COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DAWN M. THOMPSON, R.N. Appellant, v. SCOTT & WHITE MEMORIAL HOSPITAL d/b/a BAYLOR SCOTT & WHITE MCLANE CHILDREN'S MEDICAL CENTER a/k/a BAYLOR SCOTT & WHITE HEALTH, Appellee.	§ § § § § § § §	No. 08-20-00158-CV Appeal from the 169th Judicial District Court of Bell County, Texas (TC# 288,860-C)

O P I N I O N[1]

Appellant Dawn Thompson is a nurse who was formerly employed by Appellee Scott & White Memorial Hospital d/b/a Baylor Scott & White McLane Children's Medical Center a/k/a Baylor Scott & White Health (the Hospital). Among other claims, Thompson filed suit against her employer alleging a violation of Texas Family Code section 261.110. TEX. FAM. CODE ANN. § 261.110(b). Thompson asserted the Hospital retaliated against her for having made a good faith

[1] This case was transferred to this Court from the Third Judicial District of Texas, our sister court of appeals in Austin (No. 03-20-00343-CV). We decide the case in accordance with the precedent of the transferor court to the extent of any conflict with this Court's precedent. TEX. R. APP. P. 41.3.

report to authorities of a case of suspected abuse and neglect by a parent of a minor patient.[2] The Hospital filed a combined traditional and no evidence motion for summary judgment, which the trial court granted as to all claims. Thompson challenges the trial court's order but only to the extent it granted an adverse judgment against her Family Code claim.[3] We affirm in part and reverse in part.

I. BACKGROUND[4]

Dawn Thompson, a licensed registered nurse, worked for the Hospital until May 15, 2016. The Hospital operates certain in-patient hospital facilities and clinics located in two Texas cities, Temple and Dallas. At times during her employment, Thompson worked with Dr. Kokash, a neurologist, who provided care to a middle-school-aged minor patient suffering from seizures. The child's parents were separated and shared custody; the father generally brought the minor patient in to see Dr. Kokash. The facts arising from the care of the minor patient form the basis of this suit.

On or about May 4, 2016, after office hours, Thompson answered a phone call from the child's mother wherein the mother reported that both parents, acting independently, had been seeking treatment with different physicians. As a result, the child was being seen by two doctors,

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[2] Thompson's suit additionally included claims brought under two other statutory codes, namely, TEX. HEALTH & SAFETY CODE ANN. § 161.134 (pertaining to abuse, neglect, and unprofessional conduct in health care facilities); and TEX. OCC. CODE ANN. § 301.4025 (pertaining to nurse reporting of violations and patient care concerns).

[3] Although Thompson filed a notice of appeal that challenged the trial court's order without limitation, she later narrowed her appeal. With her opening brief, Thompson informed this Court that she solely challenged the trial court's adverse judgment on her claim brought pursuant to section 261.110 of the Texas Family Code. *See* TEX. FAM. CODE ANN. § 261.110. Thompson thus abandoned her appeal of claims brought pursuant to the Health and Safety Code and the Occupations Code. *See* TEX. HEALTH & SAFETY CODE ANN. § 161.134; TEX. OCC. CODE ANN. § 301.4025.

[4] Our summary of the facts is taken from the pleadings, deposition testimony, and other evidence contained in our record. As we must, we note where the witnesses' testimony is in conflict, and resolve those conflicts in the light most favorable to the nonmovant. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

Dr. Kokash and another neurologist in Austin, Texas. The mother reported that Medicaid would not cover expenses from both neurologists; and there was an apparent issue with the child's medication. Both neurologists had prescribed different anti-seizure medications for the child. Learning of these circumstances, Thompson had concerns about the child receiving different medications depending on which parent had custody. Thompson called the child's father, left a message, but was not able to speak with him.

Thompson then informed Dr. Kokash of her conversation with the child's mother. Dr. Kokash responded that it was necessary to figure out which physician would remain as the child's treating doctor. Thompson proceeded to contact the other neurologist, Dr. Kerr, who stated he would notify the mother that his office would no longer treat the child until the child stopped seeing Dr. Kokash. Thompson then contacted the nurse at the child's middle school. Thompson had concerns the parents were not giving medications as prescribed. Thompson advised the school nurse that "mom had called and said she was giving one medicine and that the other parent was giving another medicine." The school nurse informed her there had been some increased behavioral issues, which was unusual for the child, and the child had been to an "in-patient psych center" due to such issues. The school nurse reported she would "keep an eye out" for worsened behavior or seizure activity. After these efforts, Thompson advised her charge nurse, Melissa O'Neal, of the circumstances disclosed by the mother of the child, and her concerns about the medications. O'Neal replied, "if you feel that there is a danger you need to make a report."

