COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

KIMBERLY JEAN GOLUCKE, Individually and as Authorized Agent of EL PASO HEALTH & REHABILITATION CENTER,	§	No. 08-21-00030-CV
	§	Appeal from the
Appellant,	§	243rd District Court
v.	§	of El Paso County, Texas
MARTHA LOPEZ,	§	(TC# 2020DCV0234)
Appellee.	§	

OPINION

In this interlocutory appeal, Appellant Kimberly Jean Golucke challenges the trial court's order denying her motion to dismiss the healthcare liability claims brought against her by Appellee, Martha Lopez. With respect to claims brought against her individually, Golucke argues the expert report Lopez served upon her failed to comply with the requirements of the Texas Medical Liability Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351. Finding the expert report inadequate, we reverse and remand to the trial court for further proceedings.

I. BACKGROUND

Three days following a total knee replacement surgery performed at Las Palmas hospital, Appellee Martha Lopez was discharged to El Paso Health & Rehabilitation Center (El Paso Health)

for treatment and recovery. On January 25, 2018, while recuperating at El Paso Health, Lopez fell to the floor as she attempted to walk to the restroom. Due to her fall, she suffered a broken femur that required surgical repair.

Lopez brought a personal injury lawsuit, alleging direct and indirect claims against multiple defendants. Her original petition alleged claims against five named entities and four individual nurses as follows: "El Paso SNF d/b/a El Paso Health & Rehabilitation Center, Advanced Healthcare Solutions LLC d/b/a El Paso Health & Rehabilitation Center, Advanced HCS LLC d/b/a El Paso Health & Rehabilitation Center, Texas Operations Management LLC, 11525 Vista Del Sol Drive LLC d/b/a El Paso Health & Rehabilitation Center, Cristina de la Rosa, Nurse Jessica Doe, Nurse Roger Doe, and nurse Kimberly Golucke." Collectively, Lopez alleged the named defendants provided outpatient services, skilled nursing care, and advice and treatment to her while she recovered from her knee replacement surgery.

Regarding her claims, Lopez asserted that all defendants "violated a duty of care owed to plaintiff to exercise that degree of care, skill, and diligence ordinarily possessed and used by other members of the medical profession in good standing under the same or similar circumstances." She further asserted that such acts and omissions constituted gross negligence entitling her to recover punitive damages. Lastly, she alleged all defendants owed a duty to exercise ordinary care in the hiring and retention of competent nurses, nurses' aides, physical therapists, and staff.

As required by the Texas Medical Liability Act, Lopez timely served on Golucke a thirteen-page expert report with a curriculum vitae attached. The report was written by Lige B. Rushing, Jr., M.D., M.S., P.A., a practicing physician, board certified in internal medicine, geriatrics, and rheumatology. In his report, Dr. Rushing described that he had reviewed Lopez's medical records and understood the course of her rehabilitative treatment based on his record review. In his review

of facts section of his report, he summarized various records addressing Lopez's condition. Within this section of the report, he identified notes or documentation on records as follows: "Y. Nunez, RN," "Ashley Dodson, RN," and "El Paso Health" records. Among the notes from El Paso Health, Dr. Rushing does not further identify which medical or nursing providers were involved in the care discussed. As relevant here, Golucke is not mentioned anywhere in the "Review of Facts" section of Dr. Rushing's report, and it is not otherwise clear from his factual recitation whether she was involved with direct treatment or supervision of Lopez's medical care.

Dr. Rushing's report summarizes the details of Lopez's post-surgery admittance to El Paso Health for treatment. As he states in his report, the records he reviewed indicated that Lopez had a physical therapy evaluation and plan of treatment executed on the day of her arrival to the rehabilitation facility. The assessment indicated she had the following problems: decreased and lower extremity strength, limitation of motion, declining balance and coordination, presence of pain, morbid obesity, and poor tolerance with functional activities. On the Berg balance scale assessment, Lopez's score revealed she presented to the facility with an exceedingly high risk for fall. Nursing notes of January 21 do not document whether a bed alarm had been instituted during rounds. A nursing note entered on January 22 indicated that Lopez was "alert and oriented forgetful at times," "[c]ontinent of bowel and bladder," "[o]ne person assist and can use wheelchair for mobility," and "[m]edicated for pain once prior to therapy." Regarding Lopez's fall on January 25, the report references to a nurse's note reading as follows:

> . . . resident had a fall, she attempted to walk on her own this nurse was walking down the hall when she got up and nurse Jessica tried to get her to sit down and she insisted to walk to her bed. This nurse tried to hold her up but could not hold her — illegible word — up -x-ray ordered stat. As a result of the fall she sustained a fracture of the distal femur which subsequently required an intramedullary nailing which was carried out successfully.

