In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-13-00052-CV

CHRISTUS HEALTH ARK-LA-TEX D/B/A
CHRISTUS ST. MICHAEL HEALTH SYSTEM, Appellant

V.

WILLIAM C. CURTIS AND TINA CURTIS, Appellees

On Appeal from the 5th District Court
Bowie County, Texas
Trial Court No. 12C1341-005

Before Morriss, C.J., Carter and Moseley, JJ.
Opinion by Chief Justice Morriss

O P I N I O N

William C. Curtis and wife, Tina Curtis, and their three expert reports allege that William was improperly treated by Dr. James Urbina[1] at Christus Saint Michael Hospital—owned and operated by Christus Health Ark-La-Tex d/b/a Christus St. Michael Health System—for symptoms of "sudden muffled hearing, balance issues, nausea and feeling poorly." The Hospital claims that the trial court should have dismissed the Curtises' lawsuit because the expert reports were conclusory on the element of causation. Because we find no abuse of discretion in the trial court's denial of the Hospital's motion to dismiss, we affirm[2] the trial court's ruling.

According to the Curtises' petition and their experts' reports, Urbina's treatment of William included administering what are called the Dix-Hallpik and Epley maneuvers (explained below). Allegedly, as a result, William suffered a brainstem stroke and a dissection or separation of the complex basilar artery at the anterior inferior cerebellar artery junction,[3] and this suit followed.

As a case involving alleged health care liability, this matter is governed by Chapter 74 of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.001–.507 (West 2011 & Supp. 2012). The plaintiff in such a suit must "serve on each

[1]While the Curtises also sued Urbina, Urbina is not a party to this appeal.

[2]This is a proper subject for an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West Supp. 2012) (appeal of interlocutory order from district court that "denies all or part of the relief sought by a motion" seeking to dismiss plaintiff's claim for failure to meet expert report requirements); *see also Lewis v. Funderburk*, 253 S.W.3d 204, 208 (Tex. 2008).

[3]This injury may be generally understood as a breach or separation of the artery at or near the cerebellum. *See Medical Dictionary*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/medlineplus/anterior%20inferior%20cerebellar%20artery (last visited Aug. 29, 2013).

party or the party's attorney one or more expert reports" within 120 days after filing the original petition. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West 2011). The report must 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 ANN. § 74.351(r)(6) (West 2011).

A trial court must grant a motion to dismiss if it appears the report does not amount to an objective, good-faith effort to comply with the statutory requirements. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 51 (Tex. 2002) (per curiam); *Longino v. Crosswhite*, 183 S.W.3d 913, 916 (Tex. App.—Texarkana 2006, no pet.). An action should be dismissed if the expert report is not sufficiently specific "to provide a basis for the trial court to conclude that the claims have merit." *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). To be a good-faith effort, the report must discuss the standard of care and breach of that standard with sufficient specificity to inform each defendant of the conduct the plaintiff has called into question and to provide a basis for the trial court to conclude that the claims have merit. *Jernigan v. Langley*, 195 S.W.3d 91, 94 (Tex. 2006) (per curiam). A report that states an expert's bare conclusions about the standard of care, breach, and causation does not meet the statutory requirements. *Wright*, 79 S.W.3d at 52; *Longino*, 183 S.W.3d at 917. Rather, the expert must explain the basis of his or her statements to link the expert's conclusions to the facts. *Wright*, 79 S.W.3d at 52.

A trial court's decision regarding the adequacy of an expert report is reviewed for an abuse of discretion. *Wright*, 79 S.W.3d at 52; *Longino*, 183 S.W.3d at 916. Before reversing the

trial court, we must find the court acted arbitrarily or unreasonably without reference to guiding rules or principles. *Wright*, 79 S.W.3d at 52. We may not, however, substitute our opinion for that of the trial court. *Id*. Nevertheless, "a clear failure by the trial court to analyze or apply the law correctly" is an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

The Hospital's appeal claims the experts' opinions as to causation are conclusory, and therefore insufficient to meet the requirements of Section 74.351(r)(6).[4] The Curtises' suit included allegations of direct negligence in staffing decisions and protocols, as well as allegations of vicarious liability of the Hospital for the treatment administered by Urbina. The Hospital does not argue these allegations were inadequate to allege vicarious liability. *See RGV Healthcare Assocs., Inc. v. Estevis*, 294 S.W.3d 264, 273 (Tex. App.—Corpus Christi 2009, pet. denied) ("When a plaintiff's claim against a hospital is not for direct negligence, but is based on the conduct of an employee through the doctrine of respondeat superior," the report "is sufficient as against the hospital to satisfy the expert report requirement for the vicarious liability claims" if "the report identifies conduct by the hospital's employee, the hospital is implicated, and . . . the report adequately addresses the standard of care applicable to the employee, how the employee breached the standard of care, and that the breach caused the plaintiff's injury.")

> [W]hen a health care liability claim involves a vicarious liability theory, either alone or in combination with other theories, an expert report that meets the statutory standards as to the employee is sufficient to implicate the employer's conduct under the vicarious theory. And if any liability theory has been adequately covered, the entire case may proceed.

[4]The Hospital's appeal does not challenge the reports' discussion of the standard of care and breach of that standard.

Certified EMS, Inc. v. Potts, 392 S.W.3d 625, 632 (Tex. 2013). The Curtises' petition alleged that Urbina was an agent, representative, or employee of the Hospital acting within the scope of that agency or employment at the time of the treatment of William.[5]

Each of the three expert opinions took note of William's "abnormal cerebrovascular anatomy" and stated that the relevant standard of care for treating a patient with such anatomy requires the treating physician "not [to] perform the Dix-Hallpik and Epley maneuvers under any circumstance."

> Dr. Urbina evaluated Mr. Curtis' condition and made the diagnosis of Benign Proximal Positional Vertigo. On 9/18/2010, Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis to reposition the crystals in his ears. The Dix-Hallpik maneuver which consists of repeated rapid significant torsion, bending, flexing, extending and rotating Mr. Curtis's neck many times at varying angles and varying degrees was performed. At this point, Mr. Curtis demonstrated double vision, blood pressure drop, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina proceeded to have Mr. Curtis do the Epley maneuver after the Dix-Hallpik was performed. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck. Mr. Curtis did not respond favorably to these procedures.

Dr. Khalid Malik, who supplied one of the Curtises' expert reports, opines that, at that point, William suffered a brainstem stroke. The expert reports, later referring again to William's "abnormal cerebrovascular anatomy," all stated that, because of that abnormal anatomy, "the treatment consisting of the Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky."

[5]In its brief, the Hospital argues that nothing in the experts' reports gave any basis for vicarious liability for the acts of Urbina. However, each report identified Urbina as a hospitalist at the Hospital and the attending physician when William was admitted. The question of vicarious liability is a legal matter to be decided later, not on the basis of the medical expert reports.

The expert reports also state that, during the Dix-Hallpik procedure, William "suffered classical stroke symptoms of double vision, blood pressure drop, acute hearing loss, vomiting, dizziness, and vital sign compromise." Each report opines that, "[b]ased on reasonable medical probability," at this point, William's brainstem was infarcted and he suffered a dissection of his complex basilar artery. Nonetheless, at this juncture, Urbina performed another contraindicated procedure, the Epley maneuver. The reports each then state unequivocally that "the rapid and repeated significant torsion, bending, flexing, extending and rotating" of William's neck, taking into consideration his abnormal cerebrovascular anatomy, caused the brainstem infarction and a "tear that resulted in a complex dissection of his basilar artery at the [anterior inferior cerebellar artery] junction." Each report then concludes, based on its author's expert medical opinion, that the previously described negligent acts and omissions of both Urbina and the Hospital proximately caused William's brainstem stroke and dissection of the complex basilar artery. Because the Curtises alleged a theory of vicarious liability, the causal allegations that Urbina's treatments caused injury to William are sufficient, alone, to satisfy Section 74.351 of the Texas Civil Practice and Remedies Code as to the Hospital. *See id.* And, since it was sufficient to surmount the expert-report hurdle as to the Hospital's potential vicarious liability, it was sufficient to avoid the dismissal of the Hospital from this action. *See TTHR Ltd. P'ship v. Moreno*, 401 S.W.3d 41, 42 (Tex. 2013); *Potts*, 392 S.W.3d at 632.

The expert reports' assertions of causation on the vicarious liability[6] action against the Hospital were not conclusory and were good-faith efforts to comply with the statutory requirements. The trial court did not abuse its discretion in finding the reports sufficient to satisfy Section 74.351.

We affirm the trial court's ruling.[7]

Josh R. Morriss, III
Chief Justice

Date Submitted: July 31, 2013
Date Decided: August 30, 2013

[6]Additionally, in allegations addressing direct liability, the reports opined that the Hospital should not have allowed Urbina on its staff; should have had policies or procedures in place to prevent Urbina from performing the two procedures, which were contraindacted because of William's abnormal cerebrovascular anatomy; and should have had a neurologist available to assess and treat William. The reports cite these omissions as well as the above-detailed acts of Urbina as proximate causes of William's injuries. We need not address whether the challenged causation link of the reports is sufficient as to these direct-liability allegations against the Hospital, since the vicarious liability cause of action is medically supported by the expert reports.

[7]The Hospital also argues that, because the Curtises did not specifically argue vicarious liability to the trial court, the argument cannot be relied upon on appeal. We do not find that argument compelling. As mentioned, the plaintiffs' petition alleged agency and respondeat superior, which is de facto the same as vicarious liability. Even if the trial court's ruling does not specifically state that vicarious liability was a basis for finding the reports sufficient, we will affirm that ruling if it can be upheld on any legal theory that finds support in the record. *See In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984) (per curiam). In answer to the Hospital's claim that the Curtises waived the theory of vicarious liability, we find that such theory was adequately argued in the petition with its allegations of agency and respondeat superior.

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Texarkana, Texas

CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System,
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v.

William C. Curtis and Tina Curtis,
Appellees.

On Accelerated Appeal From Cause No. 12C1341-005
In the 5th Judicial District Court of Bowie County, Texas
Honorable Ralph Burgess, Presiding Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

The following is a list of all parties to the trial court's order appealed from, and the names and addresses of all trial and appellate counsel:

1. Appellant-Defendant is CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System.

2. Trial and appellate counsel for Appellate-Defendant CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System are Fulbright & Jaworski L.L.P., Kevin W. Yankowsky, Warren S. Huang, and Jaqualine Elifrits, 1301 McKinney, Suite 5100, Houston, Texas 77010-3095.

3. Appellees-Plaintiffs are William C. Curtis and Tina Curtis.

4. Trial and appellate counsel for Appellees-Plaintiffs William C. Curtis and Tina Curtis are The Girards Law Firm, James E. Girards and J. Michael Ramey, 10000 North Central Expressway, Suite 750, Dallas, Texas 75231-2338.

5. An additional defendant in the underlying proceeding (but not a party to this appeal) is James H. Urbina, M.D.

6. Trial counsel for Defendant James H. Urbina, M.D. are Schell Cooley LLP, Susan C. Cooley and Casey C. Campbell, 15455 Dallas Parkway, Suite 550, Addison, Texas 75001-5678.

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STATEMENT OF THE CASE[1]

This is a health care liability case. On September 14, 2012, Appellees-Plaintiffs William C. Curtis and Tina Curtis (collectively, "the Curtises") filed suit against Appellant-Defendant CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System ("CHRISTUS") and Defendant James H. Urbina, M.D. ("Dr. Urbina"), alleging that the Defendants' purported negligence in treating Mr. Curtis' symptoms of hearing loss, instability, and nausea caused him hearing loss and sleep apnea. CR 6-9. Because their claims are health care liability claims governed by Chapter 74 of the Texas Civil Practice and Remedies Code, the Curtises served on the Defendants three expert reports and curriculum vitae in support of their claims. CR 13-41 (App. Tab 1). CHRISTUS timely filed objections to the Curtises' expert reports and moved to dismiss all of the Curtises' claims against CHRISTUS on the ground that the reports failed to comply with the requirements of Texas Civil Practice and Remedies Code § 74.351. CR 49-58, 62-129. On April 19, 2013, the trial court signed an order denying CHRISTUS' motion to dismiss based on grounds set forth in a written opinion set forth in its order. CR 150-58 (App. Tab 2). This appeal followed. CR 159-60.

[1] "CR ___" refers to the Clerk's Record. "RR ___" refers to the Reporter's Record. "App. Tab ___" refers to the Appendix attached to this brief.

ISSUE PRESENTED

Did the trial court err in denying Appellant CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System's Motion to Dismiss?

STATEMENT OF FACTS[2]

I. William Curtis Presents to CHRISTUS and Is Treated With the Dix-Hallpik and Epley Maneuvers

On or about September 17, 2010, William Curtis presented to CHRISTUS St. Michael Health System's emergency room with symptoms of hearing loss, instability, and nausea. CR 6. While he was in the emergency room, Mr. Curtis was screened by a teleneurologist. CR 14, 26, 35.[3] All of Mr. Curtis' neurological evaluations were noted to be normal. *Id*. Mr. Curtis was admitted to CHRISTUS' Primary Stroke Unit by Dr. James Urbina for observation. CR 6. Dr. Urbina diagnosed Mr. Curtis with Benign Proximal Positional Vertigo. *Id*.

On September 18, 2010, Dr. Urbina performed the Dix-Hallpik and Epley maneuvers on Mr. Curtis in an attempt to alleviate his symptoms. *Id*. Both maneuvers involved physical manipulation of Mr. Curtis' neck. *Id*. Mr. Curtis allegedly did not respond favorably to these procedures. CR 15, 27, 36. That afternoon, a second neurological consultation was provided by Dr. Khalid Malik –

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[2] The statement of facts below is drawn largely from allegations in the Curtises' Original Petition and expert reports. CHRISTUS does not concede the accuracy of those allegations and recites them herein solely to detail the allegations upon which the Curtises' lawsuit is based.

[3] The teleneurology system at CHRISTUS is an interactive video link that allows a

a neurologist and the author of one of the Curtises' expert reports (CR 13-17) – who diagnosed Mr. Curtis as having experienced a brainstem stroke. CR 15, 27, 36. Mr. Curtis was discharged from CHRISTUS on September 20, 2010. *Id*.

According to the Curtises, radiological studies performed after Mr. Curtis' discharge from CHRISTUS compared with radiological studies performed at CHRISTUS on September 17, 2010 indicate that Mr. Curtis experienced not only a brainstem stroke but also a complex basilar artery dissection. *Id*. The Curtises allege that Mr. Curtis "has suffered severed hearing loss as a result of the dissection" and "sleep apena as a result of his cerebral compromise." CR 7.

II. The Curtises File This Lawsuit Against CHRISTUS

On September 14, 2012, the Curtises filed suit against CHRISTUS and Dr. Urbina, alleging that the Defendants' purported negligence proximately caused Mr. Curtises' injuries. CR 4, 6-9. With respect to CHRISTUS, the Curtises alleged that CHRISTUS was directly negligent based on the following theories:

- CHRISTUS allegedly failed to have "an on call neurologist present at the health care facility at the time of the incident."
- CHRISTUS allegedly failed "to provide the proper physician coverage in an area where they are specialized, certified, and award winning in" "despite the worsening signs, symptoms, or findings reflecting a non-reassuring and worsening ***fetal***

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neurologist who is not physically present at CHRISTUS to evaluate a patient via that link. RR 6.

condition . . .” (emphasis added).[4]

- CHRISTUS’ staff allegedly “failed to advocate for the patients, failed to assure that a competent physician was physically present and available to care for patients, and failed to assure policies and procedures that would prevent the use of the Dix-Hallpik and Epley maneuvers on a patient such as Bill Curtis.”

  Specifically, CHRISTUS allegedly failed “to assure that the medical staff and nurses are adequately trained to properly interpret symptoms, properly respond to those symptoms, and properly and timely use the hospital Chain of Command policy in order to assure proper and timely interventions are used by the physician.”

CR 7-9.

Notwithstanding Texas law prohibiting hospitals from controlling the specific care that physicians provide to individual patients, the Curtises also alleged that CHRISTUS was vicariously liable for: (1) Dr. Urbina’s purported negligence based on the Curtises’ bald allegations that Dr. Urbina was an “agent, representative, and/or employee” of CHRISTUS; and (2) the teleneurologist and nurses’ purported negligence based on the Curtises’ bald allegations that they were “agent[s], representative[s], and/or employee[s]” of CHRISTUS. CR 7.

III. The Curtises Serve Three Expert Reports in Support of Their Allegations Against CHRISTUS

Acknowledging that their claims against CHRISTUS are health care liability

[4] CHRISTUS assumes that the clause “despite the worsening signs, symptoms, or findings reflecting a non-reassuring and worsening ***fetal*** condition” is a scrivener’s error by the Curtises as there is no allegation of injury to a newborn infant in this case and the Curtises plead that Mr. Curtis was 59 years old at the time the care in question was provided. CR 6.

claims subject to Chapter 74 of the Texas Civil Practice and Remedies Code, the Curtises served on CHRISTUS expert reports and curriculum vitae for Drs. Khalid Malik, Christopher A. Bailey, and Lee M. Buono pursuant to Texas Civil Practice and Remedies Code § 74.351. CR 13-41. Significantly, Dr. Malik – as noted above – was consulted regarding Mr. Curtis' care during Mr. Curtis' hospitalization at CHRISTUS in September 2010 (CR 15), and Dr. Bailey is currently on staff at CHRISTUS (CR 25). As shown below, all three of the Curtises' expert reports fail to satisfy Section 74.351's requirements. Consequently, the trial court erred in denying CHRISTUS' motion to dismiss the Curtises' claims against CHRISTUS pursuant to Section 74.351.

SUMMARY OF ARGUMENT

All three of the Curtises' expert reports contain the same fatal deficiency that mandates reversal of the trial court's April 19, 2012 order denying CHRISTUS' motion to dismiss. All three expert reports are improperly conclusory on the required showing that CHRISTUS' alleged breach of the applicable standard of care proximately caused Mr. Curtis' injuries. In all three expert reports, the only conduct discussed on causation is the conduct of ***Dr. Urbina***. The expert reports fail to explain how ***CHRISTUS'*** alleged breach of the standard of care proximately caused Mr. Curtis' injuries. The sole mention of CHRISTUS in the causation section of those reports consists of a single sentence: "Therefore, it is

my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela." Texas courts have held that such a conclusory statement – unsupported by any analysis specifically demonstrating to a reasonable degree how and why ***CHRISTUS***' alleged breach proximately caused the Curtises' injuries – is insufficient to satisfy Section 74.351. Consequently, CHRISTUS respectfully requests that this Court reverse the trial court's April 19, 2013 order denying CHRISTUS' motion to dismiss.

ARGUMENT

I. Standard of Review

A trial court's decision whether to dismiss a health care liability claim based on a plaintiff's failure to comply with the statutory requirements for expert reports under Texas Civil Practice and Remedies Code § 74.351 is reviewed for abuse of discretion. *See, e.g., Jernigan v. Langley*, 195 S.W.3d 91, 93 (Tex. 2006) (per curiam); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 877-78 (Tex. 2001). A trial court, however, has no discretion in determining what the law is or applying the law to the facts. *See, e.g., Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). Therefore, a trial court's failure to correctly analyze or apply the law constitutes an abuse of discretion. *Id*.

II. Requirements for Expert Reports Under Chapter 74 of the Texas Civil Practice and Remedies Code

There is no dispute that the Curtises' claims against CHRISTUS are health care liability claims governed by Chapter 74 of the Texas Civil Practice and Remedies Code. CR 4, 6. Chapter 74 requires a claimant – no later than 120 days after his original petition is filed – to serve on each party one or more expert reports (along with the curriculum vitae of the expert listed in the report) for each physician or health care provider against whom a health care liability claim is asserted. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2009) (App. Tab 3).[5] Section 74.351(r)(6) defines an expert report as follows:

> "Expert report" means a written report by an expert that provides 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 ANN. § 74.351(r)(6) (Vernon 2009).

A defendant may challenge the sufficiency of an expert report by filing and serving objections to the sufficiency of the report not later than the 21st day after the date the report was served. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2009). A defendant may then move for dismissal of the health care liability claim for failure to file an adequate expert report, and the defendant's

[5] The Curtises filed their original petition on September 14, 2012. CR 4. Thus, the current version of Chapter 74 governs the issues in this appeal.

motion ***must*** be granted "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 in Subsection (r)(6)." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l) (Vernon 2009); *see also id.* at § 74.351(b); *Somerville v. Lawrence*, 2010 Tex. App. LEXIS 6583, at *9 (Tex. App.–Texarkana Aug. 12, 2010, no pet.).

To constitute a good-faith effort under Section 74.351, the expert report must address the standard of care, breach, and causation with sufficient specificity to: (1) "inform the defendant of the specific conduct the plaintiff has called into question"; and (2) "provide a basis for the trial court to conclude that the claims have merit." *See, e.g.*, *Palacios*, 46 S.W.3d at 879; *Hardy v. Marsh*, 170 S.W.3d 865, 868-69 (Tex. App.–Texarkana 2005, no pet.). An expert report that does not specifically address ***all three required elements*** of a report – standard of care, breach, and causation – as to ***each defendant*** does not constitute a good faith effort under Section 74.351. *See, e.g., Palacios*, 46 S.W.3d at 879 ("Nor can a report meet these purposes and thus constitute a good-faith effort if it omits any of the statutory requirements"); *Russ v. Titus Hosp. Dist. d/b/a Titus Reg'l Med. Ctr.*, 128 S.W.3d 332, 340 (Tex. App.–Texarkana 2004, pet. denied) ("Omission of any of the statutory elements prevents the report from being a good-faith effort.").

An expert report cannot merely state the expert's conclusions regarding the required elements. *See, e.g.*, *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52

(Tex. 2002) (per curiam); *Hardy*, 170 S.W.3d at 869. The expert report must specifically explain the basis for the expert's opinions and link the expert's conclusions to the facts. *See, e.g.*, *Bowie Mem'l Hosp.*, 79 S.W.3d at 52 ("[R]ather, the expert must explain the basis of his statements to link his conclusions to the facts") (quotation omitted); *Russ*, 128 S.W.3d at 340 ("These three separate requirements must all be present and described with sufficient specificity") (citations omitted). A court's review of an expert report under Section 74.351 also is limited to the four-corners of the report, and a court may not rely on inferences in determining the adequacy of an expert report. *See, e.g.*, *Bowie Mem'l Hosp.*, 79 S.W.3d at 52; *Hardy*, 170 S.W.3d at 869.

III. The Trial Court Erred in Denying CHRISTUS's Motion to Dismiss Because the Curtises' Expert Reports Are Insufficient on the Required Element of Causation

The trial court's April 19, 2013 order denying CHRISTUS' motion to dismiss must be reversed because all three of the Curtises' expert reports are insufficient on the required element of causation. To satisfy Section 74.351's causation requirement for expert reports, "[a]n expert cannot simply opine that the breach caused the injury. . . . Instead, the expert must go further and explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented." *Jelinek v. Casas*, 328 S.W.3d 526, 539-40 (Tex. 2010). That is, "the expert must explain the bases of the statements and link his or her conclusions to

the facts," and "[a]n expert report must show causation beyond mere conjecture." *Longino*, 183 S.W.3d at 917-18; *see also Hardy*, 170 S.W.3d at 870 (holding that expert report was insufficient on causation where it "fail[ed] to provide sufficient specific information to show more than speculation on the element of causation").[6] Finally, the expert must establish causation ***as to each defendant***. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon 2009).