On May 6, 2016, Thompson contacted the Texas Department of Family and Protective Services, Child Protective Services (CPS), and made a report of suspected abuse or neglect of a child. Thompson reported possible harm in regard to seizure medication not being dispensed properly between divorced parents. She asserted the parents had arranged for the child to be treated

by two different neurologists and each prescribed a different medication. Thompson relayed to CPS that the mother had said she was not giving the medication Dr. Kokash prescribed, and the father was not giving the medication the other doctor prescribed. Days later, on May 10, 2016, the mother of the child came to the clinic, but Thompson did not speak with her at the direction of O'Neal.

The Hospital issued an "Employee Counseling Form," dated May 19, 2016, terminating Thompson's employment. The form was signed by Thompson and by the director of nursing, Melissa Rennert. Thompson acknowledged signing the form but asserted she did not insert the date of May 19, 2016, as she recalled she was terminated on May 15, 2016.

Procedural Background

On November 14, 2016, Thompson filed suit alleging the Hospital had discriminated against her and terminated her employment in retaliation for her good faith report of patient safety matters to include child abuse or neglect and unsafe patient care. Specifically, Thompson alleged claims for retaliatory discharge under the Texas Health and Safety Code, the Texas Occupations Code, and the Texas Family Code. *See* TEX. HEALTH & SAFETY CODE ANN. § 161.134; TEX. OCC. CODE ANN. §§ 301.4025, .413; TEX. FAM. CODE ANN. § 261.110. The Hospital responded by filing a general denial of all claims, and also asserted an affirmative defense of a legitimate and non-retaliatory reason for terminating Thompson.

On January 8, 2020, the Hospital filed a combined no evidence and traditional motion for summary judgment. Attached with the motion, the Hospital included the following: Thompson's original petition; the Hospital's original answer; a copy of Thompson's deposition; three "Employee Counseling Forms" pertaining to Thompson's work performance arising from incidents in May 2015, October 2015, and May 2016; a redacted authorization form pertaining to

the minor patient, dated October 29, 2015, which permitted release of medical information; and copies of pertinent code provisions.

In addition to traditional grounds for summary judgment, the Hospital argued that Thompson provided no evidence, or not more than a mere scintilla of evidence, to support any of her multiple causes of action, and that Thompson would have been terminated absent her report to CPS. The Hospital asserted that Thompson was terminated for "inappropriately contacting a school nurse" without a current release of information in violation of hospital policies and HIPAA.[5] It further asserted that Thompson was fired for "poor judgment in releasing a child patient's protected health information, in combination, and after, two prior warnings for policy violations of unprofessional and discourteous behavior – the last of which was a final warning." Among other claims, it argued that contacting a school nurse to discuss a patient in violation of HIPAA does not fall under the protections of the Texas Family Code, and therefore, section 261.110 does not apply. In support, the Hospital relied on the "Employee Counseling Form" issued to Thompson upon her termination, and her deposition testimony, asserting the evidence showed the true basis for her termination and a lack of causal connection to an unlawful purpose. Although Thompson filed a response to the Hospital's combined motion for summary judgment, her response contained no attachments or other evidence in support of her arguments.[6] Instead, she pointed to the Hospital's

[5] HIPAA is a commonly used acronym referring to the "Health Insurance Portability and Accountability Act of 1996," which is a federal law that required the creation of national standards to protect sensitive patient health information from being disclosed without the patient's consent or knowledge. *See* Health Insurance Portability and Accountability Act of 1996 (HIPAA), CENTERS OF DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/phlp/publications/topic/hipaa.html#:~:text=The%20Health%20Insurance%20Portability%20and,the%20patient's%20consent%20or%20knowledge.

