Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00026-CV

SOUTHEAST SNF, LLC d/b/a Southeast Nursing Rehabilitation Center, Texas Operations Management LLC, and Advanced HCS, LLC,
Appellants

v.

Ruperto C. **GUTIERREZ**, Individually and on Behalf of the Estate of Ruperto Q. Gutierrez, Sr., Deceased,
Appellee

From the 37th Judicial District Court, Bexar County, Texas
Trial Court No. 2020-CI-12410
Honorable Mary Lou Alvarez, Judge Presiding[1]

Consolidated with

No. 04-21-00027-CV

SOUTHEAST SNF, LLC d/b/a Southeast Nursing Rehabilitation Center, Texas Operations Management LLC, and Advanced HCS, LLC,
Appellants

v.

Delia **JARAMILLO**, Individually and on Behalf of the Estate of Catalina Romero, Deceased,
Appellee

From the 408th Judicial District Court, Bexar County, Texas
Trial Court No. 2020-CI-13707
Honorable Mary Lou Alvarez, Judge Presiding[2]

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[1] The Honorable Nicole Garza is the presiding judge of the 37th Judicial District Court, Bexar County, Texas. However, the Honorable Cynthia Chapa signed the orders denying appellants' objections to the expert reports, and the Honorable Mary Lou Alvarez signed the orders denying appellants' motions to dismiss.

[2] The Honorable Angelica Jimenez is the presiding judge of the 408th Judicial District Court, Bexar County, Texas. However, the Honorable Cynthia Chapa signed the orders denying appellants' objections to the expert reports, and the Honorable Mary Lou Alvarez signed the orders denying appellants' motions to dismiss.

Opinion by: Beth Watkins, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Patricia O. Alvarez, Justice
Beth Watkins, Justice

Delivered and Filed: June 16, 2021

AFFIRMED

Appellants are health care providers who were sued after nursing home patients in their care contracted COVID-19 and died. In these consolidated interlocutory appeals, they appeal the trial court's orders denying their motions to dismiss the underlying lawsuits. We affirm.

BACKGROUND

Ruperto Q. Gutierrez, Sr. and Catalina Romero were patients at Southeast Nursing & Rehabilitation Center, a skilled nursing facility and nursing home owned, operated, and/or managed by appellants Southeast SNF, LLC, Texas Operations Management LLC, and Advanced HCS LLC d/b/a Advanced Care Solutions. According to the petitions filed below, Gutierrez and Romero contracted COVID-19 and died as a result of appellants' breaches of the standard of care. Survivors of Gutierrez and Romero filed suit separately and timely served expert reports authored by Dr. Mauricio Pinto, M.D. Appellants timely objected and moved to dismiss the lawsuits against them. After holding hearings, the trial court denied appellants' objections and motions to dismiss. Appellants timely filed their notices of interlocutory appeal. Because the allegations below, expert reports, and arguments on appeal are the same, we granted appellants' motion to consolidate the cases on appeal.

ANALYSIS

Applicable Law and Standard of Review

A health care liability claimant must, within 120 days after each defendant's original answer is filed, serve each defendant health care provider with an expert report. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). The report must provide a fair summary of the expert's opinions regarding the applicable standards of care, how the health care provider breached those standards, and the causal relationship between the breach and claimant's injury. *Id.* § 74.351(r)(6). The report may be informal in that the information in the report does not need to meet the same requirements as the evidence offered in a summary judgment proceeding or trial. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

A health care provider may object and move to dismiss the lawsuit on the grounds that it was not served with a timely report or that the timely served report was deficient. TEX. CIV. PRAC. & REM. CODE § 74.351(b), (c). "Because the statute focuses on what the report discusses, the only information relevant to the inquiry is within the four corners of the document." *Palacios*, 46 S.W.3d at 878. If the trial court denies the motion to dismiss without granting an extension, the health care provider may file an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (authorizing interlocutory appeal of orders denying motion to dismiss where no report is served); *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 459 (Tex. 2017) (extending interlocutory appeal to "a motion to dismiss based on a timely but deficient report").

Statutes authorizing interlocutory appeals are a narrow exception to the general rule that appellate courts generally only have jurisdiction over final judgments. *Bonsmara Nat. Beef Co., LLC v. Hart of Tex. Cattle Feeders, LLC*, 603 S.W.3d 385, 390 (Tex. 2020). Because we only have

interlocutory appellate jurisdiction to the extent of our statutory grant of authority, we must strictly construe that authority. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007).