After discussing the standard of care applicable to El Paso Health and all other entities named in the lawsuit, and also as applied to nurses such as Cristina De La Rosa, Jessica Doe, Roger Doe, and Golucke, Dr. Rushing asserts the care and treatment provided to Lopez fell below the accepted standard of care in three ways: (1) he asserted the defendants "accepted and retained a resident whose needs they could not meet," (2) defendants "[f]ailed to have an appropriate fall prevention program," and (3) defendants "failed to prevent Martha Lopez's fall." He further asserted that Lopez should never have been permitted to walk alone or unassisted or without an assistive device. Lastly, he asserted the failures he outlined within his report proximately caused Lopez's fall and femoral fracture.

As a named defendant, Golucke objected to the report on various grounds and moved to dismiss Lopez's claim brought against her individually. After a hearing, the trial court denied Golucke's request for relief. This interlocutory appeal followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9).[1]

II. DISCUSSION

Golucke presents three issues on appeal. In her first issue, Golucke contends Dr. Rushing's expert report does not represent an adequate good faith effort under section 74.351 of the Civil Practice and Remedies Code, given it applies the same standard of care to multiple defendants without explanation as to why the same standard applies to each. Consistent with that issue, her second issue contends the expert report is insufficient as a good faith report because it failed to specifically identify what Golucke is alleged to have done, separate and apart from the other defendants, or apart from the various job classifications identified in the lawsuit. Assuming we

[1] Defendant Advanced Healthcare Solutions LLC also filed an objection to Lopez's expert report, which the trial court denied. Unlike Golucke, Advanced Healthcare Solutions LLC did not file an appeal of the trial court's judgment.

determine the report is inadequate, Golucke's third issue contends that Dr. Rushing's expert report represents no report at all; and consequently, we should reverse and render judgment dismissing Lopez's claim against Golucke.

Because Golucke attacks the expert report as not being an adequate good faith effort under section 74.351, we address her first two issues together by looking at the adequacy of each element. If we determine the report is inadequate as to any element, we then look to the third issue raised on whether the claim should be dismissed or whether Lopez should be afforded an opportunity to cure any deficiencies.

III. ADEQUACY OF THE EXPERT REPORT

By her first and second issues, Golucke contends the trial court erred in failing to dismiss Lopez's claim against her based on her failure to provide an expert report in compliance with the requirements of section 74.351 of the Texas Medical Liability Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a).

A. Standard of Review

We review a trial court's ruling on a motion to dismiss a healthcare liability claim for an abuse of discretion. *Abshire v. Christus Health Se. Texas*, 563 S.W.3d 219, 223 (Tex. 2018); *Am. Transitional Care Ctrs. of Texas, Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001). A trial court has no discretion in determining what the law is or in applying the law to the facts, and abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002).

B. Applicable Law

In a suit involving a healthcare liability claim against a defendant healthcare provider, a plaintiff must provide each defendant against whom a liability claim is asserted with one or more

expert reports. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). Within the terms of the statute, "[h]ealth care provider" is defined to include a range of persons, entities, and facilities, registered or chartered by the state to provide healthcare, including a registered nurse or a healthcare institution. *See id*. § 74.001(a)(12)(A)(i) and (vii). Moreover, the term includes an officer, director, shareholder, member, partner, manager, owner, or affiliate of a healthcare provider or physician; and an employee, independent contractor, or agent of a healthcare provider, or a physician acting in the course and scope of employment or contractual relationship of such persons or firms. *Id*. § 74.001(12)(B)(i) and (ii).

If a plaintiff timely furnishes an expert report, a defendant provider may file a motion challenging the report's adequacy. *See id*. § 74.351(a). A report is adequate if it represents "an objective good faith effort to comply with the definition of an expert report . . . ." *See id.* § 74.351(*l*). As defined by the statute, an expert report "provides a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered by the physician or healthcare provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *Id.* § 74.351(r)(6). "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)." *Id*. § 74.351(*l*). But if an expert report has not been timely served 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." *Id*. § 74.351(c).