[6] The Hospital objected to Thompson's response by asserting it was not timely filed. The trial court's final judgment, however, states as follows: "Upon considering the motion, the summary judgment evidence, [Thompson's] response and arguments from counsel, the Court granted [the Hospital's] motion in its entirety." Given the trial court's indication that it considered Thompson's response in reaching its ruling, we too must consider that response in our review. *See B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 261–62 (Tex. 2020) (per curiam) (holding a trial court's judgment stating it considered "the pleadings, evidence, and arguments of counsel," without limitation, while

summary judgment evidence, arguing it established she was fired for complying with statutory mandates to advocate for her minor patient, as contained in the Texas Family Code and the Texas Occupations Code.

The trial court entered an amended final judgment granting the Hospital's motion without specifying the grounds. Thompson later filed a timely motion for new trial, which the trial court denied. This appeal followed.

II. DISCUSSION

Thompson brings two issues on appeal. First, Thompson argues she presented sufficient evidence to defeat the no evidence motion for summary judgment brought by the Hospital. Second, regarding the traditional motion for summary judgment, she argues the Hospital failed to carry its burden to establish there were no genuine issues of material fact on her claim brought pursuant to section 261.110 of the Texas Family Code, such that the Hospital established it was entitled to judgment as a matter of law.

Standard of Review

An order granting summary judgment is reviewed de novo. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). In this case, the Hospital sought both a no evidence and traditional motion for summary judgment.[7] When the trial court's order does not specifically state the grounds for granting judgment, we must affirm the judgment "if any of the theories presented to

referencing the untimeliness of a plaintiff's response, affirmatively indicates the trial court considered the late-filed response and the evidence attached to it).

[7] The Texas Rules of Civil Procedure permit a party to combine, in a single motion, a request for summary judgment utilizing both a traditional motion and a no evidence motion. *Viasana v. Ward County*, 296 S.W.3d 652, 655 (Tex. App.—El Paso 2009, no pet.) (citing *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004)); *see also* TEX. R. CIV. P. 166a(a), (b), (i). A party is not foreclosed from asserting there is no evidence regarding a particular element even when attaching evidence supporting its traditional summary judgment request. *Binur*, 135 S.W.3d at 650. Simply because evidence is attached to a combined motion does not require a request for a no evidence summary judgment to be disregarded. *Id.*

the trial court and preserved for appellate review are meritorious." *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

We review no evidence summary judgments under the same legal sufficiency standard used to review a directed verdict. *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 130 (Tex. 2018); s*ee also* TEX. R. CIV. P. 166a(i). In a no evidence motion for summary judgment, the movant is asserting there is no evidence of one or more essential elements of the claims on which the nonmovant bears the burden of proof at trial. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). The nonmovant must then produce evidence regarding each challenged element of each challenged claim which "would enable reasonable and fair-minded people to differ in their conclusions." *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997))*; see also King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)("A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.") (internal quotation marks omitted). A nonmovant "is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam) (internal quotation marks omitted).

In a motion for traditional summary judgment, a movant has the burden of showing no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nassar v. Liberty Mut. Fire Ins. Co*., 508 S.W.3d 254, 257 (Tex. 2017). A movant must conclusively negate at least one essential element of the cause of action being asserted or

conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Evidence is conclusive only if reasonable people could not differ in their conclusions. *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once a movant initially establishes a right to summary judgment on the issues expressly presented in the motion, then the burden shifts to the nonmovant to present issues or evidence precluding summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979).

In reviewing either type of summary judgment motion, we view the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *see also Hawthorne v. Guenther*, 461 S.W.3d 218, 221 (Tex. App.—San Antonio 2015, pet. denied). Either party can rely on attached evidence—that is, the movant can rely on evidence filed by the nonmovant and vice versa. *See Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam).

Applicable Law

The Texas Family Code makes it clear that the protection of children is paramount in instances of suspected child abuse. *Albright v. Tex. Dept. of Human Servs.*, 859 S.W.2d 575, 580 (Tex. App.—Houston [1st Dist.] 1993, no writ) (citing TEX. FAM. CODE ANN. § 34.01 (Act of June 16, 1989, 71st Leg., R.S., ch. 1265, § 2, 1989 Tex. Gen. Laws 5849 (repealed 1995)) (current version at TEX. FAM. CODE ANN. § 261.101(a)). Relevant to this appeal, section 261.101 imposes reporting requirements on certain professionals when child abuse or neglect is suspected.