Application

After they were timely served with an expert report from Dr. Pinto below, appellants objected and moved to dismiss the lawsuits against them. Below, they explained:

> Defendants object to Dr. Pinto's report as insufficient and conclusory regarding the existence of a viable state law cause of action and as to the definition of the standard of care, the specific conduct alleged to be a breach of the standard of care, and how such alleged specific act or failure to act caused damages. The conclusory nature of the analysis offered by Dr. Pinto amounts to the imposition of strict or *res ipsa* liability, and/or *ipse dixit* reasoning, none of which are acceptable under Texas jurisprudence. . . .

Despite reciting that Dr. Pinto's report was insufficient and conclusory—arguments that would appear to challenge the contents of Dr. Pinto's report—the thrust of appellants' objections below was that the plaintiffs' claims are preempted so no duty exists as a matter of law. Appellants did not develop any specific arguments about how or why Dr. Pinto's report was insufficient or conclusory. Confusingly, at the top of page two of their objection, they baldly assert that Dr. Pinto's opinions regarding standard of care and breach are insufficient and conclusory—so deficient that dismissal was required. At the bottom of page two, however, they describe the specific standard of care and breach allegations contained in Dr. Pinto's report:

Specifically, he alleges that

- Southeast failed to provide staff with PPE and to take steps to prevent or mitigate the spread of COVID-19;
- Southeast failed to implement screening precautions or facility protocols to mitigate the risk of contracting COVID-19;
- Southeast allowed COVID-19 exposed health care workers to continue to treat patients;

- Southeast allowed health care workers with a fever to continue to treat patients;
- Southeast failed to close doors necessary to ensure isolation in order to mitigate the spread of COVID-19;
- Southeast failed to conduct temperature checks and to ensure hand washing to mitigate the spread of COVID-19;
- Southeast failed to adequately staff the facility to ensure that precautions and protocols could be carried out so as to mitigate the spread of COVID-19.

To preserve an argument, the complainant must have made a timely objection that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint. . . ." TEX. R. APP. P. 33.1(a)(1)(A); *see also RGV Healthcare Assocs., Inc. v. Estevis*, 294 S.W.3d 264, 270 (Tex. App.—Corpus Christi–Edinburg 2009, pet. denied) (concluding "generic, boilerplate objection" was insufficient to preserve appellants' argument that expert report was insufficient on causation).

Instead of developing an argument that Dr. Pinto's expert report was inadequate, appellants claimed Dr. Pinto's "report fails to establish a viable state law claim" because federal law preempts claims like theirs involving personal protective equipment. They doubled down on those arguments at the hearings on their objections, contending only that the claims were preempted, and not that Dr. Pinto's report was deficient. They declared:

> our argument here really is that because Doctor Pinto, in both these cases, he has the same opinion, because Southeast SNF did not use PPE properly, did not provide them, you know, sufficient PPE. . . there's a claim against Southeast SNF. . . . And what we're pointing out here is that because of the Secretary's declaration and because - - because the expert report is implicating these countermeasures, it's invoking the statute and so we think that the expert report by its very nature isn't - - it doesn't state a viable claim under Texas law because even though there normally would be a duty, you know, to provide reasonably careful health care, nursing care, there's not a duty in this case because federal law takes it away.

When appellees responded, "[t]he report is sufficient. There's no objection to the qualifications of Doctor Pinto. There's no objection that the report is conclusory; that it does not state what the

standard of care is; or that the standard of care was violated," appellants did not disagree. *See In re A.D.P.*, 281 S.W.3d 541, 548 (Tex. App.—El Paso 2008, no pet.) (holding appellants waived complaint where opposing party made contrary representation to trial court and "[a]ppellants did not disagree with or object to this statement"); *see also Watts v. Watts*, 396 S.W.3d 19, 23 (Tex. App.—San Antonio 2012, no pet.) (argument on appeal must match argument raised in trial court).

Appellants repeat their preemption arguments on appeal. They also complain that Dr. Pinto's report fails to sufficiently describe the standard of care, the breaches appellees allege, or how those breaches caused the deaths of Gutierrez and Romero. However, because appellants did not develop their sufficiency arguments below, appellees did not have an opportunity to respond to them and the trial court did not have an opportunity to consider them. *See, e.g.*, *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014) (observing preservation of error doctrine "conserves judicial resources and promotes fairness by ensuring that a party does not neglect a complaint at trial and raise it for the first time on appeal"). That is especially important where, as here, the trial court would have discretion—had it found Dr. Pinto's report deficient—to grant an extension to cure the deficiency. TEX. CIV. PRAC. & REM. CODE § 74.351(c). We therefore conclude appellants' argument that Dr. Pinto's report is insufficient is not properly preserved.