If an expert report is to constitute a good faith effort, it must provide enough information regarding the expert's opinions on the three statutory elements—standard of care, breach, and causation—to fulfill two purposes. *Palacios*, 46 S.W.3d at 879 (construing former art. 4590i,

§ 13.01). First, the report must inform the defendant of the specific conduct the plaintiff calls into question. *Id.* Second, the report must provide a basis for the trial judge to determine that the claims have merit. *Id.* Although the report need not marshal all the plaintiff's proof, if the report does not meet these two purposes and omits any of the statutory requirements, it does not constitute a good faith effort. *Id.* at 878-79. A report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill its two purposes. *Id.* at 879. Rather, to constitute a good faith effort, a report must explain the basis of the expert's statements and link his or her conclusions to the facts of the case. *Bowie*, 79 S.W.3d at 52. In determining whether the report constitutes a good faith effort, the trial court is limited to the information contained within the four corners of the report and may not draw inferences to supply absent but necessary information. *Palacios*, 46 S.W.3d at 878; *Bowie*, 79 S.W.3d at 53.

C. Analysis

We first note that when a plaintiff sues more than one defendant, the expert report must set forth the standard of care applicable to each defendant and explain the causal relationship between each defendant's individual acts and the injury. *Tenet Hosps., Ltd. v. De La Riva*, 351 S.W.3d 398, 404 (Tex. App.—El Paso 2011, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (r)(6)); *Tenet Hosps. Ltd. v. Love*, 347 S.W.3d 743, 753-54 (Tex. App.—El Paso 2011, no pet.). This is not to state, however, that an expert report concluding that multiple defendants owed the same standard of care to the plaintiff, and breached that duty in the same manner, can never constitute a good faith effort as required by law. Clearly, a report that so concludes can constitute a good faith effort in some circumstances. *See Methodist Hosp. v. Shepherd-Sherman*, 296 S.W.3d 193, 199 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (holding the report sufficiently explained the statutory elements were the same as to all relevant healthcare providers); *San Jacinto*

Methodist Hosp. v. Bennett, 256 S.W.3d 806, 817 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding the report adequately assigned required elements to the staff of each of the two named hospital defendants); *In re Stacy K. Boone, P.A.*, 223 S.W.3d 398, 405-06 (Tex. App.—Amarillo 2006, orig. proceeding) (finding report adequately informs each of the multiple defendants of the specific conduct called into question).

An expert report concluding that different healthcare providers are collectively negligent, must explain why, under the particular circumstances, the providers owed the same standard of care to the plaintiff and breached that duty in the same manner. *Love*, 347 S.W.3d at 753; *Taylor v. Christus Spohn Health Sys. Corp.*, 169 S.W.3d 241, 244 (Tex. App.—Corpus Christi 2004, no pet.). Said differently, an expert report that fails to provide a reasoned explanation supported by specific facts as to why different providers are collectively negligent is inadequate. *Love*, 347 S.W.3d at 753; *Taylor*, 169 S.W.3d at 244.

Here, Golucke contends that Dr. Rushing's report is inadequate based on three reasons: (1) it lumps together multiple defendants without adequate explanation as to why the standard of care is identical for all providers; (2) it fails to explain how each defendant breached the standard of care; and (3) it fails to tie the specific actions or omissions of Golucke to the specific event of Lopez's fall. In short, Golucke argues that Dr. Rushing's collective allegations are not specific enough as to implicate acts or omissions by her with regard to the required elements of standard of care, breach, and causation. With these complaints in mind, we first address Dr. Rushing's opinions on standard of care and breach, as applied to Golucke. We then review the element of causation.

1. Standard of care and breach

Under a heading titled, "Standard of Care," Dr. Rushing provides the following opening paragraph above multiple bullet points:

> The standard of care for a rehabilitation facility such as EL PASO SNF LLC d/b/a EL PASO HEALTH & REHABILITATION CENTER, ADVANCED HEALTHCARE SOLUTIONS INC. d/b/a EL PASO HEALTH & REHABILITATION CENTER, AHS HEALTHCARE SOLUTIONS LLC d/b/a EL PASO HEALTH & REHABILITATION CENTER, ADVANCED HCS LLC d/b/a EL PASO HEALTH & REHABILITATION CENTER, TEXAS OPERATIONS MANAGEMENT LLC; 11525 VISTA DEL SOL DRIVE LLC d/b/a EL PASO HEALTH & REHABILITATION, and/or 'El Paso Health' through the actions of its administrator, director of nursing, charge nurses, staff nurses, CNA's, Care Plan Coordinator, Medical director, therapists and as applied to Register Nurses such as CRISTINA DE LA ROSA, NURSE JESSICA DOE; NURSE ROGER DOE; and KIMBERLY JEAN GOLUCKE in the context of the care of Ms. Lopez requires . . .