In this case, all three expert reports are fatally deficient because they are improperly conclusory on causation as to CHRISTUS. The only reference to CHRISTUS on causation in those reports consists of the following statement:

> Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

CR 17, 28-29, 37-38. Nowhere in any of their expert reports do the experts specifically opine that the alleged breaches of the standard of care by ***CHRISTUS***[7] that they attempt to identify in their reports caused the Curtises' injuries.

All three expert reports attempt to identify three ways in which CHRISTUS allegedly breached the standard of care: (1) by failing to staff its facility with

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[6] *See also Jelinek*, 328 S.W.3d at 539-40 (holding that expert report was insufficient on causation); *Bowie Mem'l Hosp.*, 79 S.W.3d at 52-54 (same); *Longino v. Crosswhite*, 183 S.W.3d 913, 917 (Tex. App.–Texarkana 2006, no pet.) (same).

[7] As in CHRISTUS' motion to dismiss filed in the trial court, "CHRISTUS" here refers to and encompasses CHRISTUS, its nurses, and its staff. *See, e.g.*, CR 67-68.

adequately trained health care providers; (2) by failing to have an onsite neurologist or, alternatively, obtaining a neurology consult from the teleneurologist prior to Dr. Urbina's performance of the Dix-Hallpik and Epley maneuvers; and (3) by failing to have policies and procedures to ensure the Dix-Hallpik and Epley maneuvers were not performed on patients like Mr. Curtis. CR 16, 28, 37.

Yet, each expert report fails to specifically explain "to a reasonable degree" "how and why" CHRISTUS' alleged failure to adequately staff its facility, provide an onsite neurologist or consult the teleneurologist, or adopt and enforce policies and procedures to bar the Dix-Hallpik and Epley maneuvers on patients like Mr. Curtis caused the Curtises' injuries. *See, e.g.*, *Jelinek*, 238 S.W.3d at 539-40. Specifically, the Curtises' experts fail to explain how and why having adequately trained staff could or would have stopped Dr. Urbina from performing the Dix-Hallpik and Epley maneuvers. For example, the Curtises' experts fail to explain how and why these unidentified staff members with unspecified training: (1) would have known that the Dix-Hallpik and Epley maneuvers were contraindicated when a licensed physician like Dr. Urbina allegedly did not; (2) would have had the authority to override Dr. Urbina's decision to perform the Dix-Hallpik and Epley maneuvers; and (3) would have timely and successfully overrode Dr. Urbina's decision to perform the Dix-Hallpik and Epley maneuvers before he performed them. *See Kingwood Pines Hosp., LLC v. Gomez*, 362 S.W.3d 740, 750 (Tex.

App.–Houston [14th Dist.] 2011, no pet.) (reversing trial court's denial of motion to dismiss because expert report's opinion on causation was improperly conclusory / "[The expert] provided no explanation regarding how and why these failures resulted in the alleged molestation. Rather, he provided bare assertions that [the defendants'] failure to 'properly supervise' the patients resulted in [the plaintiff's] damages. He did not attempt to explain what constitutes proper supervision").

The Curtises' experts also fail to explain how and why not having an onsite neurologist or consulting with a teleneurologist caused the Curtises' injuries. For example, the Curtises' experts fail to opine that a neurologist/teleneurologist: (1) would have been timely consulted prior to Dr. Urbina's performance of the Dix-Hallpik and Epley maneuvers if he or she had been available; (2) would not have chosen to order the Dix-Hallpik and Epley maneuvers; and (3) would have ordered some unspecified alternative treatment that would have avoided the Curtises' injuries. Indeed, the Curtises' experts conclusory opinions are fatally undermined by their express acknowledgment in their reports that two different neurologists – including Dr. Malik (one of the Curtises' ***own*** experts) as well as a teleneurologist – were actually available and consulted during Mr. Curtis' hospitalization at CHRISTUS. CR 14-15, 26-27, 35-36. Yet those two neurological consultations still did not prevent Mr. Curtis' alleged injuries from occurring.

The Curtises' experts further fail to explain how or why not having policies

or procedures that bar the Dix-Hallpik and Epley maneuvers from being performed on patients like Mr. Curtis caused the Curtises' injuries. As a threshold matter, it is completely preposterous that it is possible – much less the standard of care – for a full-service hospital to: (1) anticipate every possible medical situation that it may face; and (2) adopt a policy or procedure authorizing it to prohibit a physician from performing a specific procedure in response to such medical situation. But even assuming the standard of care does, in fact, require hospitals like CHRISTUS to have such foresight and maintain such an encyclopedic collection of policies and procedures, the Curtises' experts fail to specifically explain how or why: (1) hospital personnel would have been able to timely and successfully enforce policies or procedures barring Dr. Urbina from performing the Dix-Hallpik and Epley maneuvers; and (2) enforcing or successfully such policies or procedures would have resulted in Dr. Urbina choosing another unspecified treatment that would have prevented the Curtises' alleged injuries from occurring.

The trial court's opinion in support of its order denying CHRISTUS' motion to dismiss fails to address these deficiencies in the Curtises' experts' reports on causation. Instead, in overruling CHRISTUS' objections that those reports' causation opinions are improperly conclusory, the trial court merely asserted that "the reports state in detail how the performance of the maneuvers on Plaintiff at the time he presented caused the injuries for which he now complains." CR 156.

While the expert reports may have addressed how the maneuvers may have caused Mr. Curtis' alleged injuries, the trial court failed to explain how the expert reports specifically establish "to a reasonable degree" the separate proposition of "how and why" ***CHRISTUS***' alleged breach of the standard of care applicable to hospitals (as opposed to Dr. Urbina's alleged breach of the standard of care applicable to physicians) proximately caused the Curtises' purported injuries.

Because the Curtises' expert reports are fatally deficient on causation – one of the three required elements for an expert report under Section 74.351 – the Curtis' expert reports do not constitute an objective good faith effort to comply with Section 74.351's expert report requirement. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.351(l) & (r)(6) (Vernon 2009); *Palacios*, 46 S.W.3d at 879; *Russ*, 128 S.W.3d at 340; *see also Longino*, 183 S.W.3d at 917 ("Omission of any of the statutory elements prevents the report from being a good-faith effort"). Therefore, the trial court erred in denying CHRISTUS' motion to dismiss, and the trial court's April 19, 2013 order denying CHRISTUS' motion must be reversed.

IV. The Trial Court's Order Denying CHRISTUS' Motion to Dismiss Cannot Be Affirmed Based on the Curtises' Vicarious Liability Theory Against CHRISTUS

In addition to pleading direct liability theories against CHRISTUS, the Curtises also have pled that CHRISTUS is vicariously liable for the alleged negligence of Dr. Urbina based on the doctrine of *respondeat superior*. CR 7. In

accordance with its duty of candor to this Court, CHRISTUS informs this Court of two recent Texas Supreme Court decisions that could support – but do not mandate – affirmance of the trial court's April 19, 2013 order denying CHRISTUS' motion to dismiss. First, the Supreme Court has held that an expert report is sufficient as to a claim that Alleged Principal X is vicariously liable for the conduct of Alleged Agent Y if the expert report is sufficient as to Alleged Agent Y. *See Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 632 (Tex. 2013); *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671-72 (Tex. 2008) (per curiam). Neither CHRISTUS nor Dr. Urbina filed objections in the trial court specifically challenging the sufficiency of the Curtises' expert reports as to the alleged negligence of Dr. Urbina.

Second, in two decisions issued earlier this year, the Texas Supreme Court held that, if a plaintiff's expert report is sufficient as to one liability theory under Section 74.351, then the plaintiff's ***entire*** case may proceed against the defendant even if the plaintiff's expert report is deficient as to any other liability theory. *See Potts*, 392 S.W.3d at 630, 632; *TTHR Ltd. P'ship d/b/a Presbyterian Hosp. of Denton v. Moreno*, 2013 Tex. LEXIS 271, at *1-*2 (Tex. Apr. 5, 2013).

Based on the above authority, the Curtises conceivably ***could have*** argued in the trial court that CHRISTUS' motion to dismiss should be denied in its entirety because: (1) the Curtises' expert reports are sufficient as to their vicarious liability theory against CHRISTUS based on the conduct of Dr. Urbina; and (2) the

sufficiency of those reports in that narrow respect is sufficient for the Curtises' entire case to proceed against CHRISTUS notwithstanding the fatal deficiencies in the Curtises' expert reports as to their direct liability theories against CHRISTUS. The above argument, however, does not support affirmance of the trial court's order denying CHRISTUS' motion to dismiss for at least two independent reasons.

In *Potts*, the Texas Supreme Court stated that "[f]or the particular liability theory addressed, the report must sufficiently describe the defendant's alleged conduct" because "[s]uch a report both informs a defendant of the behavior in question and allows the trial court to determine if the allegations have merit." *Potts*, 392 S.W.3d at 631. In *Potts*, the expert reports sufficiently described the specific basis for the plaintiff's vicarious liability theory against the defendant in that case so as to inform the defendant of the behavior at issue and so as to allow the trial court to determine if that vicarious liability theory had merit. For example, the expert reports in *Potts* expressly identified the individual who committed the sexual assault in that case as an "employee" of the defendant.[8]

In contrast, in the present case, none of the Curtises' expert reports offer any

[8] *Certified EMS, Inc. v. Potts*, 355 S.W.3d 683, 687 (Tex. App.–Houston [1st Dist.] 2011), *aff'd*, 392 S.W.3d 625, 632 (Tex. 2013) ("The expert reports' description of Hardin as an employee of [the defendant] support [the plaintiffs'] theory that [the defendant] is vicariously liable under the doctrine of respondeat superior"); *id.* at 689 ("[T]he first reports timely filed by [the plaintiffs] implicate the conduct of Hardin and [the defendant]. Foster's report mentions Hardin's improper conduct and explains that at the time of the conduct he was employed by a 'Temporary Nursing Agency Service.' This was sufficient to implicate [the defendant]").

description – much less a sufficient description – of the specific basis for the Curtises' vicarious liability theory against CHRISTUS based on the alleged conduct of Dr. Urbina so as to inform CHRISTUS of the behavior at issue and so as to allow the trial court to determine if that vicarious liability theory had merit. In light of longstanding Texas jurisprudence that hospitals generally ***are not*** vicariously liable for the conduct of physicians who practice at their facilities,[9] the only way CHRISTUS or the trial court could have been informed of the alleged basis for the Curtises' vicarious liability theory against CHRISTUS based on the alleged conduct of Dr. Urbina would be to look outside of the four corners of the Curtises' expert reports or rely on speculative inferences from those reports in violation of the well-established prohibition against such practices. *See, e.g.*, *Bowie Mem'l Hosp.*, 79 S.W.3d at 52; *Hardy*, 170 S.W.3d at 869.

But even if this Court were to conclude that the *Potts/Moreno* argument may have merit under the facts of this case (which it does not), such argument nevertheless fails for the additional, independent reason that the Curtises waived the argument. The Curtises never raised the above argument in the trial court in any of their responses to CHRISTUS' objections or motion to dismiss or in their motion to deem their expert reports adequate. CR 59-61, 130-33, 141-45. The

[9] *See, e.g.*, *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 948-50 (Tex. 1988) (hospitals generally not liable for independent contractor physicians absent showing of ostensible

trial court also never relied on the above argument in denying CHRISTUS' motion to dismiss. CR 150-58. In fact, the trial court's written opinion expressly states that it denied CHRISTUS' motion to dismiss "***[f]or all of the foregoing reasons***" but none of those "foregoing reasons" is based on the above argument. CR 158 ("For all of the foregoing reasons, the Court finds that Christus St. Michael's Motion to Dismiss should be, and the same is hereby, DENIED").[10] The Curtises therefore waived the above argument and cannot rely on such argument to support affirmance of the trial court's order denying CHRISTUS' motion to dismiss.[11] Thus, reversal of the trial court's order denying CHRISTUS' motion to dismiss and remand of this case for further proceedings remains the proper relief in this appeal.

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agency); *Garrett v. L.P. McCuistion Community Hosp.*, 30 S.W.3d 653, 655-57 (Tex. App.–Texarkana 2000, no pet.) (same).

[10] The trial court also was not required to reach that argument in denying CHRISTUS' motion to dismiss where it concluded that the Curtises' expert reports were sufficient as to at least one of the Curtises' direct liability theories against CHRISTUS. CR 158 n.2.

[11] *See, e.g.*, TEX. R. APP. P. 33.1(a); *San Jacinto Methodist Hosp. v. Carr*, 2008 Tex. App. LEXIS 3850, at *8 (Tex. App.–Houston [1st Dist.] May 22, 2008, no pet.) (rejecting plaintiff's contention that defendant failed to timely object to expert reports because plaintiff waived such contention in trial court / "Although Methodist did not object to the initial expert reports, Methodist can object to the reports on appeal because the Carrs did not raise the issue of waiver in their response to Methodist's motion to dismiss. As such, the issue was not before the trial court when it made its decision, and we may not consider it on appeal"); *Hansen v. Starr*, 123 S.W.3d 13, 18 (Tex. App.–Dallas 2003, pet. denied) ("[T]he [plaintiffs] contend the trial court erred in granting the motions to dismiss because the doctors waived their right to complain about the adequacy of the expert report. As noted above, however, the [plaintiffs] did not raise the issue of waiver in their responses to the motions to dismiss. In reviewing the trial court's judgment, we may only consider what was before the trial court at the time it made its decision. . . . Because the [plaintiffs] did not assert waiver in their responses, the trial court could not have addressed the argument when it dismissed their claims").

CONCLUSION

For the reasons stated above, Appellant CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System respectfully requests that this Court: (1) reverse the trial court's April 19, 2013 order denying CHRISTUS' Motion to Dismiss; and (2) remand this case to the trial court with instructions to determine CHRISTUS' request for attorney's fees and costs pursuant to Texas Civil Practice and Remedies Code § 74.351(b). CHRISTUS further respectfully requests that this Court grant CHRISTUS any and all other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned counsel – in reliance upon the word count of the computer program used to prepare this document – certifies that this brief contains 4,580 words, excluding the words that need not be counted under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Kevin W. Yankowsky
Kevin W. Yankowsky

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellant's Opening Brief on the Merits was served by electronic mail and certified mail, return receipt requested, on June 18, 2013, upon the following counsel of record:

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Kevin W. Yankowsky

INDEX TO APPENDIX

Appendix Tab 1

EXPERT OPINION OF KHALID MALIK, MD

This report is written at the request of The Girard's Law Firm and is written in order to comply with *Texas Civil practices & Remedies Code* 74.325. I have been informed that subsection (k) of the statute provides that an expert opinion prepared under this law is not admissible in evidence by any party; shall not be used in a deposition, trial, or other proceeding; and shall not be referred to by any Defendant during the course of any proceeding in this case. All opinions expressed herein are based upon reasonable medical probability.

Materials Reviewed

I have reviewed the medical care given to William C. Curtis by James Urbina, MD at Christus Saint Michael Hospital (Certified Primary Stroke Center) in Texarkana, Texas. In addition, I have reviewed related patient studies from UT Southwestern in Dallas Texas, Collom & Carney Clinic, Advanced Imaging, and Advanced Pulmonary and Sleep Solutions in Texarkana, Texas.

Qualifications

I am a board-certified physician, licensed to practice medicine in the State of Texas. I received the M.D. degree in 1991 from the King Edward Medical College. Thereafter, from 1994 to 1995, I completed an internship in Internal Medicine at Marshall University in Huntington, West Virginia. From 1995 to 1998, I completed my residency training in Neurology at the Medical College of Georgia in Augusta, Georgia. From 1998 to 1999, I completed my fellowship training in Neurophysiology at the Medical College of Georgia. Further, from 2000 to 2002, I completed fellowship training in Cerebrovascular Disease. I have been engaged in the full-time practice of medicine and neurology for the past 16 years. I routinely care for patients who have and/or may be experiencing a stroke. I have been a clinical instructor in the area of neurology. I am currently a full-time member of the medical staff of Wadley Regional Medical Center, Texarkana, Texas. I am the medical director of Wadley's Certified Primary Stoke Center. As such, I am familiar with the staffing requirements and policies and procedures required of hospitals treating patients with neurological complaints. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke.

Throughout my career, I have routinely cared for patients presenting with complicated neurological issues, including patients with known neurological issues such as stroke and other unknown neurological and cerebrovascular issues. I have cared for such patients in the ER setting, in the hospital setting once such patients have been admitted, and in the office setting. I have routinely supervised nurses in the care of such patients. Specifically, I care for patients such as Mr. Curtis whose complaint was muffled hearing, unsteady balance, nausea and feeling poorly after bending his neck while working under a deck at his lake cabin. As a stroke neurologist, I am often called upon to preform interventional procedures on patients presenting with symptoms such as Mr. Curtis presented with. I evaluate such patients routinely, order and interpret appropriate lab work and diagnostic imaging studies such as MRI, MRA, CT, and CTA. I am currently, and have been at all times relevant hereto, engaged in full time medical practice in Texas. I am familiar with the standards of care for physicians caring for patients exhibiting the

signs and symptoms of Mr. Curtis, both in the office practice and in a hospital setting. My curriculum vita is attached hereto and further outlines my educations, training and experience.

All opinions expressed in this report are based on reasonable medical probability.

Texas Legal Definitions

I understand that with respect to physicians in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a physician of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances.

I understand that with respect to hospitals in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a hospital of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a hospital of ordinary prudence would have done under the same or similar circumstances.

I understand that in Texas, "proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. I understand that there may be more than one proximate cause of an event.

Patient History

On September 17, 2010, Mr. Curtis, a 59 year old male, presented to the Christus Saint Michael Hospital emergency department complaining of sudden muffled hearing, balance issues, nausea and feeling poorly. Mr. Curtis has a history of Lap band (2005) but no history of breathing or insomnia issues, hypertension, diabetes, cardiovascular or stroke-related issues. Mr. Curtis does not smoke and rarely drinks alcohol. He takes a multi vitamin and 81mgs of aspirin daily. He denied chest pain, abnormal pain, headache, melena, hematochezia, dysuria or syncope. Initial vital signs were unremarkable with a blood pressure of 119/73, pulse 51, temperature 96.4, mean arterial pressure of 88, and a respiratory rate of 16. Mr. Curtis' speech was not slurred; he did not present with any stroke related facial or extremity issues. His reflexes and strength in all four extremities were normal. He had no problem communicating with the emergency department staff and physicians.

Lab work was ordered and reported. On admission, his cholesterol was 146 and triglycerides were 38. Other lab work that I reviewed was within normal limits. Several imaging studies were ordered and performed while Mr. Curtis was in the emergency department. A chest x-ray, carotid Doppler exam, MRI of the brain, MRA of the head, and CT of the brain were all negative except for the identification of a trigeminal artery on the MRA of the head. The carotid Doppler duplex exam report noted that neither the right nor left vertebral arteries could be identified. The chest x-ray demonstrated prior granulomatous disease, but was otherwise normal. A CTA of the head and neck was ordered and performed the next morning. Mr. Curtis was screened by a teleneurologist in the emergency department. All of Mr. Curtis' neurological evaluations were noted to be normal. Initial diagnosis was heat stroke related. Mr. Curtis was

admitted for observation to the Certified Primary Stroke Unit at Christus Saint Michael Hospital under their stroke protocol. Dr. James Urbina, a hospitalist, was the attending physician.

The CTA of the head and neck was performed the morning of 9/18/2010 and revealed a persistent trigeminal artery which communicates with the basilar artery at the level of the siphon. The basilar artery proximal to this level is relatively hypoplastic. The left vertebral artery is quite small throughout its length but is faintly patent. The right vertebral artery is somewhat larger but still relatively hypoplastic. These results are of concern regarding Mr. Curtis' symptoms and condition.

Dr. Urbina evaluated Mr. Curtis' condition and made the diagnosis of Benign Proximal Positional Vertigo. On 9/18/2010, Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis to reposition the crystals in his ears. The Dix-Hallpik maneuver which consists of repeated rapid significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees was performed. At this point, Mr. Curtis demonstrated double vision, blood pressure drop, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina proceeded to have Mr. Curtis do the Epley maneuver after the Dix-Hallpik was performed. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck. Mr. Curtis did not respond favorably to these procedures. I was consulted on the afternoon of 9/18/2010. I diagnosed Mr. Curtis with his brainstem stroke. Cardiology was also consulted, but did not find any additional significant issues. Mr. Curtis was discharge from Christus Saint Michael Hospital on 9/20/2010.

A MRI was ordered by Dr. Freddie Contreras and performed at Advanced Imaging in Texarkana Texas on 9/23/2010, three days after Mr. Curtis was discharged from Christus Saint Michael Hospital's Certified Primary Stroke Unit. This MRI compared to the MRI performed at Christus Saint Michael Hospital on 9/17/2010 revealed regions of sub acute infarction in the inferior pons consistent with a brainstem stroke. A subsequent cerebral angiogram was performed at UT Southwestern in Dallas, Texas. This angiogram report, dated 10/15/2010, revealed that Mr. Curtis in addition to having suffered a brainstem stroke, had experienced a complex basilar artery dissection.

Audiology reports from Collom & Carney Clinic confirm that Mr. Curtis has suffered severe hearing loss. A sleep study performed at Advanced Pulmonary and Sleep Solutions indicates that Mr. Curtis is now suffering from sleep apnea.

Standards of Care

Mr. Curtis presented with neurological complaints and radiology confirmed an abnormal cerebrovascular anatomy. The relevant standards of care for a physician taking care of such a patient require that the physician not perform the Dix-Hallpik and Epley maneuvers under any circumstances. Such maneuvers were contraindicated given Mr. Curtis' cerebrovascular anatomy.

The relevant standards of care for a hospital caring for complex neurological patients such as Mr. Curtis require that the hospital staff its facility with adequately trained healthcare providers capable of recognizing and treating such patients. Minimal standards of care require that a hospital treating patients with complex neurological issues have an on-site neurologist

available full time to assess and treat patients presenting with neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. Moreover, minimal standards of care require that the hospital caring for patients with complex neurological problems must have, and enforce, policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on patients with neurological complaints and documented abnormal cerebrovascular anatomy.

Violations of the Standard of Care

My review of the medical records related to Mr. Curtis's treatment leads me to conclude that based on reasonable medical probability, Dr. James Urbina and Christus Saint Michael Hospital fell below the applicable standards of care in their treatment of Mr. Curtis.

Specifically, Dr. James Urbina fell below the minimal standards of care by performing the Dix-Hallpik and Epley maneuvers on Mr. Curtis. Given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy, such maneuvers were contraindicated.

