

IV. Trial Court's Failure to Grant Appellants' Motion for Extension of Time

Appellants next contend that the trial court erred in failing to grant their April 21, 2000 motion for an additional extension of time under sections 13.01(f) or 13.01(g). We disagree.

Appellants first claim that the trial court should have granted their motion for an extension of time under section 13.01(f). 4590i, § 13.01(f). Pursuant to section 13.01(f), upon a showing of good-cause for failure to timely file an adequate expert report, the trial court may grant appellants an extension of time to file the report. However, under section 13.01(f), the trial court may not extend the deadline past 210 days after suit was filed. *Pfeiffer*, 29 S.W.3d at 197. This suit was filed on July 19, 1999. Appellants' motion for extension of time under section 13.01(f) was filed on April 21, 2000, well in excess of the 210-day deadline. Therefore, we find that the trial court did not abuse its discretion in refusing to grant appellants any additional time under section 13.01(f).

Appellants also contend the trial court should have granted their motion to extend under section 13.01(g). *Id*. at § 13.01(g). Pursuant to section 13.01(g), an extension of time shall be granted by the trial court if the plaintiff shows that his or her failure to comply with the statutory requirements for an expert report was the result of accident or mistake, and was not intentional or the result of conscious indifference. *Id*. The trial court's decision as to whether appellants showed accident or mistake is subject to an abuse of discretion review. *Tesch v. Stroud*, 28 S.W.2d 782, 789 (Tex. App.—Corpus Christi 2000, pet. denied).

If the failure to file an adequate expert report was accidental, some excuse, though not necessarily a good one, is sufficient under subsection (g) to warrant an extension of time to file an expert report. *Landry v. Ringer*, 44 S.W.3d 271, 275 (Tex. App.—Houston [14th Dist.] 2001, no pet.). However, the plaintiff bears the burden of supporting his or her claim of accident or mistake with evidence. *Id*.

Generally, an accident or mistake in this context is equated to inadequate knowledge of the facts, or an unexpected occurrence, precluding compliance. *Nguyen v. Kim*, 3 S.W.3d 146, 152 (Tex. App.—Houston [14th Dist.] 1999, no pet.). Conversely, conscious indifference is characterized by failing to take some action which would have seemed indicated to a person of reasonable sensibilities, under similar circumstances. *Id*.

According to Bayshore, only eleven days after appellants' expert report was prepared, Bayshore's counsel wrote appellants' counsel, and pointed out the deficiencies in Dr. Fields' report. On November, 10, 1999, Bayshore filed its first Motion to Require Cost Bond. On January 20, 2000, Bayshore filed its First Amended Motion to Require Cost Bond. On January 25, 2000, the appellants filed their response to Bayshore's First Amended Motion to Require Cost Bond. Attached to the response was appellants' counsel's affidavit, wherein he swore that he was aware of article 4590i, § 13.01(d), and, though he claimed he made a good faith effort to comply with the export report requirements, claimed that any noncompliance with the statute was the result of "accident or mistake, and was not intentional disregard or the result of conscious indifference." Appellants, two months before filing their second request for an extension of time, were already granted one extension of time under section 13.01(g).

In appellants' second motion for an extension of time, appellants' trial counsel stated that his preoccupation with another case prevented him from timely providing an amended expert report. Specifically, appellants state that the first order granting an extension was not received in their trial counsel's office until February 22, 2000. At that time, appellant's trial counsel was out of the office, in another county, for a thirty-day jury trial. His preoccupation with the jury trial caused him to forget to check on the status of appellants' case.

Undermining appellants' evidence of accident or mistake are the facts that were before the trial court when it refused to grant appellants a second extension of time. It appears that, by receiving a series of warnings that their expert's report was inadequate, appellants' trial counsel knew, for the previous six months, of the inadequacies of the

expert report . However, instead of timely addressing the problems raised by Bayshore, counsel waited several more months, and still failed to file an adequate expert report. The trial court could have found such failure was not a result of accident or mistake. Moreover, an attorney's failure to timely file a report because of an excessive workload, created by his other cases, is not a "mistake" or "accident" that would justify his failing to meet a known statutory deadline. *Broom v. McMaster*, 992 S.W.2d 659, 664 (Tex. App.—Dallas 1999, no pet.). In short, based on the pertinent facts, we find that the trial court did not err in finding no evidence of accident or mistake to justify granting appellants' second motion for an extension of time under section 13.01(g), and therefore that it did not abuse its discretion in finding that appellants' failure to comply with the statutory requirements was not a result of accident or mistake.

For the foregoing reasons, we hold that the trial court correctly interpreted the statutory requirements of section 13.01 and did not err in applying the law to the facts. As a result, we overrule appellants' issue for review, and affirm the judgment of the trial court.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed September 13, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).