Within the bulleted information that follows the introductory paragraph, the report identifies the standard of care applicable to all defendants, listing each person or entity collectively. Dr. Rushing describes the standard of care as "the level of care and treatment that a reasonable prudent similar facility would provide under the same or similar circumstances." Such standard of care, he contends, requires "a thorough nursing assessment [to be] performed to ascertain and establish a plan of care and coordinate interdisciplinary team activity such as physical, speech and occupational therapy." Moreover, in assessing the needs of a patient in the context of a rehabilitation center, he further contends the standard of care requires that: "RN perform assessment on patient, including documentation of a bed alarm instituted during rounds;" and in skilled nursing facilities/rehabilitation centers, "all patients are considered fall risk and safety measures are to be instituted and evaluated on an hourly rounding basis." Additionally, Dr. Rushing further contends that "patients who are known to be cognitively impaired [be kept] on bed alarms to prevent falls." Thus, he describes that a facility should "provide a safe environment with necessary equipment and supervision to prevent accidents."

More specifically, Dr. Rushing asserts the facility should have taken Lopez's height and weight into consideration and required two attendants to assist her. He also asserts a "wheelchair

alarm" and "bed alarm" should have been provided for the nurses to have an opportunity to rescue Lopez if she attempted to get out of bed. He further contends the facility should "neither accept nor retain a resident whose needs they cannot meet" and should have implemented assessments of the level of fall risk. That assessment, he contends should also include an evaluation of mental status and mobility, and when risk factors are identified by the assessment, those factors should be addressed on the care plan. Lastly, Dr. Rushing's report asserts the standard of care called for multiple interventions and for assessment of environmental hazards.

After laying out the standard of care, Dr. Rushing summarizes that the care and treatment of Lopez fell below the acceptable standard of care in three ways: (1) by accepting and retaining a resident whose needs they could not meet, (2) failing to have an appropriate effective fall prevention program, and (3) failing to prevent Lopez's fall. Listing the defendants collectively, Dr. Rushing states they failed to perform a thorough nursing assessment and that it was inappropriate to assess Lopez as a low risk for a fall.[2] Dr. Rushing opines the registered nurses—to include Nurse Cristina De La Rosa, Nurse Jessica Doe, Nurse Roger Doe, and Nurse Golucke—breached the standard of care by "fail[ing] to perform an assessment on [Lopez] that included documentation of a bed alarm instituted during rounds." Dr. Rushing then states improper and incomplete assessment was a breach of the standard of care by the collective defendants. Also, he states the collective defendants failed to put bed alarms, failed to account for Lopez's height and weight, failed to require attendants to assist her, and failed to provide a wheelchair alarm. Lastly, Dr. Rushing states the collective defendants breached the standard of care by failing to provide the following interventions: Falling Star Program, monitoring (hourly, 15 minutes), bed alarm, tab alarm, side rails, handrails, room location, floor mats, frequent toileting/ toileting schedule, gait

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[2] Dr. Rushing states it was a breach to classify Lopez as a low risk for fall, but his earlier recitation of facts states the medical records listed Lopez as a high risk for fall.

belt, patient lift, use of sitters, low-rise bed, and body alarm.

Golucke argues that Dr. Rushing's report is inadequate as it applies a single standard of care to multiple defendants without any explanation as to why the same standard applied to each. In support, Golucke points to a case out of this Court where we held the expert report was inadequate when a "vague statement [did] not indicate whether the standard of care was applicable" to one defendant doctor or both. *See Clapp v. Perez*, 394 S.W.3d 254, 260 (Tex. App.—El Paso 2012, no pet.). In *Clapp*, the standard of care mentioned by the report did not contain either of the doctors' names but merely stated the standard of care required under the circumstances. *Id.* at 259. Recognizing we were prohibited from drawing inferences to supply absent, necessary information, we determined the report was inadequate based on vagueness. *Id.* at 260. Along with *Clapp*, Golucke also cites to a case from the First Court of Appeals where the court found the expert's stated standard of care was conclusory and did not constitute a good faith effort to comply with the requirements of the statute. *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 859-60 (Tex. App.—Houston [1st Dist.] 2006, no pet.). There, the report stated the same standard of care applied to the nursing staff and the anesthesiologist without explanation. *Id.* The Houston court found that, while it was conceivable that an identical standard of care could attach to an anesthesiologist and to a nursing staff, such generic statements, without more, were conclusory. *Id.*