Christus Saint Michael Hospital likewise fell below the standards of care by failing to staff its facility with adequately trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. In addition, if an onsite neurologist was not available for consultation, a neurology consult should have been obtained from the teleneurologist regarding the cerebrovascular abnormality Mr. Curtis demonstrated prior to Dr. Urbina preforming any neck manipulation. Moreover, the hospital violated minimal standards of care by failing to have, and enforce, written policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on Mr. Curtis, given his neurological complaints and documented abnormal cerebrovascular anatomy.

Christus Saint Michael Hospital staffed its facility with Dr. Urbina, a physician that was inadequately trained to treat patients presenting with complicated neurological issues, and a nursing staff in its Certified Primary Stroke Unit that was not properly trained to intervene after Mr. Curtis experienced a significant neurological event.

Under the definitions listed above, I must conclude that Dr. James Urbina and Christus Saint Michael Hospital were negligent in their treatment and care of Mr. Curtis.

Appropriate Patient Care

Dr. James Urbina should have not subjected Mr. Curtis' head or neck to any sudden movement, torsion, bending, flexion, extension, or rotation given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy. Under no circumstances should the Dix-Hallpik or Epley maneuvers have been performed. The Hospital should have had a written policy prohibiting the same. Appropriate standards of care required Dr. James Urbina to consult with neurology for evaluation of the cerebrovascular issues that were demonstrated on MRA and CTA. Likewise, Christus Saint Michael Hospital should have had an onsite neurologist, rather than the inadequately trained staff, available to assess and treat Mr. Curtis' neurological issues. A neurologist would have the training to understand and properly address Mr. Curtis' issues.

Causation and Damages

The principle of injury involved regarding the vertebral artery is due to the anatomy of this artery which is vulnerable to stretching, compression, or torquing injury as it curves around the atlas. This artery changes its direction from a vertical to a horizontal path and is therefore very likely susceptible to injury from rotation and extension.

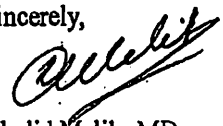
Because of Mr. Curtis' abnormal cerebrovascular anatomy that was identified on the CTA scan of 9/18/2010 while in Christus Saint Michael Hospital on their Certified Primary Stroke Unit, the treatment consisting of the Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky.

During the Dix-Hallpik maneuver, Mr. Curtis suffered classical stroke symptoms of double vision, blood pressure drop, acute hearing loss, vomiting, dizziness, and vital sign compromise. These symptoms, more likely than not, corresponded with the timing of his brainstem infarction and his complex basilar artery dissection at the anterior inferior cerebellar artery (AICA) junction. Based on reasonable medical probability, this is when Mr. Curtis infarcted his brainstem and the dissection occurred. After the initial acute neurological event, Dr. James Urbina continued with another contraindicated procedure and performed the Epley maneuver on Mr. Curtis. It is clear that these maneuvers consisting of rapid and repeated significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees subjected Mr. Curtis' abnormal cerebrovascular anatomy to extreme trauma and stress and caused a tear that resulted in a complex dissection of his basilar artery at the AICA junction and a resultant brainstem infarction with significant permanent hearing loss.

Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

I reserve the right to amend this report as more information becomes available.

Sincerely,



Khalid Malik, MD

CURRICULUM VITAE

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EDUCATION:

F. Sc (Pre-Med) 1984, Government College, Lahore, Pakistan

MBBS (Bachelor of Medicine and Bachelor of Surgery)
June, 1991, King Edward Medical College.
Punjab University, Lahore, Pakistan

FMGEMS, 1993
United States Medical Licensing Exam. 1995.

ACLS 1995 (Recertified 1997 and 2000)

Participation in the Preceptorship Program on Acute Stroke at the University of Texas Medical School at Houston, April 3-4. 1998.

Board certification: Diplomate American Board of Neurology and Psychiatry April 2000
Recertified February 2012

Subspeciality Certification in Clinical Neurophysiology March 2003.
Diplomate No:1397.

Subspeciality Certification in Vascular Neurology June 2006.
Diplomate No:314.

EXPERIENCE:

July 91 - Jan 92	House Physician,Internal Medicine Mayo Hospital, Lahore. Pakistan
Jan 92 - June 92	House Physician,Neurology Mayo Hospital Lahore Pakistan

May 93 - June 94 — Primary Care Practice
Rural Health Center, Pakistan

July 94 - June 95 — Internship year in Internal Medicine
Marshall University, Huntington, West Virginia VA Medical Center,
Huntington, West Virginia

EXPERIENCE(Cont'd)

July 95-June 98 — Residency in Neurology
Medical College of Georgia
Augusta,GA
VA Medical Center,Augusta.GA

July 98 -June 99 — Fellowship in Clinical Neurophysiology
Medical College of Georgia. Augusta.GA

March 00- Feb 02 — Cerebrovascular Disease-Traumatic Brain Injury Fellowship
VA Medical Center, Augusta, GA

Duties included:
*Treatment of acute ischemic stroke including thrombolytic therapy .

*Establishment of a rural stroke network.
*Community education about stroke.
*Clinical studies in stroke
*Carotid doppler studies.
*Research project regarding role of TFDs in reducing Hypoxia Reperfusion injury in stroke .

March 00-March 02 — Clinical Instructor in Neurology
Medical College of Georgia.
Augusta,GA

Currently — Director Stroke Program.
Wadley Regional Medical Center
Texarkana,Texas,a JCAHO Certified

Primary Stroke Center.
Currently involved in establishing Critical care pathways and acute Stroke treatment protocols at Wadley Regional Medical Center as well as Establishing a regional stroke network. Involved in community education Efforts to raise stroke awareness and also interacting with the local medical community to promote acute Stroke treatment.

Member GETAC Stroke Committee Jan 06-Feb 09.
Stroke Committee chair NETRAC 2010
Critical Care Committee member NETRAC 2011 to date

HONORS & AWARDS:

Project approved by VA Office of Academic Affiliations regarding role of transcription factor decoys in decreasing reperfusion injury in stroke.
This was a competitive research award with only four being approved and funded.

Science & Technology Scholarship awarded by Government of Pakistan.

Research Scholarship awarded by King Edward Medical College Alumni Association of North America

Merit Scholarship in Pre-Medicine

RESEARCH:

Co-Investigator in SPARCL (a double blind randomized placebo controlled study of atorvastatin as prevention of cerebrovascular events in patients with a previous TIA or stroke)

Enrollment of patients into Enlimomab, WARSS (Warfarin vs. Aspirin recurrent stroke study),AAASPS (African American Antiplatelet Stroke Prevention Study) and Citicholine studies for acute ischemic stroke.

Evaluation and management of the comatose patient.Khalid

Malik M.B.B.S. and David C Hess M.D.Post graduate Medicine February 2002.

The Influence of Age and Height On Nerve Conduction. A review of nerve conduction studies, EMG findings , Evoked potentials and histopathological changes. Michael H Rivner, MD, Thomas R Swift, MD and Khalid Malik, MD (Muscle and Nerve Sept 2001)

Use of IVIG to treat antibody mediated lack of response to botulinum toxin .
Protocol established and initial funding agreement made with Allergan.

Co investigator in the following trials:

Protocol M/2725/0002 (96391A), A Preliminary study in PD with dyskinesias Pharmacia and UpJohn,2000-2001.PI-Kapil D Sethi,MD.

A Multicenter, Open-Label, Phase III Study for the Safety. Tolerability and Clinical Effect of Rasagline Mesylate in Patients with Parkinson's Disease.
Protocol: TVP-1012/233. TEVA, 12-00-present

Requip Treatment For Restless Legs Syndrome Mayo Clinic. Scottsdale, 11/01-present

Protocol 20000105 (AMG-474-00),AMG 7400 in treatment of PD. Amgen, Inc., 2000-Present.PI Kapil D Sethi MD.

Parkinson's Disease Collaborative Study of Genetic Linkage (PROGENI) , NIH, 8/98-present

A Multicenter, US and Canada, Double-blind, Randomized, Placebo-Controlled,Parallel-Group Study for the Efficacy, Tolerability and Safety of Rasagaline Mesylate in Levodopa Treated Parkinson's disease patients with Motor Fluctuations (PRESTO) Protocol

TVP-1012/133,TEVA,9/00-present.

An Active Extension of the TVP-1012/133 (PRESTO) Study-A Bi-national, Multicenter, Double-Blind, Randomized Study to Evaluate the Safety and Tolerability of Rasagiline Mesylate in Advanced Parkinson's Disease (PD) Patients with Motor Fluctuations Treated With Chronic Levodopa/Carbidopa Therapy.
Protocol: TV{ 1012/135. TEVA, 6/01-present

An Open Extension Study of the Safety and Efficacy of Zydis Selegiline 1.25 and 2.5 fig QD as an Adjunct in the Management of Parkinsonian Patients Being Treated with Levodopa. MDS. 1997 -present

A Double-blind, Parallel-Group,Placebo Controlled,Randomized,Extension of Study 320 of the Effect of Riluzole on Progression of Parkinson's Disease. Protocol number RP54274X-320LT. Rhone-Poulenc-Rorer January 2000-present

Publications pending :
Callosal and Periventricular lesions demonstrated by Magnetic resonance Imaging in Cocaine Abusers.A case report series.
Khalid Malik MD and Shawn G Dunn MD.
Submitted to Archives of Neurology

Gait disorder in Lithium toxicity.A Video Brief .
Kapil.D.Sethi MD and Khalid Malik MD.
Submitted to Movement Disorders .

STROKE RELATED PRESENTATIONS AND COMMUNITY EDUCATION.
Profiles in Health; Acute Stroke at Wadley Life Source.
Telecast September 19,2003.

Understanding Stroke Risk factors and Prevention .Presentation to a geriatric Population at Wadley Life Source. February 26,2004.

New treatment for a Brain Attack .April 20 2004.Presented at Wake Village Baptist church.

Stroke Risk Factors and Treatment Options. KTOY Radio on May 02. 2004.

Public Health Burden of stroke.

In Hospital management of stroke.
Secondary Stroke Prevention. Invited speaker for these three presentations
At the Acute Stroke Conference sponsored by American Heart Association.
Texarkana College ,Truman Arnold Center, May 19 2004.

Secondary Stroke Prevention .A presentation to stroke survivors and care givers
At Health South Rehabilitation Hospital May 25 ,2004.

Staff meeting at Atlanta Memorial Hospital,Atlanta Texas
regarding Stroke care,A Network Approach, August 16, 2004 .

Staff meeting at Medical Park Hospital,Hope Arkansas regarding Stroke
Care,A Network Approach, August 20, 2004

Acute stroke management and Secondary prevention of Stroke.An interactive telecast over AHEC SouthWestern's Network.November 04, 2004.

Staff meeting at Howard Memorial Hospital, Nashville Arkansas regarding Stroke
Care, A Network Approach, January 19, 2005.

Brain Attack 2005,A presentation at Rose Hill Baptist Church.TexarkanaTexas.
March 01,2005.

Staff meeting at Magnolia Hospital, Magnolia, Arkansas regarding Stroke
Care, A Network Approach, March 16, 2005.

Staff meeting at Little River Memorial Hospital, Ashdown Arkansas regarding
Stroke Care, A Network Approach, April 21, 2005.

SOCIETY MEMBERSHIP:

American Academy of Neurology.

American Headache Society.

EXTRA CURRICULAR ACTIVITIES

Member Student Organization for Blood Donation, King Edward Medical College, Lahore, Pakistan (Awarded gold medal for service rendered)

Photography

Fresh water fishing.

LICENSURE:

State of Georgia License No: 046986
State of Texas License No: L 7026

REFERENCES:

Available upon request

EXPERT OPINION OF CHRISTOPHER A. BAILEY, MD

This report is written at the request of The Girard's Law Firm and is written in order to comply with *Texas Civil practices & Remedies Code* 74.325. I have been informed that subsection (k) of the statute provides that an expert opinion prepared under this law is not admissible in evidence by any party; shall not be used in a deposition, trial, or other proceeding; and shall not be referred to by any Defendant during the course of any proceeding in this case. All opinions expressed herein are based upon reasonable medical probability.

Materials Reviewed

I have reviewed the medical care given to William C. Curtis by James Urbina, MD at Christus Saint Michael Hospital (Certified Primary Stroke Center) in Texarkana, Texas. In addition, I have reviewed related patient studies from UT Southwestern in Dallas Texas, Collom & Carney Clinic, Advanced Imaging, and Advanced Pulmonary and Sleep Solutions in Texarkana, Texas.

Qualifications

I am a board certified physician, licensed to practice medicine in the State of Texas. I am board certified in critical care, internal medicine, pulmonology, and sleep medicine. I have 19 years of experience practicing medicine. I graduated from the University of Oklahoma and completed my fellowship at the University of Oklahoma in 1992. I currently maintain an active practice specializing in pulmonology and sleep medicine. I am on staff at Christus Saint Michael Hospital and Wadley Regional Medical Center in Texarkana Texas. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke. I am also intimately familiar with the standards by which physicians should address the needs of patients suffering from and /or at risk for stroke.

As such, I am familiar with the staffing requirements and policies and procedures required of hospitals treating patients with neurological complaints. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke.

Throughout my career, I have routinely cared for patients presenting with complicated neurological issues, including patients with known neurological issues such as stroke and other unknown neurological and cerebrovascular issues. I have cared for such patients in the ER setting, in the hospital setting once such patients have been admitted, and in the office setting. I have routinely supervised nurses in the care of such patients. Specifically, I care for patients such as Mr. Curtis whose complaint was muffled hearing, unsteady balance, nausea and feeling poorly after bending his neck while working under a deck at his lake cabin. As a critical care physician, I am often called upon to preform interventional procedures on patients presenting with symptoms such as Mr. Curtis presented with. I evaluate such patients routinely, order and interpret appropriate lab work and diagnostic imaging studies such as MRI, MRA, CT, and CTA. I am currently, and have been at all times relevant hereto, engaged in full time medical practice in Texas. I am familiar with the standards of care for physicians caring for patients exhibiting the signs and symptoms of Mr. Curtis, both in the office practice and in a hospital setting. My curriculum vita is attached hereto and further outlines my educations, training and experience.

All opinions expressed in this report are based on reasonable medical probability.

Texas Legal Definitions

I understand that with respect to physicians in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a physician of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances.

I understand that with respect to hospitals in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a hospital of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a hospital of ordinary prudence would have done under the same or similar circumstances.

I understand that in Texas, "proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. I understand that there may be more than one proximate cause of an event.

Patient History

On September 17, 2010, Mr. Curtis, a 59 year old male, presented to the Christus Saint Michael Hospital emergency department complaining of sudden muffled hearing, balance issues, nausea and feeling poorly. Mr. Curtis has a history of Lap band (2005) but no history of breathing or insomnia issues, hypertension, diabetes, cardiovascular or stroke-related issues. Mr. Curtis does not smoke and rarely drinks alcohol. He takes a multi vitamin and 81mgs of aspirin daily. He denied chest pain, abnormal pain, headache, melena, hematochezia, dysuria or syncope. Initial vital signs were unremarkable with a blood pressure of 119/73, pulse 51, temperature 96.4, mean arterial pressure of 88, and a respiratory rate of 16. Mr. Curtis' speech was not slurred; he did not present with any stroke related facial or extremity issues. His reflexes and strength in all four extremities were normal. He had no problem communicating with the emergency department staff and physicians.

Lab work was ordered and reported. On admission, his cholesterol was 146 and triglycerides were 38. Other lab work that I reviewed was within normal limits. Several imaging studies were ordered and performed while Mr. Curtis was in the emergency department. A chest x-ray, carotid Doppler exam, MRI of the brain, MRA of the head, and CT of the brain were all negative except for the identification of a trigeminal artery on the MRA of the head. The carotid Doppler duplex exam report noted that neither the right nor left vertebral arties could be identified. The chest x-ray demonstrated prior granulomatous disease, but was otherwise normal. A CTA of the head and neck was ordered and performed early the next morning. Mr. Curtis was screened by a teleneurologist in the emergency department. All of Mr. Curtis' neurological evaluations were noted to be normal. Initial diagnosis was heat stroke related. Mr. Curtis was admitted for observation to the Certified Primary Stroke Unit at Christus Saint Michael Hospital under their stroke protocol. Dr. James Urbina, a hospitalist, was the attending physician.

The CTA of the head and neck was performed the morning of 9/18/2010 and revealed a persistent trigeminal artery which communicates with the basilar artery at the level of the siphon. The basilar artery proximal to this level is relatively hypo-plastic. The left vertebral artery is quite small throughout its length but is faintly patent. The right vertebral artery is somewhat larger but still relatively hypoplastic. These results are of concern regarding Mr. Curtis' symptoms and condition.

Dr. Urbina evaluated Mr. Curtis' condition and made the diagnosis of Benign Proximal Positional Vertigo. On 9/18/2010, Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis to reposition the crystals in his ears. The Dix-Hallpik maneuver which consists of repeated rapid significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees was performed. At this point, Mr. Curtis demonstrated double vision, blood pressure drop, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina proceeded to have Mr. Curtis do the Epley maneuver after the Dix-Hallpik was performed. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck. Mr. Curtis did not respond favorably to these procedures. Dr. Malik, neurologist was consulted on the afternoon of 9/18/2010. Dr. Malik diagnosed Mr. Curtis with a brainstem stroke. Cardiology was also consulted, but did not find any additional significant issues. Mr. Curtis was discharged from Christus Saint Michael Hospital on 9/20/2010.

An MRI of the brain was ordered by Dr. Freddie Contreras and performed at Advanced Imaging in Texarkana Texas on 9/23/2010, three days after Mr. Curtis was discharged from Christus Saint Michael Hospital's Certified Primary Stroke Unit. This MRI compared to the MRI performed at Christus Saint Michael Hospital on 9/17/2010 revealed regions of sub acute infarction in the inferior pons consistent with a brainstem stroke. A subsequent cerebral angiogram was performed at UT Southwestern in Dallas, Texas. This angiogram report, dated 10/15/2010, revealed that Mr. Curtis in addition to having suffered a brainstem stroke had experienced a complex basilar artery dissection.

Audiology reports from Collom & Carney Clinic confirm that Mr. Curtis has suffered severe hearing loss. A sleep study performed at Advanced Pulmonary and Sleep Solutions indicates that Mr. Curtis is now suffering from sleep apnea as a result of his cerebral compromise.

Standards of Care

Mr. Curtis presented with neurological complaints and radiology confirmed an abnormal cerebrovascular anatomy. The relevant standards of care for a physician taking care of such a patient require that the physician not perform the Dix-Hallpik and Epley maneuvers under any circumstances. Such maneuvers were contraindicated given Mr. Curtis' cerebrovascular anatomy.

The relevant standards of care for a hospital caring for complex neurological patients such as Mr. Curtis require that the hospital staff its facility with adequately trained healthcare providers capable of recognizing and treating such patients. Minimal standards of care require that a hospital treating patients with complex neurological issues have an on-site neurologist available full time to assess and treat patients presenting with neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. Moreover, minimal standards of care require that the hospital caring for patients with complex neurological problems must have, and enforce, policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on patients with neurological complaints and documented abnormal cerebrovascular anatomy.

Violations of the Standard of Care

My review of the medical records related to Mr. Curtis's treatment leads me to conclude that based on reasonable medical probability, Dr. James Urbina and Christus Saint Michael Hospital fell below the applicable standards of care in their treatment of Mr. Curtis.

Specifically, Dr. James Urbina fell below the minimal standards of care by performing the Dix-Hallpik and Epley maneuvers on Mr. Curtis. Given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy, such maneuvers were contraindicated.

Christus Saint Michael Hospital likewise fell below the standards of care by failing to staff its facility with adequately trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. In addition, if an onsite neurologist was not available for consultation, a neurology consult should have been obtained from the teleneurologist regarding the cerebrovascular abnormality Mr. Curtis demonstrated prior to Dr. Urbina preforming any neck manipulation. Moreover, the hospital violated minimal standards of care by failing to have, and enforce, written policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on Mr. Curtis, given his neurological complaints and documented abnormal cerebrovascular anatomy.

Christus Saint Michael Hospital staffed its facility with Dr. Urbina, a physician that was inadequately trained to treat patients presenting with complicated neurological issues, and a nursing staff in its Certified Primary Stroke Unit that was not properly trained to intervene after Mr. Curtis experienced a significant neurological event.

Under the definitions listed above, I must conclude that Dr. James Urbina and Christus Saint Michael Hospital were negligent in their treatment and care of Mr. Curtis.

Appropriate Patient Care

Dr. James Urbina should have not subjected Mr. Curtis' head or neck to any sudden movement, torsion, bending, flexion, extension, or rotation given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy. Under no circumstances should the Dix-Hallpik or Epley maneuvers have been performed. The Hospital should have had a written policy prohibiting the same. Appropriate standards of care required Dr. James Urbina to consult with neurology for evaluation of the cerebrovascular issues that were demonstrated on MRA and CTA. Likewise, Christus Saint Michael Hospital should have had an onsite neurologist, rather than the inadequately trained staff, available to assess and treat Mr. Curtis' neurological issues. A neurologist would have the training to understand and properly address Mr. Curtis' issues.

Causation and Damages

The principle of injury involved regarding the vertebral artery is due to the anatomy of this artery which is vulnerable to stretching, compression, or torquing injury as it curves around the atlas. This artery changes its direction from a vertical to a horizontal path and is therefore very likely susceptible to injury from rotation and extension.

Because of Mr. Curtis' abnormal cerebrovascular anatomy that was identified on the CTA scan the morning of 9/18/2010 while in Christus Saint Michael Hospital on their Certified Primary Stroke Unit, the treatment consisting of the Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky.

During the Dix-Hallpik maneuver, Mr. Curtis suffered classical stroke symptoms of double vision, blood pressure drop, acute hearing loss, vomiting, dizziness, and vital sign compromise. These symptoms, more likely than not, corresponded with the timing of his brainstem infarct and his complex basilar artery dissection at the anterior inferior cerebellar artery (AICA) junction. Based on reasonable medical probability, this is when Mr. Curtis infarcted his brainstem and the dissection occurred. After the initial acute neurological event, Dr.

James Urbina continued with another contraindicated procedure and performed the Epley maneuver on Mr. Curtis. It is clear that these maneuvers consisting of rapid and repeated significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees subjected Mr. Curtis' abnormal cerebrovascular anatomy to extreme trauma and stress. The torsion, bending, flexing, extending, and rotating of Mr. Curtis' neck during these procedures caused his brainstem to infarct and caused a tear that resulted in a complex dissection of his basilar artery at the AICA junction.

Mr. Curtis has extremely small hypoplastic right and left vertebral arteries and two thirds of his proximal basilar artery is markedly diminished in diameter at the junction where the vertebral arteries join the basilar artery. These abnormal hypoplastic vertebral arteries and the diminished diameter basilar artery are abnormal and are not as pliable and do not flex or stretch like normal sized vertebral arteries when stressed. The severe rapid and repeated neck movements Mr. Curtis experienced during the Dix-Hallpik and Epley maneuvers caused extreme trauma and stress on his abnormal cerebrovascular anatomy. Because Mr. Curtis' cerebrovascular anatomy was abnormal, he did not tolerate the trauma and stress of these procedures and as a result, these procedures caused his brainstem to infarct and caused a tear or dissection of his basilar artery at the AICA junction resulting in significant permanent hearing loss.