That leaves appellants' preemption arguments. Appellants rely on language from the supreme court's opinion in *Palacios* that "the report must provide a basis for the trial court to conclude that the claims have merit." *Palacios*, 46 S.W.3d at 879. While it is true that the "claims have merit" language has been accepted as a proxy for the requirements of section 74.351(r)(6), that statute actually requires an expert report to provide "a fair summary of the expert's opinions as of the date of the report regarding 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." TEX. CIV. PRAC. &

REM. CODE § 74.351(r)(6). The plain language of the statute does not require that the expert disprove the application of a legal doctrine like preemption. We simply do not interpret *Palacios*—which also notes that expert reports are informal and preliminary, and that review of expert reports is limited to the four corners of the report—to require the author to disprove the application of legal doctrines like preemption which would ultimately prevent claimants from recovering on their claims. Indeed, because the report must be authored by a person with medical expertise, a medical expert would not typically be qualified to provide a legal opinion that the plaintiff's claims were not preempted. *See id.* § 74.351(r)(5); *see also State v. T.S.N.*, 547 S.W.3d 617, 621 (Tex. 2018) (requiring courts to interpret statutes to avoid absurd results).

Our sister court reviewed a somewhat analogous preemption argument in *Archer v. Tunnell*, No. 05-15-00459-CV, 2016 WL 519632 (Tex. App.—Dallas Feb. 9, 2016, no pet.). There, the plaintiff was injured after the truck in which he was riding struck cattle that had strayed onto the roadway. *See id*. at *1. The cattle were owned by the defendant, a physician. *See id*. The plaintiff sued, and the physician-defendant moved to dismiss the suit, arguing it was a health care liability claim and the plaintiff was required—but failed—to serve an expert report. *See id*. The physician-defendant also filed a motion for summary judgment alleging that he was a representative of numerous retirement plans, and that the trial court lacked jurisdiction to hear any claims involving the retirement plans as a result of ERISA preemption. *Id*. After denying the defendant-physician's motion to dismiss due to the lack of an expert report, the trial court stated that it would deny the motion for summary judgment on ERISA grounds. *See id*. at *2.

On appeal, the physician-defendant abandoned his challenges to the expert report but maintained his argument that ERISA preempted the plaintiff's claims. *See id*. at *3. Relying on section 51.014, the court of appeals dismissed the appeal, concluding "we could not consider in this interlocutory appeal whether the trial court erred by denying the motions [seeking summary

judgment and dismissal of the plaintiff's suit on ERISA grounds] because no statute authorizes the interlocutory appeal of such an order." *Id*. The same result is required here.

Under the plain language of section 51.014(a)(9), we only have interlocutory appellate jurisdiction to review an order denying a health care provider's motion to dismiss on the grounds that: (1) it was not timely served with a report; or (2) it was timely served with a deficient report. *Zamarripa*, 526 S.W.3d at 459. Appellants' argument that the causes of action against them are not legally viable because they are preempted, however, is not the same as an argument that Dr. Pinto's expert report was deficient or late. *See, e.g.*, *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 631–32 (Tex. 2013) (recognizing while section 74.351(b) and (c) challenges are limited, other pretrial motions "permit trial courts to dispose of claims that lack evidentiary support"). We cannot construe section 51.014(a)(9) to extend our limited interlocutory appeal jurisdiction to reach appellants' preemption arguments.

CONCLUSION

Having concluded we lack jurisdiction to review the only arguments appellants preserved for appeal, we dismiss this appeal for want of jurisdiction.[3]

Beth Watkins, Justice

[3] Appellees ask this court to sanction appellants for, inter alia, "raising new objections without justification and in violation of the law." Appellees argue that appellants' "improper conduct substantially increased the time necessary to respond to the frivolous objections," and appellees' briefing bears that out—in addition to the twelve pages they dedicated in their appellate brief to arguments related to preemption and our jurisdiction, they also spent more than four pages arguing that Dr. Pinto's expert reports were adequate. Nevertheless, "[t]he decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation." *Archer*, 2016 WL 519632, at *4. We decline to exercise that discretion here.