In response, Lopez asserts Golucke's argument—that the "only circumstance" in which an expert can assert the same standard of care to multiple defendants is when the report explains why the same standard applies to all—is an argument unsupported by text of the statute. Instead, Lopez directs us to another case out of this Court that distinguished from *Clapp*. *See Gonzalez v. Padilla*, 485 S.W.3d 236, 248 (Tex. App.—El Paso 2016, no pet.). In *Gonzalez*, we recognized that *Clapp*

dealt with the differing responsibilities of two specialist physicians who each performed separate tasks during a surgical procedure. *Id.* The *Gonzalez* case, however, involved more general topics to include wound care and infection prevention. *Id.* Because those two concerns are common to all fields of medical practice, we found the expert report was adequate in providing the same standard of care for different defendants who had different responsibilities and performed different tasks. *Id.* In *Gonzalez*, we found the expert had specifically identified the defendants and adequately stated the generally applicable standard of care. *Id.* Viewed in the context of *Gonzalez*, Lopez argues Dr. Rushing's report is adequate as a good faith effort to fairly summarize the standard of care applicable to all defendants, including Golucke. Lopez argues that protecting a patient from a fall during recovery requires "much less technical knowledge" than administration of anesthesia like in *Clapp*. Lopez argues that Dr. Rushing listed the interventions and procedures the facility and its employees should have taken to prevent a fall at the rehabilitation facility.

Lopez fails to cite any authority, however, and we are not aware of any, that view the subject of fall prevention in the same light as wound care and infection prevention. Furthermore, even if fall prevention is the type of care that requires "less technical knowledge," Dr. Rushing did not explain why the same standard of care applied to all defendants he listed with regard to the prevention of falls. *See id.* Although the substance of Dr. Rushing's report on standard of care is not vague or minimal, like in *Clapp* and *Gray*, what is lacking is an explanation on what Golucke herself did wrong or failed to do, such as to indicate how she breached the standard of care applicable to her individually. *See Clapp*, 394 S.W.3d at 260; *Gray*, 189 S.W.3d at 859.

Responding to this criticism, Lopez argues the expert report repeatedly identified Golucke as breaching the standard of care by failing to perform the stated assessments and interventions. In support of her argument, Lopez cites to cases where courts found an expert's explanation on breach

of the standard of care presented an adequate good faith effort that satisfied the requirements of the statute. *See Harvey v. Kindred Healthcare Operating, Inc.*, 578 S.W.3d 638, 652-53 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding expert's explanation that the standard of care was breached adequate when healthcare providers all had a duty to comply with the doctor's orders for patient monitoring and breached when it was not done); *Weatherford Texas Hosp. Co., LLC v. Laudermilt*, No. 02-17-00075-CV, 2017 WL 4974778, at *3 (Tex. App.—Fort Worth Nov. 2, 2017, no pet.) (mem. op.) (holding the expert reports as adequate even though they did not address the multiple nurses' breaches of the standard of care because their breaches were based on the failure by all of the nurses to make proper documentation).

Contrary to Lopez's argument, we find these cases distinguishable. First, *Harvey* involved a lawsuit filed against a hospital, not the individual doctors or nurses providing services and treatment. *Harvey*, 578 S.W.3d at 649. Although the case involved the application of the same standard of care to multiple providers, this general application was brought in the context of supporting liability against the hospital defendant. *Id.* The Court found the expert was not required to set out a different standard of care as to each employee because she opined the multiple providers all owed the plaintiff the same standard of care. *Id.* A breach existed because none of the healthcare providers who were involved in the plaintiff's care complied with the doctor's orders, resulting in a breach by the hospital. *Id.* at 652. In contrast, the *Laundermilt* case did involve a suit filed against multiple nurses. *Laudermilt*, 2017 WL 4974778, at *3. However, the court determined the expert report was adequate in finding the breach existed based on all of the nurses' failure to act. *Id.* Distinguishable from the facts of this case, *Laundermilt* found the expert report named each defendant nurse and noted the nurses "*all treated* [the plaintiff] in the emergency department on the day in question (emphasis added)." *Id.*

The Supreme Court of Texas has held that the statutory definition of an expert report "requires, as to each defendant, a fair summary of the expert's opinion about the applicable standard of care . . . ." *Palacios*, 46 S.W.3d at 878. The Supreme Court further described, "[i]dentifying 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." *Palacios*, 46 S.W.3d at 880. A fair summary, even if something less than a full statement of the applicable standard of care, must set out what care was expected but not given. *THN Physicians Ass'n v. Tiscareno*, 495 S.W.3d 914, 920 (Tex. App.—El Paso 2016, no pet.). "An expert's bare, collectivized accusations of negligence against multiple defendants are insufficient to meet the [expert report] requirements; the expert must either individually distinguish the defendants from one another or else explain why all defendants are subject to the same standard of care." *Mendez-Martinez v. Carmona*, 510 S.W.3d 600, 606 (Tex. App.—El Paso 2016, no pet.). "Where a plaintiff sues multiple defendants in a health care liability case, the expert report must delineate the standards of care applicable to each defendant and then explain how the defendants' respective breaches of those standards of care are causally linked to the plaintiff's injury." *Id.*