Before Mr. Curtis suffered his brainstem stroke and complex basilar artery dissection, he had no history or symptoms of any sleep issues. The brainstem stroke has caused an alteration in the upper airway function and tone, thus resulting in upper airway obstruction and Obstructive Sleep Apnea Syndrome (OSAS). Mr. Curtis developed insomnia and began to have significant sleep issues during his stroke recovery period. It is more likely than not that Mr. Curtis' sleep issues were a direct result of his brainstem stroke and basilar artery dissection. Beyond any reasonable medical probability, Mr. Curtis' sleeping disorder was proximately caused by the brainstem stroke and complex basilar artery dissection.

Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

I reserve the right to amend this report as more information becomes available.

Sincerely,

Christopher A. Bailey, MD

CHRISTOPHER A. BAILEY, M.D.
1550 MOORES LANE
TEXARKANA, TEXAS 75503
(903) 793-7378 (W)
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PERSONAL DATA

PLACE OF BIRTH: COATESVILLE, PENNSYLVANIA
MARITAL STATUS: MARRIED (TERRI)
CHILDREN: ONE (CHISTOPHER ALEXANDER)

EDUCATION

1989 M.D. UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
1985 B.S. UNIVERSITY OF OKLAHOMA, NORMAN
1981 H.S. COATESVILLE AREA SENIOR HIGH

POSTGRADUATE TRAINING AND FELLOWSHIP APPOINTMENTS

1999-2000 STANFORD SCHOOL OF SLEEP MEDICINE,
PALO ALTO, CALIFORNIA

1993-1996 FELLOW, PULMONARY DISEASE AND CRITICAL CARE
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
OKLAHOMA CITY, OKLAHOMA

1992-1993 INTERNAL MEDICINE CHIEF RESIDENT
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
OKLAHOMA CITY, OKLAHOMA

1990-1993 RESIDENCY, COMBINED INTERNAL MEDICINE/PEDIATRICS
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER

OKLAHOMA CITY, OKLAHOMA

1989-1990 INTERNSHIP, COMBINED INTERNAL MEDICINE/PEDIATRICS
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
OKLAHOMA CITY, OKLAHOMA

LICENSES

OKLAHOMA
TEXAS
ARKANSAS

SPECIALTY CERTIFICATION

AMERICAN BOARD OF INTERNAL MEDICINE (DIPLOMAT) 1993-Present
AMERICAN BOARD OF PEDIATRICS (DIPLOMAT) 1993-2000
AMERICAN BOARD OF INTERNAL MEDICINE, PULMONARY DISEASE (DIPLOMAT) 1996-Present.
AMERICAN BOARD OF INTERNAL MEDICINE, CRITICAL CARE MEDICINE (DIPLOMAT) 1997-Present
AMERICAN BOARD OF SLEEP MEDICINE (DIPLOMAT) 2002-Present

HONORS

1998 & 2000	OUTSTANDING FACILITY AWARD AHEC SOUTHWEST
1994-1996	LERNER HINSHAW NIH FELLOWSHIP GRANT
1993	WILLIAM W. RUCKS AWARD
1993	PEADIATRICS OUTSTANDING TEACHER AWARD
1993	APPOINTED MEMBER, INTERNAL MEDICINE CLINICAL COMPETENCY COMMITTEE
1990-1993	APPOINTED MEMBER, INTERNAL MEDICINE HOUSESTAFF

	ADVISORY COMMITTEE
1990-1991	APPOINTED MEMBER, PROVOST'S TASK FORCE ON STUDENT/RESIDENT HEALTH, OU HEALTH SCIENCES CENTER CAMPUS
1987-1988	APPOINTED MEMBER, DEAN'S STUDENT ADVISORY COMMITTEE
1984-1987	ASSOCIATION BLACK PERSONNEL HIGH ACADEMIC ACHIEVEMENT AWARD
1984-1985	ROXIE SCOTT SCHOLORSHIP
1982-1985	DEAN'S HONOR ROLL (CONSISTENTLY)
1981	COATESVILLE AREA SENIOR HIGH SCHOOL COMMUNITY SCHOLORSHIP
1981	HIGH SCHOOL NATIONAL HONOR SOCIETY
1981	WOMAN'S LEAGUE FOR MINORITY EDUCATION SCHOLARSHIP

PROFESSIONAL APPOINTMENTS

DIRECTOR OF SLEEP LAB, WADLEY MEDICAL CENTER
JUNE/2001 - 2004

INTERNAL MEDICINE SECTION CHIEF - ST. MICHAELS HOSPITAL
1999-2001

INTERNAL MEDICINE SECTION CHIEF-WADLEY REGIONAL HOSPITAL
JANUARY 2003-2004

DIRECTOR OF CARDIOPULMONARY SECTION, WADLEY REGIONAL MEDICAL CENTER. JANUARY 1997 - September 2003

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BARRY A. GRAY, M.D.
P.O. BOX 26901, ROOM 3SP-400
OKLAHOMA CITY, OKLAHOMA 73190

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JOHN COZART, M.D.
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TEXARKANA, TX 75503

PAUL SARNA, M.D
HEALTH CARE EXPRESS
3515 RICHMOND ROAD
TEXARKANA, TX 75503

EXPERT OPINION OF LEE M. BUONO, MD

This report is written at the request of The Girard's Law Firm and is written in order to comply with *Texas Civil practices & Remedies Code* 74.325. I have been informed that subsection (k) of the statute provides that an expert opinion prepared under this law is not admissible in evidence by any party; shall not be used in a deposition, trial, or other proceeding; and shall not be referred to by any Defendant during the course of any proceeding in this case. All opinions expressed herein are based upon reasonable medical probability.

Materials Reviewed

I have reviewed the medical care given to William C. Curtis by James Urbina, MD at Christus Saint Michael Hospital (Certified Primary Stroke Center) in Texarkana, Texas. In addition, I have reviewed related patient studies from UT Southwestern in Dallas Texas, Collom & Carney Clinic, Advanced Imaging, and Advanced Pulmonary and Sleep Solutions in Texarkana, Texas.

Qualifications

I am a board-certified neurosurgeon, licensed to practice medicine in the State of New Jersey. I received the M.D. degree in 1997 from the Jefferson Medical College, Philadelphia, PA and was Cum Laude, AOA. Thereafter, from 1997 to 2003, I completed a neurosurgery residency program at Thomas Jefferson University Hospital where my training included 1 year dedicated to cerebrovascular and interventional training with Robert H. Rosenwasser. I have been engaged in the full-time practice of neurosurgery for the past 11 years. I currently maintain a very active neurosurgery practice and am affiliated with Capital Health System in Trenton, New Jersey. I routinely care for patients who have and/or may be experiencing cerebrovascular issues such as stroke. I am familiar with the staffing requirements and policies and procedures required of hospitals treating patients with neurological complaints. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke.

Throughout my career, I have routinely cared for patients presenting with complicated neurological issues, including patients with known neurological issues such as stroke and other unknown neurological and cerebrovascular issues. I have cared for such patients in the ER setting, in the hospital setting once such patients have been admitted, and in the office setting. I have routinely supervised nurses in the care of such patients. Specifically, I care for patients such as Mr. Curtis whose complaint was muffled hearing, unsteady balance, nausea and feeling poorly after bending his neck while working under a deck at his lake cabin. As a neurosurgeon, I am often called upon to preform interventional procedures on patients presenting with symptoms such as Mr. Curtis presented with. I evaluate such patients routinely, order and interpret appropriate lab work and diagnostic imaging studies such as MRI, MRA, CT, and CTA. I am currently, engaged in full time neurosurgical practice in New Jersey. Prior to my move to New Jersey in 2010, I was engaged in full-time neurosurgical practice in Texas. I am familiar with the standards of care for physicians caring for patients exhibiting the signs and symptoms of Mr. Curtis, both in the office practice and in a hospital setting. My curriculum vita is attached hereto and further outlines my educations, training and experience.

All opinions expressed in this report are based on reasonable medical probability.

Texas Legal Definitions

I understand that with respect to physicians in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a physician of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances.

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Patient History

On September 17, 2010, Mr. Curtis, a 59 year old male, presented to the Christus Saint Michael Hospital emergency department complaining of sudden muffled hearing, balance issues, nausea and feeling poorly. Mr. Curtis has a history of Lap band (2005) but no history of breathing or insomnia issues, hypertension, diabetes, cardiovascular or stroke-related issues. Mr. Curtis does not smoke and rarely drinks alcohol. He takes a multi vitamin and 81mgs of aspirin daily. He denied chest pain, abnormal pain, headache, melena, hematochezia, dysuria or syncope. Initial vital signs were unremarkable with a blood pressure of 119/73, pulse 51, temperature 96.4, mean arterial pressure of 88, and a respiratory rate of 16. Mr. Curtis' speech was not slurred; he did not present with any stroke related facial or extremity issues. His reflexes and strength in all four extremities were normal. He had no problem communicating with the emergency department staff and physicians.

Lab work was ordered and reported. On admission, his cholesterol was 146 and triglycerides were 38. Other lab work that I reviewed was within normal limits. Several imaging studies were ordered and performed while Mr. Curtis was in the emergency department. A chest x-ray, carotid Doppler exam, MRI of the brain, MRA of the head, and CT of the brain were all negative except for the identification of a trigeminal artery on the MRA of the head. The carotid Doppler duplex exam report noted that neither the right nor left vertebral arties could be identified. The chest x-ray demonstrated prior granulomatous disease, but was otherwise normal. A CTA of the head and neck was ordered and performed the morning of 9/18/2010. Mr. Curtis was screened by a teleneurologist in the emergency department on 9/17/2010. All of Mr. Curtis' neurological evaluations were noted to be normal. Initial diagnosis was heat stroke related. Mr. Curtis was admitted for observation to the Certified Primary Stroke Unit at Christus Saint Michael Hospital under their stroke protocol. Dr. James Urbina, a hospitalist, was the attending physician.

The CTA of the head and neck was performed the morning of 9/18/2010 and revealed a persistent trigeminal artery which communicates with the basilar artery at the level of the siphon. The basilar artery proximal to this level is relatively hypo-plastic. The left vertebral artery is

quite small throughout its length but is faintly patent. The right vertebral artery is somewhat larger but still relatively hypoplastic. These results are of concern regarding Mr. Curtis' symptoms and condition.

Dr. Urbina evaluated Mr. Curtis' condition and made the diagnosis of Benign Proximal Positional Vertigo. On 9/18/2010, Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis to reposition the crystals in his ears. The Dix-Hallpik maneuver which consists of repeated rapid significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees was performed. At this point, Mr. Curtis demonstrated double vision, blood pressure drop, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina proceeded to have Mr. Curtis do the Epley maneuver after the Dix-Hallpik was performed. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck. Mr. Curtis did not respond favorably to these procedures. Dr. Malik, neurologist was consulted on the afternoon of 9/18/2010. Dr. Malik diagnosed Mr. Curtis with his brainstem stroke. Cardiology was also consulted, but did not find any additional significant issues. Mr. Curtis was discharged from Christus Saint Michael Hospital on 9/20/2010.

An MRI was ordered by Dr. Freddie Contreras and performed at Advanced Imaging in Texarkana Texas on 9/23/2010, three days after Mr. Curtis was discharged from Christus Saint Michael Hospital's Certified Primary Stroke Unit. This MRI compared to the MRI performed at Christus Saint Michael Hospital on 9/17/2010 revealed regions of sub acute infarction in the inferior pons consistent with a brainstem stroke. A subsequent cerebral angiogram was performed at UT Southwestern in Dallas, Texas. This angiogram report, dated 10/15/2010, revealed that Mr. Curtis in addition to having suffered a brainstem stroke, had experienced a complex basilar artery dissection.

Audiology reports from Collom & Carney Clinic confirm that Mr. Curtis has suffered severe hearing loss. A sleep study performed at Advanced Pulmonary and Sleep Solutions by Dr. Christopher Bailey indicates that Mr. Curtis is now suffering from sleep apnea as a result of his cerebral compromise.

Standards of Care

Mr. Curtis presented with neurological complaints and radiology confirmed an abnormal cerebrovascular anatomy. The relevant standards of care for a physician taking care of such a patient require that the physician not perform the Dix-Hallpik and Epley maneuvers under any circumstances. Such maneuvers were contraindicated given Mr. Curtis' cerebrovascular anatomy.

The relevant standards of care for a hospital caring for complex neurological patients such as Mr. Curtis require that the hospital staff its facility with adequately trained healthcare providers capable of recognizing and treating such patients. Minimal standards of care require that a hospital treating patients with complex neurological issues have an on-site neurologist available full time to assess and treat patients presenting with neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. In addition, if an onsite neurologist was not available for consultation, a neurology consult could have been obtained from the teleneurologist regarding the cerebrovascular abnormality Mr. Curtis demonstrated prior to Dr. Urbina preforming any neck manipulation. Moreover, minimal standards of care require that the hospital caring for patients with complex neurological problems must have and enforce, policies and procedures to assure that Dix-Hallpik and Epley maneuver are not

performed on patients with neurological complaints and documented abnormal cerebrovascular anatomy.

Violations of the Standard of Care

My review of the medical records related to Mr. Curtis's treatment leads me to conclude that based on reasonable medical probability, Dr. James Urbina and Christus Saint Michael Hospital fell below the applicable standards of care in their treatment of Mr. Curtis.

Specifically, Dr. James Urbina fell below the minimal standards of care by performing the Dix-Hallpik and Epley maneuvers on Mr. Curtis. Given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy, such maneuvers were contraindicated.

Christus Saint Michael Hospital likewise fell below the standards of care by failing to staff its facility with adequately trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. Moreover, the hospital violated minimal standards of care by failing to have, and enforce, written policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on Mr. Curtis, given his neurological complaints and documented abnormal cerebrovascular anatomy.

Christus Saint Michael Hospital staffed its facility with Dr. Urbina, a physician that was inadequately trained to treat patients presenting with complicated neurological issues, and a nursing staff in its Certified Primary Stroke Unit that was not properly trained to intervene after Mr. Curtis experienced a significant neurological event.

Under the definitions listed above, I must conclude that Dr. James Urbina and Christus Saint Michael Hospital were negligent in their treatment and care of Mr. Curtis.

Appropriate Patient Care

Dr. James Urbina should have not subjected Mr. Curtis' head or neck to any sudden movement, torsion, bending, flexion, extension, or rotation given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy. Under no circumstances should the Dix-Hallpik or Epley maneuvers have been performed. The Hospital should have had a written policy prohibiting the same. Appropriate standards of care required Dr. James Urbina to consult with neurology or neurosurgery for evaluation of the cerebrovascular issues that were demonstrated on MRA and CTA. Likewise, Christus Saint Michael Hospital should have had an onsite neurologist, rather than the inadequately trained staff, available to assess and treat Mr. Curtis' neurological issues. A neurologist would have the training to understand and properly address Mr. Curtis' issues.

Causation and Damages

The principle of injury involved regarding the vertebral artery is due to the anatomy of this artery which is vulnerable to stretching, compression, or torquing injury as it curves around the atlas. This artery changes its direction from a vertical to a horizontal path and is therefore very likely susceptible to injury from rotation and extension.

Because of Mr. Curtis' abnormal cerebrovascular anatomy that was identified on the CTA scan the morning of 9/18/2010 while in Christus Saint Michael Hospital on their Certified

Primary Stroke Unit, the treatment consisting of the Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky.

During the Dix-Hallpik maneuver, Mr. Curtis suffered classical stroke symptoms of double vision, blood pressure drop, acute hearing loss, regurgitation, dizziness, and vital sign compromise. These symptoms, more likely than not, corresponded with the timing of his brainstem infarct and his complex basilar artery dissection at the anterior inferior cerebellar artery (AICA) junction. Based on reasonable medical probability, this is when Mr. Curtis infarcted his brainstem and the dissection occurred. After the initial acute neurological event, Dr. James Urbina continued with another contraindicated procedure and performed the Epley maneuver on Mr. Curtis. It is clear that these maneuvers consisting of rapid and repeated significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees subjected Mr. Curtis' abnormal vertebrovascular anatomy to extreme stress. The extreme torsion, bending, flexing, extending, and rotating of Mr. Curtis' neck during these traumatic procedures caused Mr. Curtis' brainstem infarct and caused a tear that resulted in a complex dissection of his basilar artery at the AICA junction.

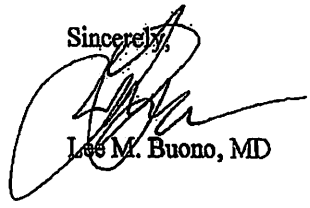
Mr. Curtis has extremely small hypoplastic right and left vertebral arteries and two thirds of his proximal basilar artery is markedly diminished in diameter at the junction where the vertebral arteries join the basilar artery. These abnormal hypoplastic vertebral arteries and the diminished diameter basilar artery are abnormal and are not as pliable and do not flex or stretch like normal sized vertebral arteries when stressed. The severe rapid and repeated neck movements Mr. Curtis experienced during the Dix-Hallpik and Epley maneuvers caused trauma to Mr. Curtis's abnormal vertebrovascular anatomy and caused the brainstem stroke and a tear or dissection of the basilar artery at the AICA junction causing significant permanent hearing loss.

Before Mr. Curtis suffered his brainstem stroke and complex basilar artery dissection, he had no history or symptoms of any sleep issues. Mr. Curtis developed insomnia and began to have significant sleep issues during his stroke recovery period. Beyond any reasonable medical probability, Mr. Curtis' sleeping disorder was proximately caused by the brainstem stroke and complex basilar artery dissection.

Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

I reserve the right to amend this report as more information becomes available.

Sincerely,



Lee M. Buono, MD

Lee M. Buono, MD

Education

1989 - 1993 **Rutgers University** New Brunswick, N.J.
- BS, Neurobiology
- Cum Laude, George H. Cook Scholar

1993 – 1997 **Jefferson Medical College** Phila. PA
- Cum Laude, AOA

1997 – 2003 **Thomas Jefferson Univ. Hosp.**
- Resident Neurosurgery

Skills

Spine: General and complex instrumentation / trauma with Delaware Valley Regional Spinal Cord Injury Center; F. A. Simeone and Alexander Vacarro
Tumors / spinal AVM's & fistula's

Cranial: General, stereotactic and frameless
1 year dedicated cerebrovascular and interventional training with Robert H. Rosenwasser
Cerebral Angiography
Epilepsy and intraoperative corticography with Michael O'Connor and David Andrews
Skull base and Acoustic Neuroma's with William Bucheit

Peripheral Nerve: Three months dedicated with Philadelphia hand-center

Pediatrics: Six months dedicated at Children's Hosp Phila with Leslie Sutton

Other: Gamma – Knife and Linear Accelerator
Spinal cord and vagal nerve stimulators with Giancarlo Barolat

Publications, Abstracts, Presentaions

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immunohistochemical changes in spinal cord of patients with amyotrophic lateral sclerosis. Neurology 30: 29-38, 1993.

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   *presented 1993, Society for Neuroscience, Washington D.C.

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10. Buono L.M., Vinal P., Simeone F.A.: Comparison of bioactive molecules in hibernating and non-hibernating woodchuck cerebrospinal fluid. Stroke 67: 317-321, 1997.

    * presented 1997, International Joint Conference on Stroke & Cerebral Circulation, Anaheim CA.

11. Buono L.M., Vinal P., Simeone F.A.: Environmental light measurements and circadian rhythm characteristics of patients before, during, and following Neurosurgery and hospitalization: A wrist actigraph study. J Neurol Neurosurg Psych 38: 411-414, 1997.

12. Buono L.M., Rosenwasser R.H.: Prophylactic High-dose intravenous Magnesium sulfate for protection of cerebral ischemia in rat subarachnoid hemorrhage-induced cerebral vasospasm. Neurosurgery 2002 (in press).

Book Chapters

1. Andrews DW, Buono LM, Sharan A. The History of Stereotactic

Work experience

2004 – September 2010

Neurosurgical Associates of Texarkana – Texarkana, TX

October 2010 - Present

Capital Health System, Trenton, NJ

Appendix Tab 2

CAUSE NO. 12C1341-005

WILLIAM C. CURTIS and TINA CURTIS
Plaintiffs

IN THE 5TH DISTRICT COURT

VS.

FOR THE STATE OF TEXAS

JAMES HUMBERTO URBINA, M.D., and CHRISTUS HEALTH ARKLATEX, d/b/a CHRISTUS ST. MICHAEL HEALTHCARE SERVICE,
Defendants

SERVING BOWIE COUNTY

MEMORANDUM ORDER DENYING DEFENDANT CHRISTUS ST. MICHAEL'S MOTION TO DISMISS

On this day, the Court considered Defendant Christus Health Arklatex, d/b/a Christus St. Michael ("Christus St. Michael) Healthcare Service's Motion to Dismiss for Failure to File an Expert Report as required by s74.351 Texas Civil Practices and Remedies Code. The Court, having considered the pleadings, the arguments of counsel, and the applicable law, finds that the Motion should be DENIED. The reasons for the Court's ruling are as follows.

I.

FACTUAL BACKGROUND

On September 17, 2010, Plaintiff William Curtis was treated at Christus St. Michael Hospital in Texarkana, Texas. Defendant Dr. James Urbina diagnosed Mr. Curtis with Benign Proximal Positional Vertigo (BPPV), and admitted him to the Christus St. Michael's Primary Stroke Unit for observation. Mr. Curtis was diagnosed and treated by Dr. Urbina and nurses and staff of Christus St. Michael over the next three days. During that time, Dr. Urbina performed the Dix-Hallpik

and the Epley maneuvers on Mr. Curtis. Plaintiffs allege that the two procedures were contraindicated and caused Mr. Curtis to suffer a brainstem stroke and a torn artery. Mr. Curtis was released on September 20, 2010.

Plaintiffs filed this suit alleging medical negligence on the part of all Defendants. Defendant Christus filed its Motion to Dismiss Plaintiffs' claims under Texas Civil Practices and Remedies Code s74.351 for failing to file an adequate expert report.

II.

STANDARD OF REVIEW AND APPLICABLE LAW

A. Expert Report Requirements

Section 74.351(a) places the following requirements on a plaintiff in a medical malpractice case:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report or each physician or health care provider against whom a liability claim is asserted.

The statute goes on to define an "expert report" as a

> written report by an expert that provides 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 s74.351(r)(6).

In American Transitional Care Centers of Texas, Inc. v. Palacios, 46 S.W.3d 873 (Tex. 2001), the Supreme Court discussed the requirements for a sufficient expert report.

> The statute defines an expert report as "a written report by an expert that provides a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered . . . failed to meet the standards, and the causal relationship between that failure and the injury, harm or damages claimed.

Id. at 877. Moreover,

> In setting out the expert's opinions on each of those elements, the report must provide enough information to fulfill two purposes if it is to constitute a good-faith effort. First, the report must inform the defendant of the specific conduct the plaintiff has called into question. Second, and equally important, the report must provide a basis for the trial court to conclude that the claims have merit. . . . A report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill these two purposes.