Section 261.101(b) of the Family Code imposes reporting requirements as follows:

> If a professional has reasonable cause to believe that a child has been abused or neglected or may be abused or neglected, or that a child is a victim of an offense under Section 21.11, Penal Code, and the professional has reasonable cause to believe that the child has been abused as defined by Section 261.001, the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected or is a victim of an offense under Section 21.11, Penal Code. A professional may not delegate to or rely on another person to make the report.

TEX. FAM. CODE ANN § 261.101(b).

Within this subsection, the term "professional" is expressly defined as:

> [A]n individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, **nurses,** doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.

Id. (emphasis added). Unless other exceptions apply that are not applicable here, the professional's report shall be made to: "(1) any local or state law enforcement agency; (2) the department;[8] or (3) the state agency that operates, licenses, certifies, or registers the facility in which the alleged abuse or neglect occurred." *Id*. § 261.103(a). If known, the person making a report shall identify "(1) the name and address of the child; (2) the name and address of persons responsible for the care, custody, or welfare of the child; (3) and any other pertinent information concerning the alleged or suspected abuse or neglect." *Id*. § 261.104. A professional who knowingly fails to make such a report as required by law commits a Class A misdemeanor offense, except that the offense is a state jail felony if it is shown at trial that the actor intended to conceal the abuse or neglect. *Id.* § 261.109(a-1), (c).

Within the employment context, the Texas Family Code provides protection to employees

[8] Section 261.001 of the Family Code defines "Department" as "the Department of Family and Protective Services." *See* TEX. FAM. CODE ANN. § 261.001(2).

who report suspected child abuse or neglect in good faith. Specifically, section 261.110(b) provides:

> (b) An employer may not suspend or terminate the employment of, discriminate against, or take any other adverse employment action against a person who is a professional and who in good faith:
>
> (1) reports child abuse or neglect to:
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> (A) the person's supervisor;
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> (B) an administrator of the facility where the person is employed;
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> (C) a state regulatory agency; or
>
> (D) a law enforcement agency; or
>
> (2) initiates or cooperates with an investigation or proceeding by a governmental entity relating to an allegation of child abuse or neglect.

Id. § 261.110(b). A person may sue for injunctive relief, damages, or both, if the person is suspended or terminated from employment, discriminated against, or suffers any adverse employment action in violation of this section. *Id.* § 261.110(c). The employer is not liable if it shows that it would have terminated the employee even if the employee had not reported child abuse. *Id*. § 261.110(k).

The circumstances here present a case of first impression in this jurisdiction but other courts have previously addressed a claim of this nature. First, at least one of our sister courts of appeals has addressed the merits of a claim of this type after a jury trial. *See Harris County v. Norris*, 240 S.W.3d 255, 259–261 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (affirming jury verdict favorable to employee who established she would not have been terminated had she not made a report of abuse). Second, similar to the procedural posture of this case, the Fifth Circuit Court of Appeals addressed such a claim within a summary judgment proceeding. *See Perkins v. Child Care Assocs.*, 751 F. App'x 469, 477–78 (5th Cir. 2018) (per curiam).

Also, we note there are other statutory provisions in effect that differ in substance but nonetheless protect employees from unlawful retaliation under prescribed circumstances. *E.g.*, TEX. GOV'T CODE ANN. § 554.002 (prohibiting retaliation by a state agency or local government for a good faith report of a violation of law to an appropriate law enforcement authority); TEX. LABOR CODE ANN. § 21.055 (prohibiting retaliation against an employee engaging in certain protected activities); *Id.* § 451.001 (prohibiting retaliation for the filing of a worker's compensation claim or otherwise participating in such a proceeding). Similar to these statutory claims, section 261.110 of the Family Code requires a causal link between the adverse employment action and the mandatory report of child abuse. TEX. FAM. CODE ANN § 261.110(b)(1) and (i); *cf. Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 633 (Tex. 1995) (claim based on violation of TEX. GOV'T CODE ANN. § 554.002). Given the structural similarity of retaliatory claims, we are guided by analogous cases interpreting such claims.