We conclude Dr. Rushing did not provide an explanation on why the same standard of care applied to Golucke as it did to other defendants, regardless of job title or function, and we cannot assume it does. *Cf. In re Stacy K. Boone*, 223 S.W.3d at 405 (finding the report adequate where the expert applied the same standard of care for a cardiologist, a physician's assistant, the practice group, two surgeons and their practice group because the expert explained all the individual defendants were involved with the post-operative anti-coagulation therapy to be administered to the patient); *Bailey v. Amaya Clinic, Inc.*, 402 S.W.3d 355, 367-68 (Tex. App.—Houston [14th

Dist.] 2013, no pet.) (finding expert report adequate good-faith effort when it stated the standard of care, applied to the doctor and the doctor's staff members, required the facility's employees not place the patient on a piece of equipment for weight loss purposes with known balance and stability problems because it sufficiently explained that the doctor and the clinic both owed the same duties to the patient).

Furthermore, Dr. Rushing fails to explain, identify, or describe any specific conduct that is attributable to Golucke. Instead, the report leaves us attempting to infer which individual was involved in the breaches identified. Golucke is not mentioned in Dr. Rushing's factual recitation and he does not point to medical records or notes mentioning her involvement. Additionally, Golucke is never mentioned individually; but collectively instead, along with several other nurses and defendants. We cannot determine whether Dr. Rushing believes Lopez was under Golucke's immediate care, whether Golucke was a supervisor of other nurses who were in charge of Lopez's care, whether Golucke was in charge of implementing safety measures for patients, or whether Golucke was in charge of patient assessments. The biggest difference between Lopez's cited cases and the facts of this case is the expert report all adequately stated how the defendant healthcare providers were involved in the care of the patient. Here, Dr. Rushing makes no assertion that Golucke was involved in the care of Lopez, whether directly or indirectly, except as collectively mentioned.

We conclude the trial court abused its discretion by overruling Golucke's objections to the report and finding Dr. Rushing's report provided a fair summary of the standard of care and how Golucke breached it. Because Golucke challenges whether the report met all the requirements of section 74.531, we also look to the causation element.

2. Causation

Dr. Rushing's report includes an opinion on the causal relationship between the stated breach and Lopez's injury. He states as follows:

> [Lopez] should never have been permitted to walk alone or unassisted or without an assistive device. The harm/injury that resulted from these failures was [Lopez's] fall and fracture of her distal femur. As a result of this fracture [Lopez] had to undergo a second surgery i.e. the intramedullary nailing of the left femur and because of this was subjected to substantial pain and suffering and prolonged recovery.

Continuing, Dr. Rushing further states that if the collective defendants had "properly conducted a Functional Capacity Exam/Fall Risk Assessment at the time of [Lopez's] admission," then the previously stated interventions would have been put in place and Lopez could not have walked to the restroom without assistance.

> If [Lopez] did attempt to ambulate on her own[,] then the proper healthcare provider would have been notified and been able to assist [Lopez] in a timely manner. This would have included a two person assist or assistive device such as a wheelchair or walker. More likely than not, if the standard of care was met in the case in the form of a proper fall risk assessment, and implementation of the above[-]mentioned interventions, [Lopez] would not have fallen. Within reasonable medical probability, [Lopez's] fall and fracture of her distal femur, second surgery i.e.[,] the intramedullary nailing of the left femur and substantial pain and suffering and prolonged recovery was caused by [the collective defendants'] breach of the standard of care.
>
> It is my opinion that the failures outlined above proximately caused [Lopez's] fall and femoral fracture. Had it not have been for these failures and fall [Lopez] would not have been subjected to the second surgery and the associated pain and suffering and prolonged recovery.

An expert report must explain the basis of the expert's statements regarding causation and link his conclusions to the facts. *Bowie*, 79 S.W.3d at 53. "A causal relationship is established by proof that the negligent act or omission was a substantial factor in bringing about the harm and that absent said act or omission, the harm would not have occurred." *De La Riva*, 351 S.W.3d at 404 (citing *Costello v. Christus Santa Rosa Health Care Corp.*, 141 S.W.3d 245, 249 (Tex. App.—

San Antonio 2004, no pet.)). Two factors are considered: "(1) whether the expert established a logical, complete chain between a negligent act and the plaintiff's injury; and (2) whether the report gave the trial court sufficient medical details to allow the court to decide if the case was frivolous." *Mendez-Martinez*, 510 S.W.3d at 607 (citing *Clapp*, 394 S.W.3d at 258). Causation cannot be inferred but must be clearly stated. *Castillo v. August*, 248 S.W.3d 874, 883 (Tex. App.—El Paso 2008, no pet.). In cases involving more than one defendant, the expert report must set forth the standard of care applicable to each defendant and explain the causal relationship between each defendant's individual acts and the injury. *De La Riva*, 351 S.W.3d at 404 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (r)(6)). An expert may not assert that multiple defendants are all negligent for failing to meet the standard of care with no explanation of how each defendant breached the standard of care and how that breach caused or contributed to the cause of injury. *Taylor*, 169 S.W.3d at 244.