Id. at 879. In addition,

> 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. at 880. Finally,

> If a trial court determines that an expert report does not meet these statutory requirements and the time for filing a report has passed, it must then dismiss with prejudice the claims against the defendant who has challenged the report.

Id. at 877.

Consequently, a proper expert report must satisfy four requirements. First, it must be written by a qualified expert. Second, the report must identify the applicable standard of care. Third, it must identify the "manner in which the care rendered . . . failed to meet the standards," including "specific information about what the defendant should have done differently." Finally, the report must identify "the causal relationship between that failure and the injury, harm, or damages claimed." Moreover, "a report that merely states the expert's conclusions about the

standard of care, breach, and causation does not" meet the requirements of the statute. Id. at 879.

In the present case, the Defendants raise the following objections to Plaintiff's Experts' report:

1. That all three of Plaintiff's expert reports fail to adequately identify the standard of care applicable to CHRISTUS, its nurses or its staff;

2. That all three of Plaintiff's expert reports to state the factual basis that was relied upon in coming to the conclusion that a deviation from the standard of care occurred;

3. That all three of Plaintiff's expert reports failed to adequately address causation; specifically, the reports failed to provide an explanation of the causal relationship between the alleged failure of CHRISTUS, its nurses, or its staff to adhere to accepted standards of care the alleged injury Plaintiffs suffered; and

4. That because all three of Plaintiff's expert reports are merely identical verbatim documents they cannot reflect the true individual opinions of any one doctor, and therefore do constitute expert reports as defined by Chapter 74, Texas Civil Practices and Remedies Code.

B. Do the expert reports satisfy the statutory requirements?

Plaintiff's expert reports essentially identify the following standards of care applicable to physicians such as Dr. Urbina and facilities such as Christus St. Michael:

1. No doctor should ever perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms.

2. No medical facility should ever grant privileges to any doctor who would perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms.

3. If a medical facility grants staff privileges to a doctor who would perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms, then the medical facility should have written policies prohibiting

physicians on staff from every performing the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms, and the medical facility should have a neurologist on staff who knows better than to perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms so that the neurologist can consult with the treating physician to inform him not to perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms.

With respect to the breach of the standard of care element, Plaintiff's experts assert:

1. Dr. Urbina fell below the minimum standards of care by performing the Dix-Hallpik or Epley maneuvers on Plaintiff in view of his condition upon presentment.

2. Christus St. Michael fell below the minimum standards of care by failing to staff its facility with a doctor who knew not to perform the Dix-Hallpik or Epley maneuvers on Plaintiff in view of his condition upon presentment.

3. Alternatively, Christus St. Michael fell below the minimum standards of care by failing to staff its facility with a neurologist or by failing to make a teleneurologist available who would know not to perform the Dix-Hallpik or Epley maneuvers on Plaintiff in view of his condition upon presentment.

4. Finally, Christus St. Michael fell below the minimum standards of care by failing to have and enforce, written policies and procedures to assure that the Dix-Hallpik or Epley maneuvers are not performed on a patient presenting with the complaints presented by Plaintiff.

When identifying what Christus St. Michael should have done differently as it relates to the standard of care, Plaintiff's experts assert:

1. Dr. Urbina should not have performed the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms.

2. Christus St. Michael should have staffed its facility with a doctor who knew better than to perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms, or it should have had an onsite neurologist who knew better than to perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms so that the neurologist could have consulted with Dr. Urbina to inform him not to perform the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms.

3. Christus St. Michael should have had written policies prohibiting physicians on staff from every performing the Dix-Hallpik or Epley maneuvers on a patient presenting with Plaintiff's symptoms.

Finally, with respect to causation, Plaintiff's experts assert that:

1. The basilar artery at the AICA junction is vulnerable to stretching, compression, or torquing injury as it curves around the atlas. This artery changes its direction from a vertical to a horizontal path and is therefore very likely susceptible to injury from rotation and extension.

2. Plaintiff had an abnormal cerebrovascular anatomy, and because of this anatomy, the Dix-Hallpik and Epley maneuvers were contraindicated, dangerous and very risky.

3. During the Dix-Hallpik and Epley maneuvers, which consist of rapid and repeated significant torsion, bending, flexing, extending and rotating Plaintiff's abnormal cerebrovascular anatomy was subjected to extreme trauma and stress, which caused it to tear.

4. This tear resulted in a complex dissection of his basilar artery at the AICA junction and a resultant brainstem infarction with significant permanent hearing loss.

1. Christus St. Michael's Objections to the Expert Reports

Christus St. Michael basically has two criticisms of the expert reports: 1) that they are conclusory and therefore do not sufficiently identify the elements necessary under s74.351 and 2) that all three reports are verbatim identical and therefore cannot constitute a fair summary of the experts' opinions. The Court will address each of these in more detail below.

2. Are the expert reports too conclusory?

Clearly, the reports do not exhaustively state all of the training and care required of a physician who would satisfy the standard of care requiring the hospital to adequately staff its facility. Yet, the reports clearly state that Christus St. Michael should have staffed its facility with a physician who had enough training to at least

know that he should never perform the Dix-Hallpik and Epley maneuvers on a patient presenting with Plaintiff's symptoms; or provided the physician with a neurologist who could have told him not to do the maneuvers; and finally that it should have written procedures prohibiting the use of those maneuvers on patients with the symptoms presented by Plaintiff. Further, the reports state that Christus's failure to do these things breached the standard of care, and that it should have done the opposite instead. Finally, the reports state in detail how the performance of the maneuvers on Plaintiff at the time he presented caused the injuries for which he now complains.

The performance of these maneuvers on Plaintiff is directly at issue in this case. The expert reports directly link the standard of care, breach of the standard of care and causation to these maneuvers. Accordingly, Plaintiff's experts' descriptions of the standard of care, breach, and causation are sufficiently factual to satisfy the requirements of s74.351.[1]

3. **Does the fact that the reports are verbatim render them insufficient?**

Christus St. Michael asserts that the reports cannot constitute a good faith effort to provide a fair summary of the experts' opinions because they are virtually identical. Christus St. Michael concludes that "one person drafted the substantive

[1]The Court is aware there may be issues regarding whether a medical facility such as Christus St. Michael is legally responsible for supervising the care provided by a physician or directing that certain treatments be prohibited. Nevertheless, the Court is not required to resolve these issues at this juncture. As the Supreme Court noted in American Transitional Care Centers v. Palacios, 46 S.W.3d 873, 879 (Tex. 2001), an expert report under s74.351 need not meet the same requirements as the evidence offered in a summary judgment proceeding or a trial. Consequently, the only issue at this point is whether the reports provide a good faith effort to provide a fair summary of the experts' opinions, not whether the opinions stated therein apply the correct legal standard.

statements contained in all three documents," and that "at least two, and possibly all three physicians simply 'cut and pasted' the statements and opinions of someone else onto a report whose only original thoughts were the respective physician's academic credentials in the reports' beginning paragraphs." Nevertheless, the appellate courts have held that "in assessing the adequacy of the [expert] report, the trial court must look only within the four corners of the report, and inferences are not permitted." Hardy v. Marsh, 170 S.W.3d 865, 869 (Tex. App. – Texarkana 2005, no pet.), citing Bowie Memorial Hospital v. Wright, 79 S.W.3d 48, 52-53 (Tex. 2002), and American Transitional Care Ctrs. v. Palacios, 46 S.W.3d 873, 878 (Tex. 2001). Thus, the Court may not engage in the kind of inferences offered by Christus St. Michael.

Yet, even if the Court could indulge in such inferences, they do not necessarily negate the reports' validity. Christus St. Michael has not directed the Court to any authority, and the Court has found none, which holds that an expert is required to actually sit at the keyboard and type the information himself or dictate the report to a typist so that the words therein belong exclusively to the expert. Nor has the Court seen any authority holding that an expert is required to ensure that his report is unique from reports of other experts. Preparation of litigation materials, such as discovery and affidavits, are generally collaborative efforts between attorneys on the one hand and their clients and witnesses on the other. While the drafting process generally involves such collaboration, the witness has to be able to approve it in its final form as a correct statement of his or her testimony and opinions and will not sign off on the document unless it is accurate.

Regardless of their identical nature, all three reports contain the signatures of the Plaintiffs' experts verifying the accuracy of the information contained therein. The question is not whether the final reports are too similar, but whether they constitute a good faith effort to provide a fair summary of the experts' opinions. For the reasons stated above, the reports accomplish that goal.[2]

III.

CONCLUSION

For all of the foregoing reasons, the Court finds that Christus St. Michael's Motion to Dismiss should be, and the same is hereby, DENIED.

Signed this 19th day of April, 2013.

Ralph K. Burgess
Presiding Judge

[2]In Certified EMS, Inc. v. Potts, 392 S.W.3d 625 (Tex. 2013), the Supreme Court held that "an expert report that adequately addresses at least one pleaded liability theory satisfies the statutory requirements, and the trial court must not dismiss in such a case." The Court has found that the expert reports satisfy the statutory requirements as to at least one theory alleged by Plaintiffs, and therefore, satisfies the statutory requirements as to all causes of action.

Appendix Tab 3

SUBCHAPTER H. PROCEDURAL PROVISIONS

Sec. 74.351. EXPERT REPORT. (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

(b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by Subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to Subsection (c), enter an order that:

(1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and

(2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.

(c) If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

[Subsections (d)-(h) reserved]

(i) Notwithstanding any other provision of this section, a claimant may satisfy any requirement of this section for serving an expert report by serving reports of separate experts regarding different physicians or health care providers or regarding different issues arising from the conduct of a physician or health care provider, such as issues of liability and causation. Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or

health care providers or with respect to both liability and causation issues for a physician or health care provider.

(j) Nothing in this section shall be construed to require the serving of an expert report regarding any issue other than an issue relating to liability or causation.

(k) Subject to Subsection (t), an expert report served under this section:

(1) is not admissible in evidence by any party;

(2) shall not be used in a deposition, trial, or other proceeding; and

(3) shall not be referred to by any party during the course of the action for any purpose.

(l) A court shall grant a motion challenging the adequacy of an expert report 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 in Subsection (r)(6).

[Subsections (m)-(q) reserved]

(r) In this section:

(1) "Affected parties" means the claimant and the physician or health care provider who are directly affected by an act or agreement required or permitted by this section and does not include other parties to an action who are not directly affected by that particular act or agreement.

(2) "Claim" means a health care liability claim.

[(3) reserved]

(4) "Defendant" means a physician or health care provider against whom a health care liability claim is asserted. The term includes a third-party defendant, cross-defendant, or counterdefendant.

(5) "Expert" means:

(A) with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401;

(B) with respect to a person giving opinion testimony regarding whether a health care provider departed from accepted standards of health care, an expert qualified to testify under the requirements of Section 74.402;

(C) with respect to a person giving opinion testimony

about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, a physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence;

(D) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a dentist, a dentist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence; or

(E) with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care for a podiatrist, a podiatrist or physician who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence.

(6) "Expert report" means a written report by an expert that provides 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.

(s) Until a claimant has served the expert report and curriculum vitae as required by Subsection (a), all discovery in a health care liability claim is stayed except for the acquisition by the claimant of information, including medical or hospital records or other documents or tangible things, related to the patient's health care through:

(1) written discovery as defined in Rule 192.7, Texas Rules of Civil Procedure;

(2) depositions on written questions under Rule 200, Texas Rules of Civil Procedure; and

(3) discovery from nonparties under Rule 205, Texas Rules of Civil Procedure.

(t) If an expert report is used by the claimant in the course of the action for any purpose other than to meet the service requirement of Subsection (a), the restrictions imposed by Subsection

(k) on use of the expert report by any party are waived.

(u) Notwithstanding any other provision of this section, after a claim is filed all claimants, collectively, may take not more than two depositions before the expert report is served as required by Subsection (a).

Added by Acts 2003, 78th Leg., ch. 204, Sec. 10.01, eff. Sept. 1, 2003.
Amended by:

Acts 2005, 79th Leg., Ch. 635, Sec. 1, eff. September 1, 2005.

ORAL ARGUMENT CONDITIONALLY REQUESTED

No. 06-13-52-CV

IN THE SIXTH COURT OF APPEALS
OF TEXARKANA, TEXAS

CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System,
Appellant,

v.

William C. Curtis and Tina Curtis,
Appellees.

On Accelerated Appeal from Cause No. 12C1341-005
In the 5th Judicial District Court of Bowie County, Texas
Honorable Ralph Burgess, Presiding Judge

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Appellees - Plaintiffs:	William C. Curtis and Tina Curtis
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Additional Defendant: (not in appeal)	James H. Urbina, M.D.
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Trial Court Judge:	Honorable Ralph Burgess 5th District Court Dallas County, Texas

STATEMENT ON ORAL ARGUMENT

Appellees believe the matter is adequately presented in the Briefs and that the Court should simply affirm the trial court's decision denying the motion to dismiss and overruling the objections to the expert reports. Should the Court grant oral argument, Appellees respectfully requests that they be permitted to participate in the argument.

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STATEMENT OF THE CASE

Nature of the case: Appellees sued Appellant and others for medical malpractice and seek damages caused by their negligence.

Course of proceedings and Trial court disposition: On September 14, 2012, Appellees, filed their Original Petition, Request for Disclosure, and Request for Production in the 5th District Court of Dallas County, Texas against James Urbina, M.D., CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System (~~C~~HRISTUS") along with three expert reports and CVs. (CR 4). Appellees alleged that Appellant was both directly and vicariously negligent in its treatment and care of William Curtis. (CR 4.) Appellees filed their Chapter 74 expert reports/CVs (from Dr. Khalid Malik, a neurologist, Dr. Christopher Bailey, a critical care, internal medicine, and pulmonology and sleep medicine physician, and Dr. Lee Buono, a neurosurgeon) with the Original Petition. (CR 4.)

Appellant filed its objection to the reports but did not assert that the reports were untimely. (CR 49.) Appellees filed their response to the objection. (CR 59). Appellants filed a Motion to Dismiss. (CR 62). Appellees filed a response to the Motion to Dismiss. (CR 130). Appellees filed a Motion to Deem Reports Adequate. (CR 141). Appellants filed a response to same. (CR 1246).

On April 22, 2013, the Honorable Ralph Burgess overruled the objections. (CR 150.) Appellant timely filed its Notice of Accelerated Appeal. (CR 159.)

ISSUE PRESENTED

1. Did the Trial Court Properly Exercise Its Discretion by Denying Appellant‘s Motion to Dismiss Because the Reports Constitute a Good Faith Effort to Comply With the Requirements of Section 74.351?

STATEMENT OF FACTS

As set out in pleadings, on September 17, 2010, Bill Curtis was admitted to Christus St. Michael Hospital with symptoms of hearing loss, instability, and nausea. At the time of care, Mr. Curtis was a 59-year old man with no history of stroke. Mr. Curtis was then admitted to Christus St. Michael Hospital's Certified Primary Stroke Unit for observation by Dr. James Urbina. Dr. Urbina diagnoses Mr. Curtis with Benign Proximal Positional Vertigo (BPPV). Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis. This was contraindicated. As a result, Mr. Curtis demonstrated double vision, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina then performed the Epley maneuver. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck and was also contraindicated. These maneuvers caused a dissection in a small artery in Curtis's neck resulting in a brainstem stroke.

SUMMARY OF ARGUMENT

The Trial Court did not abuse its discretion by overruling Appellant's objections to the three expert reports. Under settled case law, expert reports are sufficient for purposes of Chapter 74 when they provide a fair summary of the expert's opinions regarding the applicable standards of care, defendant failed to meet the standards, and causation. *See Baylor Univ. Med. Ctr. v. Rosa,* 240 S.W.3d 565, 570 (Tex. App. – Dallas 2007, pet. denied) (expert reports are to be read together). The reports are very detailed and very specific. The Appellant was identified by name or collectively where appropriate, the experts are qualified by expertise, experience, education, and knowledge, each individual defendant is linked to the applicable standard of care, each individual defendant is identified in connection with how that standard was breached, and Drs. Malik, Bailey, and Buono connect everything together for purposes of causation. All reports detail the links between the Appellant's negligence and William Curtis's injuries, and when the reports are read together, as required, they sufficiently address causation. The trial court properly concluded that Appellant's objections were meritless.

Appellant's arguments on appeal are an attempt to impose upon Appellees requirements that are not part of a Chapter 74 analysis. Appellant states the Chapter 74 reports are deficient by failing to state CHRISTUS's breach of standard of care proximately caused harm to Bill Curtis. However, each report clearly states, "CHRISTUS St. Michael Hospital fell below the standard of care by failing to staff its facility with adequate trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues…." The reports state that Mr. Curtis's abnormal cerebrovascular anatomy was identified on the CTA scan taken while he was at CHRISTUS St. Michael Hospital in their Primary Stroke Unit. The three reports taken together, it is obvious that the physical maneuvering of Curtis's head and neck would not have

been done had Appellant adhered to the standard of care. For this reason, the causation discussion regarding Dr. Urbina applies equally to Appellants. Appellants' disagreement with the standards of care or conclusions set forth by the experts is not a legitimate basis for challenging compliance with Chapter 74. With respect to causation, the Appellants demand certainty where the law only requires an expert to opine to a reasonable degree of medical probability. Appellee's detailed and specific reports easily comply with the standards imposed by section 74.351.

In the alternative, should the Court conclude that the reports are somehow insufficient under section 74.351, the Court should exercise its authority to grant a thirty-day extension to cure any deficiencies.

ARGUMENT

A. Standard of Review

Courts of appeals "apply an abuse of discretion standard in reviewing a trial court's decision" with respect to Chapter 74 expert reports. *See American Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *see also Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) ("we review a trial court's decision about whether a report constitutes a good-faith effort to comply with the Act under an abuse-of-discretion standard"); *Kelly Ryan Cook, P.A. v. Spears,* 275 S.W.3d 577, 579 (Tex. App. – Dallas 2008, no pet.) A trial court abuses its discretion when it acts arbitrarily or unreasonably without reference to any guiding rules and principles. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex.2003). "When reviewing matters committed to the trial judge's discretion, an appellate court may not substitute its judgment for that of the trial judge." *Baylor University Med. Ctr. v. Rosa,* 240 S.W.3d 565 (Tex. App. – Dallas 2007, pet. denied). Under section 74.351:

- The reports cannot each be read in isolation, as Appellant suggests by attacking the reports individually. They must be read together in determining whether the requirements of Section 74.351 have been met. *Rosa,* 240 S.W.3d at 570.
- The reports collectively must inform the defendant of the specific conduct called into question and provide a basis for the court to conclude the claims have merit. The reports are not to be judged by the standards of a summary judgment hearing and are not required, at this stage of the proceedings, to meet the *Daubert/Robinson* test for admissibility at trial. *Christian Care Centers, Inc. v. Golenko,* 328 S.W.3d 637, 641 (Tex. App. – Dallas 2010, n.p.h.); *American Transitional Care Centers of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001).

At this stage of the proceedings, the expert reports are not to be measured by whether or not they are trial-worthy. Under Civil Practice & Remedies Code section 74.351:

> To constitute a good faith effort to comply with the statutory requirements, an expert report must inform the defendant of the specific conduct called into question and provide a basis for the trial court to determine that the claims have merit. It does not need to marshal all of the plaintiff's proof, but it must include a fair summary of the expert's opinion on each of the elements identified in the statute: the applicable standard of care, the breach or deviation from the standard of care, and the causal relationship between the breach and the injury.

Golenko, 328 S.W.3d at 647.

Point I **The Trial Court Properly Exercised its Discretion by Overruling Appellant's Objections to the Expert Reports Because the Reports Constitute a Good Faith Effort to Comply With the Requirements of Section 74.351 and Provide a Fair Summary of the Experts' Opinions Regarding the Standards of Care, Breach of Those Standards, and Causation.**

The trial court properly exercised its discretion in rejecting the challenges made to the reports because the reports constitute an objective good-faith effort to comply with section

74.351, providing a fair summary of each expert's opinions regarding the applicable standards of care, how Appellant's conduct failed to meet those standards, and causation.

A. An Expert Report is Sufficient Under Section 74.351 When it Provides a Fair Summary of the Expert's Opinions Regarding the Applicable Standards of Care, Defendant's Failure to Meet the Standards, and Causation.

The Court should affirm the trial court's conclusion that the expert reports met the standards imposed by Civil Practice & Remedies Code section 74.351. To constitute a valid report under section 74.351, the expert report must 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). Plaintiffs' experts are not required to use ~~"a~~ny particular "magic words'" to pass muster under the statute. *Wright,* 79 S.W.3d at 53 (Tex. 2002). Instead, when a plaintiff timely files an expert report and a defendant objects to the report and/or seeks dismissal because of the report's purported inadequacy, the trial court may grant the motion ~~"o~~*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 in Subsection (r)(6)." Tex. Civ. Prac. & Rem. Code § 74.351(l) (emphasis added). Accordingly, this Court may not grant a motion to dismiss or sustain objections to the sufficiency of the report when presented with such a good faith effort.

Plaintiffs may satisfy their statutory requirements by filing reports from multiple experts. ~~"~~Nothing in this section shall be construed to mean that a single expert must address all liability and causation issues with respect to all physicians or health care providers or with respect to both liability and causation issues for a physician or health care provider." Tex. Civ. Prac. & Rem.

Code § 74.351(i); *see also Packard v. Guerra*, 252 S.W.3d 511, 527 (Tex. App. – Houston [14th Dist.] 2008, pet. denied); *Palafox v. Silvey,* 247 S.W.3d 310, 314 (Tex. App. – El Paso 2007, no pet.). Accordingly, the Court must read reports from multiple experts together in determining whether the Chapter 74 standards have been satisfied. In this case, the reports collectively provide the required information under Chapter 74.

B. The Reports Sufficiently Establish the Qualifications of the Experts to Opine Regarding the Standard of care Applicable to Appellants, Breaches of the Standard of Care, and Causation.

All experts are qualified to give an opinion regarding the standard of care applicable to them. Under Section 74.401(a), a person may qualify as an expert with respect to medical standards of care when the person:

> (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 § 74.401(a). A court may also consider whether the witness is board certified in an area relevant to the claim and whether the physician is actively practicing medicine in areas relevant to the claim. Tex. Civ. Prac. & Rem. Code § 74.401(c).

When evaluating an expert's qualifications under Chapter 74, ~~"t~~he proper inquiry concerning whether a physician is qualified to testify is not the physician's area of practice but the stated familiarity with the issues involved in the claim before the court." *Concentra Health Serv., Inc. v. Everly,* 2010 WL 1267775, *4 (Tex. App. – Fort Worth 2010, no pet.). A physician with practical knowledge of what is customarily and usually done under the circumstances

confronting the defendant is competent to testify. *Id.* The reports here are by three physicians who have encountered and treated patients with stroke or stroke symptoms. They have practical knowledge regarding what is customarily and usually done under the circumstances, and they therefore easily comply with this standard. As laid out in Dr. Malik's, Dr. Bailey, and Dr. Buono's reports, the duty to identify and treat patients with stroke symptoms is a shared duty between hospital, hospital staff, and physician.