A professional employee suing under section 261.110 must prove by a preponderance of the evidence that she suffered discriminatory or retaliatory conduct by the employer that would not have occurred when it did if the employee had not reported the violation of law. *Cf. City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 67 (Tex. 2000) (applying the preponderance standard to a claim brought under TEX. GOV'T CODE ANN. § 554.002); *Hinds*, 904 S.W.2d at 633 (same). In other words, the employee must establish a "but for" causal nexus between the protected activity and the adverse employment action. *Cf. Tex. Nat. Res. Conservation Comm'n v. McDill*, 914 S.W.2d 718, 723 (Tex. App.—Austin 1996, no writ.) (applying the statutory presumption afforded by TEX. GOV'T CODE ANN. § 554.004). But, in meeting this causal nexus, the employee need not establish the protected activity was the sole cause of the employer's action. *Cf. Hinds*, 904 S.W.2d at 635.

Section 261.110 of the Family Code allows for a presumption of the causal connection if the employee is terminated or suspended not later than 60 days after a report of suspected child abuse or neglect. TEX. FAM. CODE ANN § 261.110(i). That provisions states:

> A plaintiff suing under this section has the burden of proof, except that there is a **rebuttable presumption** that the plaintiff's employment was suspended or terminated or that the plaintiff was otherwise discriminated against **for reporting abuse or neglect** if the suspension, termination, or discrimination occurs **before the 61st day** after the date on which the person made a report in good faith.

Id. (emphasis added). When applicable, this presumption relieves the employee of her initial burden to prove she was terminated for her report of suspected child abuse. *Id*. That presumption, however, is rebuttable. *Id*. The presumption does not shift the burden of proof and stands only in the absence of evidence to the contrary. *Cf. City of Fort Worth v. Johnson*, 105 S.W.3d 154, 163 (Tex. App.—Waco 2003, no pet.) (applying analogous 90-day presumption under TEX. GOV'T CODE ANN. § 554.004(a)). If sufficient evidence is produced to support a finding of the non-existence of the causal connection between the termination or suspension and the reported violation of law, the case then proceeds as if no presumption ever existed. *Id*.; *see also Garza v. City of Mission*, 684 S.W.2d 148, 152 (Tex. App.—Corpus Christi 1984, writ dism'd). There is no presumption aiding the employee after the presumption is rebutted by positive evidence to the contrary. *Johnson*, 105 S.W.3d at 163.

If no presumption is raised or the presumption is rebutted by sufficient evidence, the employee must then produce some evidence to support a causal connection between the report made and the retaliatory conduct by the employer. *Cf. Johnson*, 105 S.W.3d at 163 (citing *Zimlich*, 29 S.W.3d at 68). A fact finder may not infer a causal connection without some evidence to support the finding. *Id*. Because of the inherent difficulty of producing direct evidence to show an employer's illegal motivation, especially in a summary judgment proceeding, a showing of

circumstantial evidence may be sufficient. *Zimlich*, 29 S.W.3d at 69. Circumstantial evidence can include: "(1) knowledge of the report of illegal conduct, (2) expression of a negative attitude toward the employee's report of the conduct, (3) failure to adhere to established company policies regarding employment decisions, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for the adverse employment action was false." *Office of Att'y Gen. v. Rodriguez*, 605 S.W.3d 183, 192–93 (Tex. 2020) (quoting *Zimlich*, 29 S.W.3d at 69).

Analysis

We look at Thompson's two issues together to determine whether summary judgment was properly established as a matter of law. In doing so, we first determine whether Thompson is afforded the presumption of causal connection, and if so, the burden then shifts to the Hospital such that we must then determine whether the Hospital rebutted the presumption. If rebutted, the burden would shift back to Thompson to establish the existence of a genuine issue of material fact regarding a causal connection between her report of suspected child abuse and neglect and her termination from employment.

Does the Presumption Apply?

The Hospital does not contest that Thompson made a report to CPS on May 6, 2016, in which she relayed information concerning parents of a minor patient having two physicians, Dr. Kokash and Dr. Kerr, who each prescribed medication without either knowing about the involvement of the other. And, also, when each parent had custody of the child, she reported the mother was not giving the medication Dr. Kokash prescribed, and the father was not giving the medication that Dr. Kerr prescribed. The Hospital neither contests that Thompson was terminated days later, on May 15, 2016. Without dispute, Thompson's termination of employment occurred

within 60 days of her report to CPS. *See* TEX. FAM. CODE ANN § 261.110(i).