As to the element of causation, Golucke asserts Dr. Rushing's expert report is similar to a previous case out of this Court. In *De La Riva*, plaintiff filed a healthcare liability suit against a hospital, a doctor, and multiple nurses after her child was born with a brain injury. *De La Riva*, 351 S.W.3d at 401-02. The hospital and some of the defendant nurses appealed the trial court's denial of their objections and motion to dismiss. *Id.* at 402. Specifically, the appellants contested the expert's opinions on causation. *Id.* The expert report set out a factual recitation of what occurred on the day of delivery that did not mention any of appealing nurses, what they did, or how they participated in the delivery of plaintiff's child. *Id.* at 404. This Court found the expert report to be deficient in its opinion on causation when it stated "an earlier delivery and prompt resuscitation would have significantly mitigated if not wholly prevented [the child's] neurological[] problems." *Id.* The Court held:

> Looking to the four corners of the report, we note that it does not explain, identify, or describe what conduct, act or omissions are attributable to any of the Appellants, that is, the report does not explain the causal relationship between each defendant's individual acts and injury caused to [the child]. Rather, the report would have us infer which party was responsible for each cause. But as set out in other expert reports, each of the ten named defendants had numerous and varying responsibilities as to the two patients involved.

Id. at 404-05.

Additionally, the Thirteenth Court of Appeals has found an expert report failed "to state what each defendant should have done in order to meet the standard of care, what each defendant failed to do, and how such failure led to [the plaintiff's] death." *Taylor*, 169 S.W.3d at 245-46. Following the death of her husband, plaintiff brought suit against several defendants to include three individual doctors and a hospital defendant. *Id.* at 242. After the trial court granted defendants' motion to dismiss asserting an inadequate expert report, plaintiff appealed wherein she argued the expert report constituted a good faith effort to show compliance with statutory requirements. *Id.* at 243. The report at issue had concluded that collective actions of the defendants were negligent, and the negligence was the proximate cause of the death of the patient. *Id.* The expert report applied a single standard of care to a variety of providers including an emergency room physician, a hospital, a cardiology association, and others. *Id.* at 246. The Corpus Christi court found that the expert report "simply states that various procedures that should have occurred did not, without specifying which party was responsible for undertaking which procedures." *Id.* Based on this deficiency, the court held the trial court's conclusion that the report did not represent a good faith effort to comply with the statutory requirements was not an abuse of discretion. *Id.*

Lopez responds that Dr. Rushing's opinion on causation gives sufficient detail of the causal relationship between the breach and Lopez's injuries. Lopez asserts the facts in *De La Riva* are not comparable here because Dr. Rushing stated Lopez's "fall, fracture, surgery, pain and suffering

were caused by Golucke and the other defendants' failure to comply with the standard of care." However, as mentioned above, Golucke is never singled out to demonstrate which breach is attributable to her. An expert report is not required to assign "relative amounts of blame to different defendants." *See Mendez-Martinez*, 510 S.W.3d at 607 (stating a requirement that an expert must not only delineate how the defendants breached the standard of care but must also assign relative negligence percentages among the defendants in order to survive dismissal is untenable). But the report must adequately identify the relative standards of care, breaches, and causal links between the patient and her individual caretakers. *Id.* at 607. "Assigning blame among multiple defendants ordinarily involves resolving fact disputes, and we generally leave cause-in-fact issues for resolution on summary judgment or at trial unless the causal link between a defendant and the plaintiff's injury becomes too attenuated." *Id.* (citing *Tenet Hospitals, Ltd. v. Garcia*, 462 S.W.3d 299, 312 (Tex. App.—El Paso 2015, no pet.)).