1. CHRISTUS St. Michael's Negligence and Proximate Cause Clearly Stated.

Appellant is incorrect in contending that the expert reports fail to explain how Appellant's breach of the standard of care proximately caused Mr. Curtis's injuries. (Appellant's Brief at 5-6.) Each report outlines Appellant's breach and causation:

> Christus Saint Michael Hospital likewise fell below the standards of care by failing to staff its facility with adequately trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy.
>
> Moreover, the hospital violated minimal standards of care by failing to have, and enforce, written policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on Mr. Curtis, given his neurological complaints and documented abnormal cerebrovascular anatomy.
>
> Christus Saint Michael Hospital staffed its facility with Dr. Urbina, a physician that was inadequately trained to treat patients presenting with complicated neurological issues, and a nursing staff in its Certified Primary Stroke Unit that was not properly trained to intervene after Mr. Curtis experienced a significant neurological event.
>
> Under the definitions listed above, I must conclude that Dr. James Urbina and Christus Saint Michael Hospital were negligent in their treatment and care of Mr. Curtis.
>
> Because of Mr. Curtis' abnormal cerebrovascular anatomy that was identified on the CTA scan the morning of 9/18/2010 while in Christus Saint Michael Hospital on their Certified Primary Stroke Unit, the treatment consisting of the

> Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky.
>
> Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

Appellant has challenged the expert reports by claiming the explanation of proximate cause is conclusory. *Id.* Appellees' expert reports include a detailed explanation of the relevant anatomy and the mechanism of injury involved in this case resulting from the improper physical maneuvering of Curtis's head and neck. (CR 4). The trial court considered Appellant's argument and correctly rejected it – stating "[t]he expert reports directly link the standard of care, breach of the standard of care and causation to these maneuvers." (CR 156). *See, e.g., Hayes v. Carroll*, 314 S.W.3d 494, 507 (Tex. App. – Austin 2010, no pet.) (report adequately stated causation where report stated "failure to notice the presence of the bandage and monitor the effect it had on Carroll's leg caused the bandage and its effects to go undetected, which caused the damage requiring amputation of her leg"). Appellant will have an opportunity to challenge the opinions of Dr. Malik, Bailey, and Buono with its own expert opinions or during a *Daubert/Robinson* hearing. But disagreement with the experts' opinions is not a basis for sustaining an objection to a report under section 74.351.

In addition, since Appellees have pleaded vicarious liability against Appellant for the conduct of the physician-defendants the Trial Court was equally within his discretion to deny the Motion to Dismiss. Appellant seems to concede that the causation analysis is adequate as to the other defendants. (Appellant's Brief at page 5).

Alternative Request for Thirty-Day Extension

In the alternative, should the Court find the reports deficient, the Court should grant an extension under § 74.351(c). *See Leland v. Brandal*, 257 S.W.3d 204, 207 (Tex. 2008); *Ogletree v. Matthews,* 262 S.W.3d 316 (Tex. 2007). The reports represent a good faith effort to comply with the statute. If the Court does not agree, Appellees requests the Court grant a thirty-day extension to cure deficiency. Indeed because the reports are, if deficient, clearly not "absent," the only appropriate remedy is a thirty-day extension to cure the deficiencies.

CONCLUSION AND PRAYER

For the foregoing reasons, Appellees asks this Court to affirm the trial court's order denying Appellant's motion to dismiss and overruling its objections to the expert reports and remand this case for trial, or in the alternative grant a 30-day extension to cure any deficiencies, and grant Appellees such other and further relief to which they are justly entitled.

Respectfully submitted,

THE GIRARDS LAW FIRM

By: /s/ James E. Girards

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned counsel - in reliance upon the word count of the computer program used to prepare this document - certifies that this brief contains 3,748 words, excluding the words that need not be counted under Texas Rule o f Appellate Procedure 9.4(i)(l).

__/s/ James E. Girards_____
James E. Girards

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served upon all counsel of record via electronic filing, or certified mail, return receipt requested, on this 8th day of July, 2013 as follows:

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ORAL ARGUMENT CONDITIONALLY REQUESTED

No. 06-13-52-CV

IN THE SIXTH COURT OF APPEALS
TEXARKANA, TEXAS

CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System,
Appellant,

v.

William C. Curtis and Tina Curtis,
Appellees.

On Accelerated Appeal from Cause No. 12C1341-005
In the 5th Judicial District Court of Bowie County, Texas
Honorable Ralph Burgess, Presiding Judge

APPENDIX TO APPELLEES' BRIEF

In compliance with rule 38.1(j) of the Texas Rules of Appellate Procedure, Appellees submit this Appendix to their brief containing the following items:

TAB A: Expert Report and CV of Khalid Malik, M.D.

TAB B: Expert Report and CV of Christopher A. Bailey, M.D.

TAB C: Expert Report and CV of Lee M Buono, M.D.

APPENDIX TAB A

EXPERT OPINION OF KHALID MALIK, MD

This report is written at the request of The Girard's Law Firm and is written in order to comply with *Texas Civil practices & Remedies Code* 74.325. I have been informed that subsection (k) of the statute provides that an expert opinion prepared under this law is not admissible in evidence by any party; shall not be used in a deposition, trial, or other proceeding; and shall not be referred to by any Defendant during the course of any proceeding in this case. All opinions expressed herein are based upon reasonable medical probability.

Materials Reviewed

I have reviewed the medical care given to William C. Curtis by James Urbina, MD at Christus Saint Michael Hospital (Certified Primary Stroke Center) in Texarkana, Texas. In addition, I have reviewed related patient studies from UT Southwestern in Dallas Texas, Collom & Carney Clinic, Advanced Imaging, and Advanced Pulmonary and Sleep Solutions in Texarkana, Texas.

Qualifications

I am a board-certified physician, licensed to practice medicine in the State of Texas. I received the M.D. degree in 1991 from the King Edward Medical College. Thereafter, from 1994 to 1995, I completed an internship in Internal Medicine at Marshall University in Huntington, West Virginia. From 1995 to 1998, I completed my residency training in Neurology at the Medical College of Georgia in Augusta, Georgia. From 1998 to 1999, I completed my fellowship training in Neurophysiology at the Medical College of Georgia. Further, from 2000 to 2002, I completed fellowship training in Cerebrovascular Disease. I have been engaged in the full-time practice of medicine and neurology for the past 16 years. I routinely care for patients who have and/or may be experiencing a stroke. I have been a clinical instructor in the area of neurology. I am currently a full-time member of the medical staff of Wadley Regional Medical Center, Texarkana, Texas. I am the medical director of Wadley's Certified Primary Stoke Center. As such, I am familiar with the staffing requirements and policies and procedures required of hospitals treating patients with neurological complaints. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke.

Throughout my career, I have routinely cared for patients presenting with complicated neurological issues, including patients with known neurological issues such as stroke and other unknown neurological and cerebrovascular issues. I have cared for such patients in the ER setting, in the hospital setting once such patients have been admitted, and in the office setting. I have routinely supervised nurses in the care of such patients. Specifically, I care for patients such as Mr. Curtis whose complaint was muffled hearing, unsteady balance, nausea and feeling poorly after bending his neck while working under a deck at his lake cabin. As a stroke neurologist, I am often called upon to preform interventional procedures on patients presenting with symptoms such as Mr. Curtis presented with. I evaluate such patients routinely, order and interpret appropriate lab work and diagnostic imaging studies such as MRI, MRA, CT, and CTA. I am currently, and have been at all times relevant hereto, engaged in full time medical practice in Texas. I am familiar with the standards of care for physicians caring for patients exhibiting the

signs and symptoms of Mr. Curtis, both in the office practice and in a hospital setting. My curriculum vita is attached hereto and further outlines my educations, training and experience.

All opinions expressed in this report are based on reasonable medical probability.

Texas Legal Definitions

I understand that with respect to physicians in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a physician of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances.

I understand that with respect to hospitals in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a hospital of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a hospital of ordinary prudence would have done under the same or similar circumstances.

I understand that in Texas, "proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. I understand that there may be more than one proximate cause of an event.

Patient History

On September 17, 2010, Mr. Curtis, a 59 year old male, presented to the Christus Saint Michael Hospital emergency department complaining of sudden muffled hearing, balance issues, nausea and feeling poorly. Mr. Curtis has a history of Lap band (2005) but no history of breathing or insomnia issues, hypertension, diabetes, cardiovascular or stroke-related issues. Mr. Curtis does not smoke and rarely drinks alcohol. He takes a multi vitamin and 81mgs of aspirin daily. He denied chest pain, abnormal pain, headache, melena, hematochezia, dysuria or syncope. Initial vital signs were unremarkable with a blood pressure of 119/73, pulse 51, temperature 96.4, mean arterial pressure of 88, and a respiratory rate of 16. Mr. Curtis' speech was not slurred; he did not present with any stroke related facial or extremity issues. His reflexes and strength in all four extremities were normal. He had no problem communicating with the emergency department staff and physicians.

Lab work was ordered and reported. On admission, his cholesterol was 146 and triglycerides were 38. Other lab work that I reviewed was within normal limits. Several imaging studies were ordered and performed while Mr. Curtis was in the emergency department. A chest x-ray, carotid Doppler exam, MRI of the brain, MRA of the head, and CT of the brain were all negative except for the identification of a trigeminal artery on the MRA of the head. The carotid Doppler duplex exam report noted that neither the right nor left vertebral arteries could be identified. The chest x-ray demonstrated prior granulomatous disease, but was otherwise normal. A CTA of the head and neck was ordered and performed the next morning. Mr. Curtis was screened by a teleneurologist in the emergency department. All of Mr. Curtis' neurological evaluations were noted to be normal. Initial diagnosis was heat stroke related. Mr. Curtis was

admitted for observation to the Certified Primary Stroke Unit at Christus Saint Michael Hospital under their stroke protocol. Dr. James Urbina, a hospitalist, was the attending physician.

The CTA of the head and neck was performed the morning of 9/18/2010 and revealed a persistent trigeminal artery which communicates with the basilar artery at the level of the siphon. The basilar artery proximal to this level is relatively hypoplastic. The left vertebral artery is quite small throughout its length but is faintly patent. The right vertebral artery is somewhat larger but still relatively hypoplastic. These results are of concern regarding Mr. Curtis' symptoms and condition.

Dr. Urbina evaluated Mr. Curtis' condition and made the diagnosis of Benign Proximal Positional Vertigo. On 9/18/2010, Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis to reposition the crystals in his ears. The Dix-Hallpik maneuver which consists of repeated rapid significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees was performed. At this point, Mr. Curtis demonstrated double vision, blood pressure drop, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina proceeded to have Mr. Curtis do the Epley maneuver after the Dix-Hallpik was performed. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck. Mr. Curtis did not respond favorably to these procedures. I was consulted on the afternoon of 9/18/2010. I diagnosed Mr. Curtis with his brainstem stroke. Cardiology was also consulted, but did not find any additional significant issues. Mr. Curtis was discharge from Christus Saint Michael Hospital on 9/20/2010.

A MRI was ordered by Dr. Freddie Contreras and performed at Advanced Imaging in Texarkana Texas on 9/23/2010, three days after Mr. Curtis was discharged from Christus Saint Michael Hospital's Certified Primary Stroke Unit. This MRI compared to the MRI performed at Christus Saint Michael Hospital on 9/17/2010 revealed regions of sub acute infarction in the inferior pons consistent with a brainstem stroke. A subsequent cerebral angiogram was performed at UT Southwestern in Dallas, Texas. This angiogram report, dated 10/15/2010, revealed that Mr. Curtis in addition to having suffered a brainstem stroke, had experienced a complex basilar artery dissection.

Audiology reports from Collom & Carney Clinic confirm that Mr. Curtis has suffered severe hearing loss. A sleep study performed at Advanced Pulmonary and Sleep Solutions indicates that Mr. Curtis is now suffering from sleep apnea.

Standards of Care

Mr. Curtis presented with neurological complaints and radiology confirmed an abnormal cerebrovascular anatomy. The relevant standards of care for a physician taking care of such a patient require that the physician not perform the Dix-Hallpik and Epley maneuvers under any circumstances. Such maneuvers were contraindicated given Mr. Curtis' cerebrovascular anatomy.

The relevant standards of care for a hospital caring for complex neurological patients such as Mr. Curtis require that the hospital staff its facility with adequately trained healthcare providers capable of recognizing and treating such patients. Minimal standards of care require that a hospital treating patients with complex neurological issues have an on-site neurologist

available full time to assess and treat patients presenting with neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. Moreover, minimal standards of care require that the hospital caring for patients with complex neurological problems must have, and enforce, policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on patients with neurological complaints and documented abnormal cerebrovascular anatomy.

Violations of the Standard of Care

My review of the medical records related to Mr. Curtis's treatment leads me to conclude that based on reasonable medical probability, Dr. James Urbina and Christus Saint Michael Hospital fell below the applicable standards of care in their treatment of Mr. Curtis.

Specifically, Dr. James Urbina fell below the minimal standards of care by performing the Dix-Hallpik and Epley maneuvers on Mr. Curtis. Given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy, such maneuvers were contraindicated.

Christus Saint Michael Hospital likewise fell below the standards of care by failing to staff its facility with adequately trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. In addition, if an onsite neurologist was not available for consultation, a neurology consult should have been obtained from the teleneurologist regarding the cerebrovascular abnormality Mr. Curtis demonstrated prior to Dr. Urbina preforming any neck manipulation. Moreover, the hospital violated minimal standards of care by failing to have, and enforce, written policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on Mr. Curtis, given his neurological complaints and documented abnormal cerebrovascular anatomy.

Christus Saint Michael Hospital staffed its facility with Dr. Urbina, a physician that was inadequately trained to treat patients presenting with complicated neurological issues, and a nursing staff in its Certified Primary Stroke Unit that was not properly trained to intervene after Mr. Curtis experienced a significant neurological event.

Under the definitions listed above, I must conclude that Dr. James Urbina and Christus Saint Michael Hospital were negligent in their treatment and care of Mr. Curtis.

Appropriate Patient Care

Dr. James Urbina should have not subjected Mr. Curtis' head or neck to any sudden movement, torsion, bending, flexion, extension, or rotation given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy. Under no circumstances should the Dix-Hallpik or Epley maneuvers have been performed. The Hospital should have had a written policy prohibiting the same. Appropriate standards of care required Dr. James Urbina to consult with neurology for evaluation of the cerebrovascular issues that were demonstrated on MRA and CTA. Likewise, Christus Saint Michael Hospital should have had an onsite neurologist, rather than the inadequately trained staff, available to assess and treat Mr. Curtis' neurological issues. A neurologist would have the training to understand and properly address Mr. Curtis' issues.

Causation and Damages

The principle of injury involved regarding the vertebral artery is due to the anatomy of this artery which is vulnerable to stretching, compression, or torquing injury as it curves around the atlas. This artery changes its direction from a vertical to a horizontal path and is therefore very likely susceptible to injury from rotation and extension.

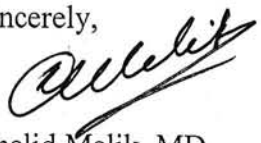
Because of Mr. Curtis' abnormal cerebrovascular anatomy that was identified on the CTA scan of 9/18/2010 while in Christus Saint Michael Hospital on their Certified Primary Stroke Unit, the treatment consisting of the Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky.

During the Dix-Hallpik maneuver, Mr. Curtis suffered classical stroke symptoms of double vision, blood pressure drop, acute hearing loss, vomiting, dizziness, and vital sign compromise. These symptoms, more likely than not, corresponded with the timing of his brainstem infarction and his complex basilar artery dissection at the anterior inferior cerebellar artery (AICA) junction. Based on reasonable medical probability, this is when Mr. Curtis infarcted his brainstem and the dissection occurred. After the initial acute neurological event, Dr. James Urbina continued with another contraindicated procedure and performed the Epley maneuver on Mr. Curtis. It is clear that these maneuvers consisting of rapid and repeated significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees subjected Mr. Curtis' abnormal cerebrovascular anatomy to extreme trauma and stress and caused a tear that resulted in a complex dissection of his basilar artery at the AICA junction and a resultant brainstem infarction with significant permanent hearing loss.

Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

I reserve the right to amend this report as more information becomes available.

Sincerely,



Khalid Malik, MD

CURRICULUM VITAE

Khalid Malik, M.D.
585 Hwy 67 E,
Maud,
Texas,75567
(903) 733 0786

EDUCATION:

F. Sc (Pre-Med) 1984, Government College, Lahore, Pakistan

MBBS (Bachelor of Medicine and Bachelor of Surgery)
June, 1991, King Edward Medical College, Punjab University, Lahore, Pakistan

FMGEMS, 1993
United States Medical Licensing Exam, 1995.

ACLS 1995 (Recertified 1997 and 2000)

Participation in the Preceptorship Program on Acute Stroke at the University of Texas Medical School at Houston, April 3-4, 1998.

Board certification: Diplomate American Board of Neurology and Psychiatry April 2000
Recertified February 2012

Subspeciality Certification in Clinical Neurophysiology March 2003.
Diplomate No:1397.

Subspeciality Certification in Vascular Neurology June 2006.
Diplomate No:314.

EXPERIENCE:

July 91 - Jan 92	House Physician,Internal Medicine Mayo Hospital, Lahore, Pakistan
Jan 92 - June 92	House Physician,Neurology Mayo Hospital Lahore Pakistan

May 93 - June 94	Primary Care Practice Rural Health Center, Pakistan
July 94 - June 95	Internship year in Internal Medicine Marshall University, Huntington, West Virginia VA Medical Center, Huntington, West Virginia

EXPERIENCE(Cont'd)

July 95-June 98	Residency in Neurology Medical College of Georgia Augusta,GA VA Medical Center,Augusta.GA
July 98 -June 99	Fellowship in Clinical Neurophysiology Medical College of Georgia. Augusta.GA
March 00- Feb 02	Cerebrovascular Disease Traumatic Brain Injury Fellowship VA Medical Center, Augusta, GA

Duties included:

*Treatment of acute ischemic stroke including thrombolytic therapy .

*Establishment of a rural stroke network.
*Community education about stroke.
*Clinical studies in stroke
*Carotid doppler studies.
*Research project regarding role of TFDs in reducing Hypoxia Reperfusion injury in stroke .

March 00-March 02	Clinical Instructor in Neurology Medical College of Georgia. Augusta,GA
Currently	Director Stroke Program. Wadley Regional Medical Center Texarkana,Texas,a JCAHO Certified

Primary Stroke Center.
Currently involved in establishing
Critical care pathways and acute
Stroke treatment protocols at Wadley
Regional Medical Center as well as
Establishing a regional stroke network .
Involved in community education
Efforts to raise stroke awareness
and also interacting with the local
medical community to promote acute
Stroke treatment .

Member **GETAC** Stroke Committee Jan 06-
Feb 09.
Stroke Committee chair **NETRAC** 2010
Critical Care Committee member **NETRAC**
2011 to date

HONORS & AWARDS:

Project approved by VA Office of Academic Affiliations regarding role of transcription factor decoys in decreasing reperfusion injury in stroke.
This was a competitive research award with only four being approved and funded.

Science & Technology Scholarship awarded by Government of Pakistan .

Research Scholarship awarded by King Edward Medical College Alumni Association of North America

Merit Scholarship in Pre-Medicine

RESEARCH:

Co-Investigator in SPARCL (a double blind randomized placebo controlled study of atorvastatin as prevention of cerebrovascular events in patients with a previous TIA or stroke)

Enrollment of patients into Enlimomab, WARSS (Warfarin vs. Aspirin recurrent stroke study),AAASPS (African American Antiplatelet Stroke Prevention Study) and Citicholine studies for acute ischemic stroke.

Evaluation and management of the comatose patient.Khalid

Malik M.B.B.S. and David C Hess M.D.Post graduate Medicine February 2002.

The Influence of Age and Height On Nerve Conduction. A review of nerve conduction studies, EMG findings , Evoked potentials and histopathological changes. Michael H Rivner, MD, Thomas R Swift, MD and Khalid Malik, MD (Muscle and Nerve Sept 2001)

Use of IVIG to treat antibody mediated lack of response to botulinum toxin .
Protocol established and initial funding agreement made with Allergan.

Co investigator in the following trials:

Protocol M/2725/0002 (96391A), A Preliminary study in PD with dyskinesias Pharmacia and UpJohn,2000-2001.PI-Kapil D Sethi,MD.

A Multicenter, Open-Label, Phase III Study for the Safety. Tolerability and Clinical Effect of Rasagline Mesylate in Patients with Parkinson's Disease.
Protocol: TVP-1012/233. TEVA, 12-00-present

Requip Treatment For Restless Legs Syndrome Mayo Clinic. Scottsdale, 11/01-present

Protocol 20000105 (AMG-474-00),AMG 7400 in treatment of PD. Amgen, Inc., 2000-Present.PI Kapil D Sethi MD.

Parkinson's Disease Collaborative Study of Genetic Linkage (PROGENI) , NIH, 8/98-present

A Multicenter, US and Canada, Double-blind, Randomized, Placebo-Controlled,Parallel-Group Study for the Efficacy, Tolerability and Safety of Rasagaline Mesylate in Levodopa Treated Parkinson's disease patients with Motor Fluctuations (PRESTO) Protocol

TVP-1012/133,TEVA,9/00-present.

An Active Extension of the TVP-1012/133 (PRESTO) Study-A Bi-national, Multicenter, Double-Blind, Randomized Study to Evaluate the Safety and Tolerability of Rasagiline Mesylate in Advanced Parkinson's Disease (PD) Patients with Motor Fluctuations Treated With Chronic Levodopa/Carbidopa Therapy.
Protocol: TV{ 1012/135. TEVA, 6/01-present

An Open Extension Study of the Safety and Efficacy of Zydis Selegiline 1.25 and 2.5 fig QD as an Adjunct in the Management of Parkinsonian Patients Being Treated with Levodopa. MDS. 1997 -present

A Double-blind, Parallel-Group,Placebo Controlled.Randomized.Extension of Study 320 of the Effect of Riluzole on Progression of Parkinson's Disease. Protocol number RP54274X-320LT. Rhone-Poulenc-Rorer January 2000-present

Publications pending :
Callosal and Periventricular lesions demonstrated by Magnetic resonance Imaging in Cocaine Abusers.A case report series.
Khalid Malik MD and Shawn G Dunn MD.
Submitted to Archives of Neurology

Gait disorder in Lithium toxicity.A Video Brief .
Kapil.D.Sethi MD and Khalid Malik MD.
Submitted to Movement Disorders .

STROKE RELATED PRESENTATIONS AND COMMUNITY EDUCATION.
Profiles in Health; Acute Stroke at Wadley Life Source.
Telecast September 19,2003.

Understanding Stroke Risk factors and Prevention .Presentation to a geriatric Population at Wadley Life Source. February 26,2004.

New treatment for a Brain Attack .April 20 2004.Presented at Wake Village Baptist church.