The Hospital does not contend, in this instance, that it had no knowledge of the report, or that Thompson acted in bad faith or with ill intent.[9] Indeed, the evidence established that Thompson informed her supervisor, Melissa O'Neal, that she was concerned that the parents were not giving the correct medications. She relayed the conversations she had had with the child's mother, with Dr. Kerr's office, and with the school nurse. Thompson testified O'Neil told her, "If I felt that the child was in danger I need to report, because I have a duty to report."

Based on the evidence presented, Thompson is afforded the benefit of a rebuttable presumption of a causal connection between the report of abuse and her termination. *See* TEX. FAM. CODE ANN. § 261.110(i). Thompson was relieved of the initial burden and it shifted to the Hospital to rebut the presumption by producing "sufficient evidence to support a finding of the nonexistence of a causal connection between the employee's termination and the report[.]" *Cf. Tex. Health & Human Servs. Comm'n v. Vestal*, No. 03-19-00509, 2020 WL 7252320, at *3–4 (Tex. App.—Austin Dec. 10, 2020, pet. denied) (mem. op.) (applying an analogous rebuttable presumption pursuant to TEX. GOV'T CODE ANN. § 554.004(a)).

Was the Presumption Rebutted?

To rebut the presumption, the Hospital relies on two types of evidence. First, the Hospital presented an "Employee Counseling Form," dated May 19, 2016. The Hospital contends the form documents the basis for Thompson's termination thereby establishing the nonexistence of a causal connection between the termination and the report of abuse. The counseling form is a one-page

[9] The Hospital acknowledges in briefing that it did not argue in the trial court, nor is it arguing in this Court, that Thompson's CPS report failed to satisfy a "good faith" report of "neglect." *See* TEX. FAM. CODE ANN. § 261.110. Generally, the motion for summary judgment must state the grounds on which it is made. TEX. R. CIV. P. 166a(c); *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 566 (Tex. 2016). Because the Hospital did not assert lack of good faith reporting of child neglect, we may not consider that ground in this appeal. *Id*.

document containing Thompson's name, employee ID, her department, and lists O'Neal as her supervisor. In the spaces provided, the form identifies the type of action taken as a termination, the primary issue as policy violation, secondary issue as performance, and lists the date of incident as May 4, 2016. Altogether it contains three areas of comments.

The first is titled "Describe the Incident or Issue (What, When, Where etc.)," the second is titled "Expectations: (Include goals/objectives, timeframes, etc.)," and finally, the last is titled "Employee Comments." The first section includes the following writing:

> On 5/10/2016, [the Hospital] received complaint of [ ] Thompson inappropriately **contacting a school nurse** to discuss a patient without a signed release of information from the parent. This is a violation of HIPAA and patient rights. As a result of this violation your employment is being terminated immediately.

The next section continues:

> An Audit revealed that [Thompson] contacted a school nurse without a [Release of Information]. Furthermore, **a CPS referral was made without all details known** to [ ] Thompson. It is a violation of a patient's rights under HIPAA to share information with outside parties without a current [Release of Information].

Lastly, there are no comments under the "Employee Comments" section. The Hospital argued in its combined motion that the incident was the third and final violation[10] and it resulted in her termination.

In addition to the counseling form, the Hospital also attached Thompson's deposition testimony, essentially arguing she had conceded therein that she believed she was fired as a result of an administrator "gunning" for her following a conflict that stemmed back to May 2015. The Hospital argues that Thompson had in fact received a written warning for behavioral misconduct and violations of a patient's privacy in the past.

[10] The Hospital asserts evidence of two previous incidents where Thompson received written counseling, with the second form acting as a final warning.

In sum, the Hospital asserts both the counseling form and the deposition established the nonexistence of a causal connection between Thompson's termination and the report such that no presumption ever existed. It argues the counseling form and deposition conclusively established she was terminated for her purported HIPAA infraction, not for a report to CPS.

Responding, Thompson argues the counseling form itself mentions the CPS report on its face thereby raising a fact issue concerning the causal link between her report and her termination of employment. She points to the inclusion of the statement: "[f]urthermore, a CPS referral was made without all details known." Thompson argues the mention of a report to CPS shows it was a motivating factor in her termination and therefore summary judgment was not proper. The Hospital replies that the area of the form that includes that information simply addresses Thompson's failure to meet the Hospital's expectations and to follow its procedures.