Stroke Risk Factors and Treatment Options. KTOY Radio on May 02. 2004.

Public Health Burden of stroke.

In Hospital management of stroke.
Secondary Stroke Prevention. Invited speaker for these three presentations
At the Acute Stroke Conference sponsored by American Heart Association.
Texarkana College ,Truman Arnold Center, May 19 2004.

Secondary Stroke Prevention .A presentation to stroke survivors and care givers
At Health South Rehabilitation Hospital May 25 ,2004.

Staff meeting at Atlanta Memorial Hospital,Atlanta Texas
regarding Stroke care,A Network Approach, August 16, 2004 .

Staff meeting at Medical Park Hospital,Hope Arkansas regarding Stroke
Care,A Network Approach, August 20, 2004

Acute stroke management and Secondary prevention of Stroke.An interactive telecast over AHEC SouthWestern's Network.November 04, 2004.

Staff meeting at Howard Memorial Hospital, Nashville Arkansas regarding Stroke Care, A Network Approach, January 19, 2005.

Brain Attack 2005,A presentation at Rose Hill Baptist Church.TexarkanaTexas.
March 01,2005.

Staff meeting at Magnolia Hospital, Magnolia, Arkansas regarding Stroke
Care, A Network Approach, March 16, 2005.

Staff meeting at Little River Memorial Hospital, Ashdown Arkansas regarding
Stroke Care, A Network Approach, April 21, 2005.

SOCIETY MEMBERSHIP:

American Academy of Neurology.

American Headache Society.

EXTRA CURRICULAR ACTIVITIES

Member Student Organization for Blood Donation, King Edward Medical College, Lahore, Pakistan (Awarded gold medal for service rendered)

Photography

Fresh water fishing.

LICENSURE:

State of Georgia License No: 046986
State of Texas License No: L 7026

REFERENCES:

Available upon request

APPENDIX TAB B

EXPERT OPINION OF CHRISTOPHER A. BAILEY, MD

This report is written at the request of The Girard's Law Firm and is written in order to comply with *Texas Civil practices & Remedies Code* 74.325. I have been informed that subsection (k) of the statute provides that an expert opinion prepared under this law is not admissible in evidence by any party; shall not be used in a deposition, trial, or other proceeding; and shall not be referred to by any Defendant during the course of any proceeding in this case. All opinions expressed herein are based upon reasonable medical probability.

Materials Reviewed

I have reviewed the medical care given to William C. Curtis by James Urbina, MD at Christus Saint Michael Hospital (Certified Primary Stroke Center) in Texarkana, Texas. In addition, I have reviewed related patient studies from UT Southwestern in Dallas Texas, Collom & Carney Clinic, Advanced Imaging, and Advanced Pulmonary and Sleep Solutions in Texarkana, Texas.

Qualifications

I am a board certified physician, licensed to practice medicine in the State of Texas. I am board certified in critical care, internal medicine, pulmonology, and sleep medicine. I have 19 years of experience practicing medicine. I graduated from the University of Oklahoma and completed my fellowship at the University of Oklahoma in 1992. I currently maintain an active practice specializing in pulmonology and sleep medicine. I am on staff at Christus Saint Michael Hospital and Wadley Regional Medical Center in Texarkana Texas. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke. I am also intimately familiar with the standards by which physicians should address the needs of patients suffering from and /or at risk for stroke.

As such, I am familiar with the staffing requirements and policies and procedures required of hospitals treating patients with neurological complaints. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke.

Throughout my career, I have routinely cared for patients presenting with complicated neurological issues, including patients with known neurological issues such as stroke and other unknown neurological and cerebrovascular issues. I have cared for such patients in the ER setting, in the hospital setting once such patients have been admitted, and in the office setting. I have routinely supervised nurses in the care of such patients. Specifically, I care for patients such as Mr. Curtis whose complaint was muffled hearing, unsteady balance, nausea and feeling poorly after bending his neck while working under a deck at his lake cabin. As a critical care physician, I am often called upon to preform interventional procedures on patients presenting with symptoms such as Mr. Curtis presented with. I evaluate such patients routinely, order and interpret appropriate lab work and diagnostic imaging studies such as MRI, MRA, CT, and CTA. I am currently, and have been at all times relevant hereto, engaged in full time medical practice in Texas. I am familiar with the standards of care for physicians caring for patients exhibiting the signs and symptoms of Mr. Curtis, both in the office practice and in a hospital setting. My curriculum vita is attached hereto and further outlines my educations, training and experience.

All opinions expressed in this report are based on reasonable medical probability.

Texas Legal Definitions

I understand that with respect to physicians in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a physician of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances.

I understand that with respect to hospitals in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a hospital of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a hospital of ordinary prudence would have done under the same or similar circumstances.

I understand that in Texas, "proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. I understand that there may be more than one proximate cause of an event.

Patient History

On September 17, 2010, Mr. Curtis, a 59 year old male, presented to the Christus Saint Michael Hospital emergency department complaining of sudden muffled hearing, balance issues, nausea and feeling poorly. Mr. Curtis has a history of Lap band (2005) but no history of breathing or insomnia issues, hypertension, diabetes, cardiovascular or stroke-related issues. Mr. Curtis does not smoke and rarely drinks alcohol. He takes a multi vitamin and 81mgs of aspirin daily. He denied chest pain, abnormal pain, headache, melena, hematochezia, dysuria or syncope. Initial vital signs were unremarkable with a blood pressure of 119/73, pulse 51, temperature 96.4, mean arterial pressure of 88, and a respiratory rate of 16. Mr. Curtis' speech was not slurred; he did not present with any stroke related facial or extremity issues. His reflexes and strength in all four extremities were normal. He had no problem communicating with the emergency department staff and physicians.

Lab work was ordered and reported. On admission, his cholesterol was 146 and triglycerides were 38. Other lab work that I reviewed was within normal limits. Several imaging studies were ordered and performed while Mr. Curtis was in the emergency department. A chest x-ray, carotid Doppler exam, MRI of the brain, MRA of the head, and CT of the brain were all negative except for the identification of a trigeminal artery on the MRA of the head. The carotid Doppler duplex exam report noted that neither the right nor left vertebral arties could be identified. The chest x-ray demonstrated prior granulomatous disease, but was otherwise normal. A CTA of the head and neck was ordered and performed early the next morning. Mr. Curtis was screened by a teleneurologist in the emergency department. All of Mr. Curtis' neurological evaluations were noted to be normal. Initial diagnosis was heat stroke related. Mr. Curtis was admitted for observation to the Certified Primary Stroke Unit at Christus Saint Michael Hospital under their stroke protocol. Dr. James Urbina, a hospitalist, was the attending physician.

The CTA of the head and neck was performed the morning of 9/18/2010 and revealed a persistent trigeminal artery which communicates with the basilar artery at the level of the siphon. The basilar artery proximal to this level is relatively hypo-plastic. The left vertebral artery is quite small throughout its length but is faintly patent. The right vertebral artery is somewhat larger but still relatively hypoplastic. These results are of concern regarding Mr. Curtis' symptoms and condition.

Dr. Urbina evaluated Mr. Curtis' condition and made the diagnosis of Benign Proximal Positional Vertigo. On 9/18/2010, Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis to reposition the crystals in his ears. The Dix-Hallpik maneuver which consists of repeated rapid significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees was performed. At this point, Mr. Curtis demonstrated double vision, blood pressure drop, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina proceeded to have Mr. Curtis do the Epley maneuver after the Dix-Hallpik was performed. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck. Mr. Curtis did not respond favorably to these procedures. Dr. Malik, neurologist was consulted on the afternoon of 9/18/2010. Dr. Malik diagnosed Mr. Curtis with a brainstem stroke. Cardiology was also consulted, but did not find any additional significant issues. Mr. Curtis was discharged from Christus Saint Michael Hospital on 9/20/2010.

An MRI of the brain was ordered by Dr. Freddie Contreras and performed at Advanced Imaging in Texarkana Texas on 9/23/2010, three days after Mr. Curtis was discharged from Christus Saint Michael Hospital's Certified Primary Stroke Unit. This MRI compared to the MRI performed at Christus Saint Michael Hospital on 9/17/2010 revealed regions of sub acute infarction in the inferior pons consistent with a brainstem stroke. A subsequent cerebral angiogram was performed at UT Southwestern in Dallas, Texas. This angiogram report, dated 10/15/2010, revealed that Mr. Curtis in addition to having suffered a brainstem stroke had experienced a complex basilar artery dissection.

Audiology reports from Collom & Carney Clinic confirm that Mr. Curtis has suffered severe hearing loss. A sleep study performed at Advanced Pulmonary and Sleep Solutions indicates that Mr. Curtis is now suffering from sleep apnea as a result of his cerebral compromise.

Standards of Care

Mr. Curtis presented with neurological complaints and radiology confirmed an abnormal cerebrovascular anatomy. The relevant standards of care for a physician taking care of such a patient require that the physician not perform the Dix-Hallpik and Epley maneuvers under any circumstances. Such maneuvers were contraindicated given Mr. Curtis' cerebrovascular anatomy.

The relevant standards of care for a hospital caring for complex neurological patients such as Mr. Curtis require that the hospital staff its facility with adequately trained healthcare providers capable of recognizing and treating such patients. Minimal standards of care require that a hospital treating patients with complex neurological issues have an on-site neurologist available full time to assess and treat patients presenting with neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. Moreover, minimal standards of care require that the hospital caring for patients with complex neurological problems must have, and enforce, policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on patients with neurological complaints and documented abnormal cerebrovascular anatomy.

Violations of the Standard of Care

My review of the medical records related to Mr. Curtis's treatment leads me to conclude that based on reasonable medical probability, Dr. James Urbina and Christus Saint Michael Hospital fell below the applicable standards of care in their treatment of Mr. Curtis.

Specifically, Dr. James Urbina fell below the minimal standards of care by performing the Dix-Hallpik and Epley maneuvers on Mr. Curtis. Given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy, such maneuvers were contraindicated.

Christus Saint Michael Hospital likewise fell below the standards of care by failing to staff its facility with adequately trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. In addition, if an onsite neurologist was not available for consultation, a neurology consult should have been obtained from the teleneurologist regarding the cerebrovascular abnormality Mr. Curtis demonstrated prior to Dr. Urbina preforming any neck manipulation. Moreover, the hospital violated minimal standards of care by failing to have, and enforce, written policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on Mr. Curtis, given his neurological complaints and documented abnormal cerebrovascular anatomy.

Christus Saint Michael Hospital staffed its facility with Dr. Urbina, a physician that was inadequately trained to treat patients presenting with complicated neurological issues, and a nursing staff in its Certified Primary Stroke Unit that was not properly trained to intervene after Mr. Curtis experienced a significant neurological event.

Under the definitions listed above, I must conclude that Dr. James Urbina and Christus Saint Michael Hospital were negligent in their treatment and care of Mr. Curtis.

Appropriate Patient Care

Dr. James Urbina should have not subjected Mr. Curtis' head or neck to any sudden movement, torsion, bending, flexion, extension, or rotation given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy. Under no circumstances should the Dix-Hallpik or Epley maneuvers have been performed. The Hospital should have had a written policy prohibiting the same. Appropriate standards of care required Dr. James Urbina to consult with neurology for evaluation of the cerebrovascular issues that were demonstrated on MRA and CTA. Likewise, Christus Saint Michael Hospital should have had an onsite neurologist, rather than the inadequately trained staff, available to assess and treat Mr. Curtis' neurological issues. A neurologist would have the training to understand and properly address Mr. Curtis' issues.

Causation and Damages

The principle of injury involved regarding the vertebral artery is due to the anatomy of this artery which is vulnerable to stretching, compression, or torquing injury as it curves around the atlas. This artery changes its direction from a vertical to a horizontal path and is therefore very likely susceptible to injury from rotation and extension.

Because of Mr. Curtis' abnormal cerebrovascular anatomy that was identified on the CTA scan the morning of 9/18/2010 while in Christus Saint Michael Hospital on their Certified Primary Stroke Unit, the treatment consisting of the Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky.

During the Dix-Hallpik maneuver, Mr. Curtis suffered classical stroke symptoms of double vision, blood pressure drop, acute hearing loss, vomiting, dizziness, and vital sign compromise. These symptoms, more likely than not, corresponded with the timing of his brainstem infarct and his complex basilar artery dissection at the anterior inferior cerebellar artery (AICA) junction. Based on reasonable medical probability, this is when Mr. Curtis infarcted his brainstem and the dissection occurred. After the initial acute neurological event, Dr.

James Urbina continued with another contraindicated procedure and performed the Epley maneuver on Mr. Curtis. It is clear that these maneuvers consisting of rapid and repeated significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees subjected Mr. Curtis' abnormal cerebrovascular anatomy to extreme trauma and stress. The torsion, bending, flexing, extending, and rotating of Mr. Curtis' neck during these procedures caused his brainstem to infarct and caused a tear that resulted in a complex dissection of his basilar artery at the AICA junction.

Mr. Curtis has extremely small hypoplastic right and left vertebral arteries and two thirds of his proximal basilar artery is markedly diminished in diameter at the junction where the vertebral arteries join the basilar artery. These abnormal hypoplastic vertebral arteries and the diminished diameter basilar artery are abnormal and are not as pliable and do not flex or stretch like normal sized vertebral arteries when stressed. The severe rapid and repeated neck movements Mr. Curtis experienced during the Dix-Hallpik and Epley maneuvers caused extreme trauma and stress on his abnormal cerebrovascular anatomy. Because Mr. Curtis' cerebrovascular anatomy was abnormal, he did not tolerate the trauma and stress of these procedures and as a result, these procedures caused his brainstem to infarct and caused a tear or dissection of his basilar artery at the AICA junction resulting in significant permanent hearing loss.

Before Mr. Curtis suffered his brainstem stroke and complex basilar artery dissection, he had no history or symptoms of any sleep issues. The brainstem stroke has caused an alteration in the upper airway function and tone, thus resulting in upper airway obstruction and Obstructive Sleep Apnea Syndrome (OSAS). Mr. Curtis developed insomnia and began to have significant sleep issues during his stroke recovery period. It is more likely than not that Mr. Curtis' sleep issues were a direct result of his brainstem stroke and basilar artery dissection. Beyond any reasonable medical probability, Mr. Curtis' sleeping disorder was proximately caused by the brainstem stroke and complex basilar artery dissection.

Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

I reserve the right to amend this report as more information becomes available.

Sincerely,

Christopher A. Bailey, MD

CHRISTOPHER A. BAILEY, M.D.
1550 MOORES LANE
TEXARKANA, TEXAS 75503
(903) 793-7378 (W)
(903) 793-8866 (FACSIMILE)

PERSONAL DATA

PLACE OF BIRTH: COATESVILLE, PENNSYLVANIA
MARITAL STATUS: MARRIED (TERRI)
CHILDREN: ONE (CHISTOPHER ALEXANDER)

EDUCATION

1989 M.D. UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
1985 B.S. UNIVERSITY OF OKLAHOMA, NORMAN
1981 H.S. COATESVILLE AREA SENIOR HIGH

POSTGRADUATE TRAINING AND FELLOWSHIP APPOINTMENTS

1999-2000 STANFORD SCHOOL OF SLEEP MEDICINE,
PALO ALTO, CALIFORNIA

1993-1996 FELLOW, PULMONARY DISEASE AND CRITICAL CARE
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
OKLAHOMA CITY, OKLAHOMA

1992-1993 INTERNAL MEDICINE CHIEF RESIDENT
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
OKLAHOMA CITY, OKLAHOMA

1990-1993 RESIDENCY, COMBINED INTERNAL MEDICINE/PEDIATRICS
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER

OKLAHOMA CITY, OKLAHOMA

1989–1990 INTERNSHIP, COMBINED INTERNAL MEDICINE/PEDIATRICS
UNIVERSITY OF OKLAHOMA HEALTH SCIENCES CENTER
OKLAHOMA CITY, OKLAHOMA

LICENSES

OKLAHOMA
TEXAS
ARKANSAS

SPECIALTY CERTIFICATION

AMERICAN BOARD OF INTERNAL MEDICINE (DIPLOMAT) 1993–Present
AMERICAN BOARD OF PEDIATRICS (DIPLOMAT) 1993–2000
AMERICAN BOARD OF INTERNAL MEDICINE, PULMONARY DISEASE (DIPLOMAT) 1996–Present.
AMERICAN BOARD OF INTERNAL MEDICINE, CRITICAL CARE MEDICINE (DIPLOMAT) 1997–Present
AMERICAN BOARD OF SLEEP MEDICINE (DIPLOMAT) 2002–Present

HONORS

1998 & 2000	OUTSTANDING FACILITY AWARD AHEC SOUTHWEST
1994–1996	LERNER HINSHAW NIH FELLOWSHIP GRANT
1993	WILLIAM W. RUCKS AWARD
1993	PEADIATRICS OUTSTANDING TEACHER AWARD
1993	APPOINTED MEMBER, INTERNAL MEDICINE CLINICAL COMPETENCY COMMITTEE
1990–1993	APPOINTED MEMBER, INTERNAL MEDICINE HOUSESTAFF

	ADVISORY COMMITTEE
1990-1991	APPOINTED MEMBER, PROVOST'S TASK FORCE ON STUDENT/RESIDENT HEALTH, OU HEALTH SCIENCES CENTER CAMPUS
1987-1988	APPOINTED MEMBER, DEAN'S STUDENT ADVISORY COMMITTEE
1984-1987	ASSOCIATION BLACK PERSONNEL HIGH ACADEMIC ACHIEVEMENT AWARD
1984-1985	ROXIE SCOTT SCHOLORSHIP
1982-1985	DEAN'S HONOR ROLL (CONSISTENTLY)
1981	COATESVILLE AREA SENIOR HIGH SCHOOL COMMUNITY SCHOLORSHIP
1981	HIGH SCHOOL NATIONAL HONOR SOCIETY
1981	WOMAN'S LEAGUE FOR MINORITY EDUCATION SCHOLARSHIP

PROFESSIONAL APPOINTMENTS

DIRECTOR OF SLEEP LAB, WADLEY MEDICAL CENTER
JUNE/2001 - 2004

INTERNAL MEDICINE SECTION CHIEF - ST. MICHAELS HOSPITAL
1999-2001

INTERNAL MEDICINE SECTION CHIEF-WADLEY REGIONAL HOSPITAL
JANUARY 2003-2004

DIRECTOR OF CARDIOPULMONARY SECTION, WADLEY REGIONAL MEDICAL CENTER JANUARY 1997 - September 2003

BILLY D PARSONS, M.D.
2604 ST. MICHAEL DRIVE STE425
TEXARKANA, TEXAS 75503

ROBERT PARHAM, M.D.
1902 MOORES LANE
TEXARKANA, TEXAS 75503

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P.O. BOX 26901, ROOM 3SP-400
OKLAHOMA CITY, OKLAHOMA 73190

BARRY A. GRAY, M.D.
P.O. BOX 26901, ROOM 3SP-400
OKLAHOMA CITY, OKLAHOMA 73190

BRENT R. BROWN, M.D.
P.O. BOX 26901, ROOM 3SP-400
OKLAHOMA CITY, OKLAHOMA 73190

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P.O. BOX 26901, ROOM 4SP-120
OKLAHOMA CITY, OKLAHOMA 73190

JOHN COZART, M.D.
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TEXARKANA, TX 75503

PAUL SARNA, M.D
HEALTH CARE EXPRESS
3515 RICHMOND ROAD
TEXARKANA, TX 75503

APPENDIX TAB C

EXPERT OPINION OF LEE M. BUONO, MD

This report is written at the request of The Girard's Law Firm and is written in order to comply with *Texas Civil practices & Remedies Code* 74.325. I have been informed that subsection (k) of the statute provides that an expert opinion prepared under this law is not admissible in evidence by any party; shall not be used in a deposition, trial, or other proceeding; and shall not be referred to by any Defendant during the course of any proceeding in this case. All opinions expressed herein are based upon reasonable medical probability.

Materials Reviewed

I have reviewed the medical care given to William C. Curtis by James Urbina, MD at Christus Saint Michael Hospital (Certified Primary Stroke Center) in Texarkana, Texas. In addition, I have reviewed related patient studies from UT Southwestern in Dallas Texas, Collom & Carney Clinic, Advanced Imaging, and Advanced Pulmonary and Sleep Solutions in Texarkana, Texas.

Qualifications

I am a board-certified neurosurgeon, licensed to practice medicine in the State of New Jersey. I received the M.D. degree in 1997 from the Jefferson Medical College, Philadelphia, PA and was Cum Laude, AOA. Thereafter, from 1997 to 2003, I completed a neurosurgery residency program at Thomas Jefferson University Hospital where my training included 1 year dedicated to cerebrovascular and interventional training with Robert H. Rosenwasser. I have been engaged in the full-time practice of neurosurgery for the past 11 years. I currently maintain a very active neurosurgery practice and am affiliated with Capital Health System in Trenton, New Jersey. I routinely care for patients who have and/or may be experiencing cerebrovascular issues such as stroke. I am familiar with the staffing requirements and policies and procedures required of hospitals treating patients with neurological complaints. I am intimately familiar with the manners in which prudent hospitals should address the needs of patients suffering from and/or at risk for stroke.

Throughout my career, I have routinely cared for patients presenting with complicated neurological issues, including patients with known neurological issues such as stroke and other unknown neurological and cerebrovascular issues. I have cared for such patients in the ER setting, in the hospital setting once such patients have been admitted, and in the office setting. I have routinely supervised nurses in the care of such patients. Specifically, I care for patients such as Mr. Curtis whose complaint was muffled hearing, unsteady balance, nausea and feeling poorly after bending his neck while working under a deck at his lake cabin. As a neurosurgeon, I am often called upon to preform interventional procedures on patients presenting with symptoms such as Mr. Curtis presented with. I evaluate such patients routinely, order and interpret appropriate lab work and diagnostic imaging studies such as MRI, MRA, CT, and CTA. I am currently, engaged in full time neurosurgical practice in New Jersey. Prior to my move to New Jersey in 2010, I was engaged in full time neurosurgical practice in Texas. I am familiar with the standards of care for physicians caring for patients exhibiting the signs and symptoms of Mr. Curtis, both in the office practice and in a hospital setting. My curriculum vita is attached hereto and further outlines my educations, training and experience.

All opinions expressed in this report are based on reasonable medical probability.

Texas Legal Definitions

I understand that with respect to physicians in Texas, "negligence" means the failure to use ordinary care; that is, doing that which a physician of ordinary prudence would not have done under the same or similar circumstances; or failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances.

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I understand that in Texas, "proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. I understand that there may be more than one proximate cause of an event.

Patient History

On September 17, 2010, Mr. Curtis, a 59 year old male, presented to the Christus Saint Michael Hospital emergency department complaining of sudden muffled hearing, balance issues, nausea and feeling poorly. Mr. Curtis has a history of Lap band (2005) but no history of breathing or insomnia issues, hypertension, diabetes, cardiovascular or stroke-related issues. Mr. Curtis does not smoke and rarely drinks alcohol. He takes a multi vitamin and 81mgs of aspirin daily. He denied chest pain, abnormal pain, headache, melena, hematochezia, dysuria or syncope. Initial vital signs were unremarkable with a blood pressure of 119/73, pulse 51, temperature 96.4, mean arterial pressure of 88, and a respiratory rate of 16. Mr. Curtis' speech was not slurred; he did not present with any stroke related facial or extremity issues. His reflexes and strength in all four extremities were normal. He had no problem communicating with the emergency department staff and physicians.

Lab work was ordered and reported. On admission, his cholesterol was 146 and triglycerides were 38. Other lab work that I reviewed was within normal limits. Several imaging studies were ordered and performed while Mr. Curtis was in the emergency department. A chest x-ray, carotid Doppler exam, MRI of the brain, MRA of the head, and CT of the brain were all negative except for the identification of a trigeminal artery on the MRA of the head. The carotid Doppler duplex exam report noted that neither the right nor left vertebral arties could be identified. The chest x-ray demonstrated prior granulomatous disease, but was otherwise normal. A CTA of the head and neck was ordered and performed the morning of 9/18/2010. Mr. Curtis was screened by a teleneurologist in the emergency department on 9/17/2010. All of Mr. Curtis' neurological evaluations were noted to be normal. Initial diagnosis was heat stroke related. Mr. Curtis was admitted for observation to the Certified Primary Stroke Unit at Christus Saint Michael Hospital under their stroke protocol. Dr. James Urbina, a hospitalist, was the attending physician.

The CTA of the head and neck was performed the morning of 9/18/2010 and revealed a persistent trigeminal artery which communicates with the basilar artery at the level of the siphon. The basilar artery proximal to this level is relatively hypo-plastic. The left vertebral artery is

quite small throughout its length but is faintly patent. The right vertebral artery is somewhat larger but still relatively hypoplastic. These results are of concern regarding Mr. Curtis' symptoms and condition.

Dr. Urbina evaluated Mr. Curtis' condition and made the diagnosis of Benign Proximal Positional Vertigo. On 9/18/2010, Dr. Urbina performed the Dix-Hallpik maneuver on Mr. Curtis to reposition the crystals in his ears. The Dix-Hallpik maneuver which consists of repeated rapid significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees was performed. At this point, Mr. Curtis demonstrated double vision, blood pressure drop, abnormal vital signs, vomiting, and additional hearing issues. Dr. Urbina proceeded to have Mr. Curtis do the Epley maneuver after the Dix-Hallpik was performed. Like the Dix-Hallpik, the Epley maneuver involved the physical manipulation of Mr. Curtis' neck. Mr. Curtis did not respond favorably to these procedures. Dr. Malik, neurologist was consulted on the afternoon of 9/18/2010. Dr. Malik diagnosed Mr. Curtis with his brainstem stroke. Cardiology was also consulted, but did not find any additional significant issues. Mr. Curtis was discharged from Christus Saint Michael Hospital on 9/20/2010.

An MRI was ordered by Dr. Freddie Contreras and performed at Advanced Imaging in Texarkana Texas on 9/23/2010, three days after Mr. Curtis was discharged from Christus Saint Michael Hospital's Certified Primary Stroke Unit. This MRI compared to the MRI performed at Christus Saint Michael Hospital on 9/17/2010 revealed regions of sub acute infarction in the inferior pons consistent with a brainstem stroke. A subsequent cerebral angiogram was performed at UT Southwestern in Dallas, Texas. This angiogram report, dated 10/15/2010, revealed that Mr. Curtis in addition to having suffered a brainstem stroke, had experienced a complex basilar artery dissection.

Audiology reports from Collom & Carney Clinic confirm that Mr. Curtis has suffered severe hearing loss. A sleep study performed at Advanced Pulmonary and Sleep Solutions by Dr. Christopher Bailey indicates that Mr. Curtis is now suffering from sleep apnea as a result of his cerebral compromise.

Standards of Care

Mr. Curtis presented with neurological complaints and radiology confirmed an abnormal cerebrovascular anatomy. The relevant standards of care for a physician taking care of such a patient require that the physician not perform the Dix-Hallpik and Epley maneuvers under any circumstances. Such maneuvers were contraindicated given Mr. Curtis' cerebrovascular anatomy.

The relevant standards of care for a hospital caring for complex neurological patients such as Mr. Curtis require that the hospital staff its facility with adequately trained healthcare providers capable of recognizing and treating such patients. Minimal standards of care require that a hospital treating patients with complex neurological issues have an on-site neurologist available full time to assess and treat patients presenting with neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. In addition, if an onsite neurologist was not available for consultation, a neurology consult could have been obtained from the teleneurologist regarding the cerebrovascular abnormality Mr. Curtis demonstrated prior to Dr. Urbina preforming any neck manipulation. Moreover, minimal standards of care require that the hospital caring for patients with complex neurological problems must have and enforce, policies and procedures to assure that Dix-Hallpik and Epley maneuver are not

performed on patients with neurological complaints and documented abnormal cerebrovascular anatomy.

Violations of the Standard of Care

My review of the medical records related to Mr. Curtis's treatment leads me to conclude that based on reasonable medical probability, Dr. James Urbina and Christus Saint Michael Hospital fell below the applicable standards of care in their treatment of Mr. Curtis.

Specifically, Dr. James Urbina fell below the minimal standards of care by performing the Dix-Hallpik and Epley maneuvers on Mr. Curtis. Given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy, such maneuvers were contraindicated.

Christus Saint Michael Hospital likewise fell below the standards of care by failing to staff its facility with adequately trained healthcare providers capable of recognizing and treating Mr. Curtis. The hospital failed to have an on-site neurologist available full time to assess and treat Mr. Curtis' neurological issues such as hearing loss, unstable balance and abnormal cerebrovascular anatomy. Moreover, the hospital violated minimal standards of care by failing to have, and enforce, written policies and procedures to assure that Dix-Hallpik and Epley maneuver are not performed on Mr. Curtis, given his neurological complaints and documented abnormal cerebrovascular anatomy.

Christus Saint Michael Hospital staffed its facility with Dr. Urbina, a physician that was inadequately trained to treat patients presenting with complicated neurological issues, and a nursing staff in its Certified Primary Stroke Unit that was not properly trained to intervene after Mr. Curtis experienced a significant neurological event.

Under the definitions listed above, I must conclude that Dr. James Urbina and Christus Saint Michael Hospital were negligent in their treatment and care of Mr. Curtis.

Appropriate Patient Care

Dr. James Urbina should have not subjected Mr. Curtis' head or neck to any sudden movement, torsion, bending, flexion, extension, or rotation given Mr. Curtis' neurological complaints and abnormal cerebrovascular anatomy. Under no circumstances should the Dix-Hallpik or Epley maneuvers have been performed. The Hospital should have had a written policy prohibiting the same. Appropriate standards of care required Dr. James Urbina to consult with neurology or neurosurgery for evaluation of the cerebrovascular issues that were demonstrated on MRA and CTA. Likewise, Christus Saint Michael Hospital should have had an onsite neurologist, rather than the inadequately trained staff, available to assess and treat Mr. Curtis' neurological issues. A neurologist would have the training to understand and properly address Mr. Curtis' issues.

Causation and Damages

The principle of injury involved regarding the vertebral artery is due to the anatomy of this artery which is vulnerable to stretching, compression, or torquing injury as it curves around the atlas. This artery changes its direction from a vertical to a horizontal path and is therefore very likely susceptible to injury from rotation and extension.

Because of Mr. Curtis' abnormal cerebrovascular anatomy that was identified on the CTA scan the morning of 9/18/2010 while in Christus Saint Michael Hospital on their Certified

Primary Stroke Unit, the treatment consisting of the Dix-Hallpik and the Epley maneuvers were contraindicated, dangerous, and very risky.

During the Dix-Hallpik maneuver, Mr. Curtis suffered classical stroke symptoms of double vision, blood pressure drop, acute hearing loss, regurgitation, dizziness, and vital sign compromise. These symptoms, more likely than not, corresponded with the timing of his brainstem infarct and his complex basilar artery dissection at the anterior inferior cerebellar artery (AICA) junction. Based on reasonable medical probability, this is when Mr. Curtis infarcted his brainstem and the dissection occurred. After the initial acute neurological event, Dr. James Urbina continued with another contraindicated procedure and performed the Epley maneuver on Mr. Curtis. It is clear that these maneuvers consisting of rapid and repeated significant torsion, bending, flexing, extending and rotating Mr. Curtis' neck many times at varying angles and varying degrees subjected Mr. Curtis' abnormal vertebrovascular anatomy to extreme stress. The extreme torsion, bending, flexing, extending, and rotating of Mr. Curtis' neck during these traumatic procedures caused Mr. Curtis' brainstem infarct and caused a tear that resulted in a complex dissection of his basilar artery at the AICA junction.

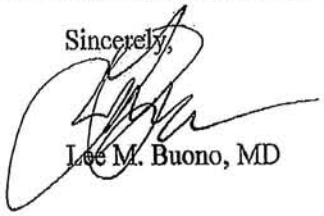
Mr. Curtis has extremely small hypoplastic right and left vertebral arteries and two thirds of his proximal basilar artery is markedly diminished in diameter at the junction where the vertebral arteries join the basilar artery. These abnormal hypoplastic vertebral arteries and the diminished diameter basilar artery are abnormal and are not as pliable and do not flex or stretch like normal sized vertebral arteries when stressed. The severe rapid and repeated neck movements Mr. Curtis experienced during the Dix-Hallpik and Epley maneuvers caused trauma to Mr. Curtis's abnormal vertebrovascular anatomy and caused the brainstem stroke and a tear or dissection of the basilar artery at the AICA junction causing significant permanent hearing loss.

Before Mr. Curtis suffered his brainstem stroke and complex basilar artery dissection, he had no history or symptoms of any sleep issues. Mr. Curtis developed insomnia and began to have significant sleep issues during his stroke recovery period. Beyond any reasonable medical probability, Mr. Curtis' sleeping disorder was proximately caused by the brainstem stroke and complex basilar artery dissection.

Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omissions of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela.

I reserve the right to amend this report as more information becomes available.

Sincerely,



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- BS, Neurobiology
- Cum Laude, George H. Cook Scholar

1993 – 1997 **Jefferson Medical College** Phila. PA
- Cum Laude, AOA

1997 – 2003 **Thomas Jefferson Univ. Hosp.**
- Resident Neurosurgery

Skills

Spine: General and complex instrumentation / trauma with Delaware Valley Regional Spinal Cord Injury Center; F. A. Simeone and Alexander Vacarro
Tumors / spinal AVM's & fistula's

Cranial: General, stereotactic and frameless
1 year dedicated cerebrovascular and interventional training with Robert H. Rosenwasser
Cerebral Angiography
Epilepsy and intraoperative corticography with Michael O'Connor and David Andrews
Skull base and Acoustic Neuroma's with William Bucheit

Peripheral Nerve: Three months dedicated with Philadelphia hand-center

Pediatrics: Six months dedicated at Children's Hosp Phila with Leslie Sutton

Other: Gamma – Knife and Linear Accelerator
Spinal cord and vagal nerve stimulators with Giancarlo Barolat

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2. Buono L.M., Krupa T., Heiman-Patterson T.: NF2FII,

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3. Buono L.M., Albel L.S., Black I.B., Dreyfus C.F.: BDNF increases GFAP positive process-bearing cells in a subpupulation of astrocytes. Soc. Neurosci Abstr. 19:1098, 1993.

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   *presented 1994 American Academy of Neurology, Washington D.C.

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   * presented 1995 American Academy of Neurology, Seattle WA.

7. Buono L.M., Heiman-Patterson T.D.: Dissection, preparation, and culture of human fetal spinal anterior horn cells. Neurosci. 75: 834-846, 1995.

8. Buono L.M., Suh Y., Heiman-Patterson T.D.: Polyacrlyamide gel electrophoresis characterization of familial hereditary spastic paraparesis. Neurology 53: 1176-1181, 1996.

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11. Buono L.M., Vinal P., Simeone F.A.: Environmental light measurements and circadian rhythm characteristics of patients before, during, and following Neurosurgery and hospitalization: A wrist actigraph study. J Neurol Neurosurg Psych 38: 411-414, 1997.

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Book Chapters

1. Andrews DW, Buono LM, Sharan A. The History of Stereotactic

Work experience

2004 – September 2010

Neurosurgical Associates of Texarkana – Texarkana, TX

October 2010 - Present

Capital Health System, Trenton, NJ

NO. 06-13-52-CV

In the Sixth Court of Appeals
Texarkana, Texas

CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System,
Appellant,

v.

William C. Curtis and Tina Curtis,
Appellees.

On Accelerated Appeal From Cause No. 12C1341-005
In the 5th Judicial District Court of Bowie County, Texas
Honorable Ralph Burgess, Presiding Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

INTRODUCTION

In their response, the Curtises make virtually no effort to rebut CHRISTUS' arguments. Instead, the Curtises merely respond with boilerplate language summarizing Texas case law on Chapter 74's expert report requirements.

The Curtises make no attempt to explain why all three of their expert reports fail to state to a "reasonable degree . . . how and why" CHRISTUS' alleged breach of the applicable standard of care proximately caused the Curtises' injuries. Instead, the Curtises claim CHRISTUS' mere disagreement over the experts' opinions is not enough to render a Chapter 74 report inadequate. CHRISTUS' objection, however, is not that all three expert reports wrongly explain how CHRISTUS' acts or omissions caused the Curtises' injuries. CHRISTUS' objection is that all three reports fail to explain causation as to CHRISTUS at all.

Rather, the only conduct discussed in all three reports relates to alleged conduct by Dr. Urbina and the sole mention of CHRISTUS on causation is the bald conclusion that in all three expert's medical opinions, rendered to a reasonable degree of medical probability, the acts and omission of Dr. Urbina and CHRISTUS caused the Curtises' harm. Such a conclusory statement, unsupported by any analysis as to "how and why" CHRISTUS' alleged acts and omissions caused such harm is insufficient to satisfy Chapter 74's expert report requirements.

What's more, the Curtises' claim by simply pleading vicarious liability and serving an expert report that is adequate as to Dr. Urbina, that is sufficient to satisfy Chapter 74's expert report requirements as to CHRISTUS on a theory of vicarious liability. This argument is flawed because none of their expert reports provide any factual basis to support a theory of vicarious liability and well-established case law prohibits looking outside the four corners of the expert report to satisfy the required elements of an expert report. Furthermore, the Curtises waived any such argument by failing to raise the argument in the trial court. Consequently, CHRISTUS respectfully requests that this Court reverse the trial court's April 19, 2013 order denying CHRISTUS' motion to dismiss.

ARGUMENT

I. The Trial Court Erred in Denying CHRISTUS' Motion to Dismiss Because the Curtises' Expert Reports Fails to Adequately Address Causation.

All three expert reports wholly fail to address how any alleged act or omission by CHRISTUS – as opposed to Dr. Urbina – caused Mr. Curtis's alleged injuries. The Curtises make no attempt to rebut this argument in their response brief. Rather than identifying where in their experts' reports such causation is adequately established, the Curtises merely respond by claiming CHRISTUS is prohibited from attacked the merits of the Curtises' health care claim and that mere disagreement over whether the Dix-Hallpik and Epley maneuvers performed by

Dr. Urbina were the cause of Mr. Curtis's injuries does not render an expert report inadequate. Resp. Br., p. 10. However, CHRISTUS' objection to the Curtises' reports is not that the reports wrongly state how and why CHRISTUS is the cause of Mr. Curtis's injuries. CHRISTUS' objection is that these reports fail to state how CHRISTUS is the cause of Mr. Curtis's injuries at all. The Curtises' argument that CHRISTUS demands more than what the law requires is untrue as causation is an essential element of any Chapter 74 expert report. Resp. Br., p. 5; *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacious*, 46 S.W.3d 873, 877-78 (Tex. 2001).

Absent from all three expert reports is any explanation as to how the alleged breaches of the standard of care by CHRISTUS – as opposed to Dr. Urbina – caused Mr. Curtis's injuries. Rather, the sole causation reference as to CHRISTUS is nothing more than boilerplate legalese: " Therefore, it is my expert medical opinion, rendered to a reasonable degree of medical probability that the above negligent acts and omission of Dr. Urbina and Christus Saint Michael Hospital each proximately caused Mr. Curtis to experience a brainstem stroke and complex basilar artery dissection and its sequela." CR 17, 28-29, 37-38. No effort is made to specifically explain how and why CHRISTUS' alleged failure to adequately staff its facility, provide an onsite neurologist or consult a teleneurologist, or adopt and enforce policies and procedures to bar the Dix-Hallpik and Epley maneuvers

on patients like Mr. Curtis caused Mr. Curtis's injuries. As CHRISTUS demonstrated in detail in its opening brief (and which the Curtises completely ignore in their response brief), the conclusory boilerplate on causation as to CHRISTUS in the Curtises' expert reports is fatally deficient. Open. Br., pp. 9-14. Without each expert's explanation to a reasonable degree as to how and why these failures proximately caused the Curtises' injuries, all three reports fail to satisfy Chapter 74's requirements. *See e.g., Jelinek v. Casas*, 328 S.W.3d 526, 539-40 (Tex. 2010); *Kingwood Pines Hosp. LLC v. Gomez*, 362 S.W.3d 740, 750 (Tex. App.—Houston [14th Dis.] 2011, no pet.).

In fact, the Curtises specifically acknowledge that in all three reports, the only conduct discussed on causation was the conduct of Dr. Urbina, but erroneously claim the discussion of causation as to Dr. Urbina applies equally to CHRISTUS. Resp. Br., pp. 4-5 ("The three reports taken together, it is obvious that the physical maneuvering of Curtis's head and neck would not have been done had Appellant adhered to the standard of care. For this reason, the causation discussion regarding Dr. Urbina applies equally to Appellants"). A discussion of causation as to Dr. Urbina cannot equally apply to establish ***direct*** liability as to CHRISTUS because an expert report must specifically address causation as to each defendant. *See e.g. Palacious*, 46 S.W.3d at 877-78 (Tex. 2001). All three expert reports have merely stated a general conclusion as to CHRISTUS without any

explanation expressly and specifically tying CHRISTUS' alleged breach of the applicable standard of care to the Curtises' purported injuries. *See e.g. Bowie Mem'l Hosp. v. Wright,* 79 S.W.3d 48, 52 (Tex. 2002) (per curiam). Thus, the Curtises' expert reports are inadequate, and the trial court's April 19, 2013 order denying CHRISTUS' motion to dismiss must be reversed.

II. The Trial Court's April 19, 2013 Order Cannot be Affirmed on the Basis of Vicarious Liability Against CHRISTUS.

In addition to failing to rebut any of CHRISTUS' arguments establishing that all three expert reports are deficient on causation with respect to the Curtises' direct liability claims against CHRISTUS, the Curtises' response fails to rebut CHRISTUS' argument that the trial court's April 19, 2013 order cannot be affirmed as to the Curtises' vicariously liability claim against CHRISTUS. The trial court's order cannot be affirmed on the basis for two independent reasons.

First, the Curtises' claim cannot be upheld on the basis of vicariously liability because the expert reports fail to explain how CHRISTUS could be held vicariously liable for the conduct of Dr. Urbina. In a lone statement at the end of their response brief, the Curtises allege that because these reports are sufficient as to Dr. Urbina and they have plead vicarious liability against CHRISTUS for the conduct of Dr. Urbina, the reports are sufficient as to CHRISTUS on the theory of vicarious liability. Resp. Br., p. 10.

However, simply pleading vicarious liability and serving a report that is adequate to the alleged employee is not enough. There must be something in the expert report that supports such a vicarious liability theory. *See Certified EMS, Inc. v. Potts,* 355 S.W.3d 638, 689 (Tex. App.—Houston [1st Dist.] 2011), *aff'd*, 392 S.W.3d 625, 632 (Tex. 2013) (finding the report identified the individual who committee the sexual assault as an "employee" of the defendant which supported the plaintiff's vicarious liability theory against the defendant); *TTHR Ltd. Partnership v. Moreno,* No. 11-0630, 2013 WL 1366028, at *2 (Tex. Apr. 5, 2013) (following the analysis in *Potts* and finding expert reports adequate as to vicarious liability because the reports addressed the defendant hospitals' alleged liability for the actions of two physicians). Unlike *Potts* and *Moreno*, there is no indication from the four corners of the Curtises' expert reports as to the basis for the Curtises' vicarious liability theory against CHRISTUS so as to inform CHRISTUS of the basis for such theory and allow the trial court to determine if such theory has merit. *See Palacios,* 46 S.W.3d at 879 (finding an expert report must provide enough information to provide a basis for the trial court to conclude the claims have merit).

Furthermore, looking to the Curtises' pleadings for the alleged bases for their vicarious liability claim would improperly require CHRISTUS or the trial court to look outside of the four corners of the Curtises' expert reports, a practice Texas law has long prohibited. *See e.g. Bowie Mem'l Hosp.*, 79 S.W.3d at 52;

Hardy v. Marsh, 170 S.W.3d 865, 868-69 (Tex. App.—Texarkana 2005, no pet.). Instead, the factual basis to support the Curtises' vicarious liability theory against CHRISTUS must be evident within the four corners of the expert reports themselves. *Id*. Because all three reports are silent as to how CHRISTUS could be held vicariously liable for the conduct of Dr. Urbina, the trial court's April 19, 2013 order cannot be affirmed on the basis of vicarious liability as to CHRISTUS.

But even if this Court concludes that the Curtises' expert reports are adequate because the Curtises' expert reports are adequate as to the Curtises' vicariously liability claim against CHRISTUS, this Court still must reverse the trial court's April 19, 2013 order denying CHRISTUS' motion to dismiss because the Curtises' waived the argument. Open. Br., pp. 17-18. Significantly, the Curtises do not dispute CHRISTUS' showing in its opening brief that: (1) the Curtises failed to raise the vicarious liability argument in the trial court; and (2) the Curtises waived the argument as a result. *Id*. Thus, the Curtises cannot rely on the alleged adequacy of their expert reports on their vicarious liability claim against CHRISTUS as a basis for affirming the trial court's April 19, 2013 order.

CONCLUSION

For the reasons stated above, Appellant CHRISTUS Health Ark-La-Tex d/b/a CHRISTUS St. Michael Health System respectfully requests that this Court: (1) reverse the trial court's April 19, 2013 order denying CHRISTUS' Motion to

Dismiss; and (2) remand this case to the trial court with instructions to determine CHRISTUS' request for attorney's fees and costs pursuant to Texas Civil Practice and Remedies Code § 74.351(b). CHRISTUS further respectfully requests that this Court grant CHRISTUS any and all other relief to which it may be entitled.

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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CERTIFICATE OF WORD COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned counsel – in reliance upon the word count of the computer program used to prepare this document – certifies that this brief contains 1724 words, excluding the words that need not be counted under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Kevin W. Yankowsky
Kevin W. Yankowsky

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2013 Appellant served a copy of this Appellant's Reply Brief on the Merits was served by electronic service (via CaseFileXpress) and certified mail, return receipt requested on July 29, 2013, upon the following counsel of record:

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