Because the evidence plainly includes a mention of the CPS report in context with the adverse action taken, we cannot say the Hospital established the nonexistence of a causal connection between the termination and report such that the case would proceed as if no presumption ever existed. *Cf. Vestal*, 2020 WL 7252320, at *3; *Johnson*, 105 S.W.3d at 163. Moreover, when looking at the evidence as a whole, the call to the school nurse—which is the purported basis for the termination—and the report to CPS were intertwined factually as both arose from the same incident involving the same patient. Thompson testified she was concerned that the parents were possibly giving different medications to the child, or not as prescribed, which could result in increased seizures or behavior concerns. Thomas testified that prior to making her report to CPS, she contacted the school nurse to inquire if the child had been experiencing increased seizures. From that contact, she learned the child had had increased issues with her behavior and received in-patient psych center treatment for those issues.

When a professional employee such as a nurse has reasonable cause to believe that a child has been abused or neglected, the professional shall make a report not later than the 48th hour after the hour the professional first has reasonable cause to believe that the child has been or may be abused or neglected. *See* TEX. FAM. CODE ANN § 261.101(b). Thompson testified she made a report due to her concern that the child was in danger. And the undisputed evidence shows she acted with her employer's knowledge and within the time frame specified by law. Notably, it also shows, by means of the counseling form, that the Hospital included her report to CPS on the documentation of the basis for her termination, commenting negatively that she had acted without all details known.

The evidence in this case materially differs from others where employers have successfully rebutted a statutory presumption. *See Perkins*, 751 F. App'x at 477–78 (finding presumption was rebutted through evidence of supervisor's declaration showing she did *not* have knowledge of an employee's report of child abuse); *Johnson*, 105 S.W.3d at 164 (finding the presumption was rebutted when the employer presented evidence through testimony showing the employee was terminated for allowing another employee to have special privileges); *Vestal*, 2020 WL 7252320, at *4 (finding presumption rebutted by a showing that the employee's direct supervisors did not have knowledge of the reports and showing through declarations employee was terminated for failure to follow company policies).

In the above cases, the employers all provided evidence showing grounds for termination and such evidence did not intertwine with affirmative evidence showing the employer had knowledge of the employee engaging in protected activity. In contrast, the evidence here specifically mentions the protected activity (the report to CPS), among those reasons given for the termination, and the principal reason for termination (a HIPAA violation) arose from the same

incident that led to the CPS report. The Hospital essentially asks us to ignore the statement on the counseling form and make inferences in its favor regarding the relevance of the protected activity with regard to the termination decision. That we cannot do. *See Merriman*, 407 S.W.3d at 248 (providing that summary judgment evidence is considered in the light most favorable to the nonmovant).

Also, we determine that Thompson's deposition testimony in which she conceded she had had a conflict with another employee, is not sufficient on its own to establish the nonexistence of a causal connection between the termination and the adverse employment action. Although Thompson mentioned her own perception that another employee had been "gunning" for her, she never asserted that the circumstance was the sole reason for her termination. Taken as a whole, Thompson's deposition additionally includes testimony describing that, when she applied for unemployment benefits, her application mentioned her termination related to a complaint her employer received by the parents of the minor patient after she had made the CPS report.

After Thompson initially established the factual basis for a statutory presumption applicable to the claim, the burden shifted to the Hospital to overcome the rebuttable presumption. To do this, the Hospital was required to produce "at least some evidence to support a finding of the nonexistence of the causal connection." *Vestal*, 2020 WL 7252320, at *4. Viewing the evidence in favor of Thompson, as we must, and drawing all reasonable inferences therefrom, we conclude the summary judgment evidence failed to rebut the statutory presumption that otherwise established a causal nexus between the termination and the CPS report.

Accordingly, we sustain Thompson's first and second issue.

III. CONCLUSION

We affirm in part the judgment of the trial court to the extent of Thompson's claims brought

pursuant to TEX. HEALTH & SAFETY CODE ANN. § 161.134 and TEXAS OCC. CODE ANN. §§ 301.4025 and 301.413. We reverse in part the judgment of the trial court to the extent of Thompson's claim brought pursuant to TEX. FAM. CODE ANN. § 261.110, and we remand this cause to the trial court for further proceedings.

GINA M. PALAFOX, Justice

June 10, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.
Alley, J., concurring without separate opinion