Lopez asserts other cases have found an expert's statement on causation that contained less detail than Dr. Rushing as adequate. *See Estate of Birdwell ex rel. Birdwell v. Texarkana Mem'l Hosp., Inc.*, 122 S.W.3d 473, 479 (Tex. App.—Texarkana 2003, pet. denied) (holding the expert report gave fair notice to the defendant hospital of the standard of care, how the hospital breached the standard, and how the breach caused plaintiff's injuries); *Peterson Reg'l Med. Ctr. v. O'Connell*, 387 S.W.3d 889, 894 (Tex. App.—San Antonio 2012, pet. denied) (finding statement that the plaintiff's inopportune death was the result of "not providing a secure and safe environment for him" and stating "simple monitoring would have allowed facility staff to intervene and prevent" plaintiff's fall was an adequate good faith effort to put the defendant hospital on notice). However, both cases involved lawsuits where the actions of different individuals were sufficient to implicate the defendant hospital. They did not involve suits against an individual

healthcare worker like a nurse defendant who is named individually in the suit.

We conclude that without a showing of how Golucke breached an applicable standard of care, Dr. Rushing further failed to make a causal connection to acts or omissions of Golucke. Without explaining what Golucke was doing, what she should have been doing, or how she was connected to the care and monitoring of Lopez, the report fails to make a causal connection between any individual act of Golucke and Lopez's injury sustained from falling.

3. Summary

Given we are prohibited from supplying missing information by inference, we conclude that Dr. Rushing's report fails to implicate any direct liability of Golucke. *De La Riva*, 351 S.W.3d at 406. As a result, the report is inadequate as to a direct claim against her individually. *Id.*; *Taylor*, 169 S.W.3d at 246. We reiterate that a plaintiff is not required to marshal all of their proof at this stage. However, in the expert report's current form, we can only speculate as to the individual conduct of Golucke, which we are not permitted to do. Finding the report inadequate, we conclude the trial court abused its discretion in denying Golucke's objections and motion to dismiss. We sustain Golucke's first and second issues.

IV. NO REPORT AT ALL OR MERELY DEFICIENT

In her third issue, Golucke asserts that no opportunity to cure is appropriate in this instance and Lopez's claim against her should be dismissed with prejudice. She argues Dr. Rushing's report may be characterized as no report at all—given its failure to implicate her conduct specifically—as opposed to a merely deficient report not complying with the statute. She urges the claim against her should be dismissed without affording Lopez an opportunity to cure the deficiencies in the report. Countering, Lopez argues that Golucke wrongly characterizes Dr. Rushing's report as being equivalent to no report at all; instead, it represented an objective good faith effort to comply with the statutory requirements. In briefing, Lopez seeks an opportunity to cure the report's deficiencies

in the event we conclude the trial court abused its discretion in failing to find Dr. Rushing's report deficient.

When an expert report is timely served and properly challenged, the trial 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)." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l). The Code "also authorizes the trial court to give a plaintiff who meets the 120-day deadline an additional thirty days in which to cure a 'deficiency' in the elements of the report." *Scoresby v. Santillan*, 346 S.W.3d 546, 549 (Tex. 2011) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c)). "The trial court should err on the side of granting the additional time and must grant it if the deficiencies are curable." *Id*. (internal citations omitted). "The purpose of the expert report requirement is to deter frivolous claims, not to dispose of claims regardless of their merits." *Id.* at 554 "A court may not provide opportunities to cure, however, when an expert report is 'absent' as opposed to deficient" such as when a report "fails to address all required elements of a claim." *Hollingsworth v. Springs*, 353 S.W.3d 506, 524 (Tex. App.—Dallas 2011, no pet.) (denying a healthcare liability claimant an opportunity to cure when the expert report "omitted any discussion of the element of causation," so the "report could not qualify as a good faith effort to meet Chapter 74's requirements").

As guidance, the Supreme Court of Texas set a "minimal standard" for when a thirty-day extension may be granted. *Scoresby*, 346 S.W.3d at 557. The Court held "a thirty-day extension to cure deficiencies in an expert report may be granted if the report is served by the statutory deadline, if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated." *Id.* "[A] document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the

plaintiff against the defendant has merit." *Id. Scoresby* held plaintiff's report was deficient because it did not state the standard of care and only implied that it was inconsistent with the physician's conduct. But the Supreme Court of Texas then held that the plaintiff should have the opportunity to cure because "there is no question that in [the expert's] opinion, [plaintiff's] claim against the [p]hysician has merit." *Id.*

Here, Dr. Rushing's report was served by the statutory deadline, and it implicates nursing care by registered nurses such as Golucke, among other staff of the facility, stating the breach of various duties applicable to such care resulted in a causal link to Lopez's injury. Although we find the expert report inadequately supports a direct claim against Golucke individually, we also conclude the report contains Dr. Rushing's belief that Lopez's claims against Golucke have merit.

We decline to dismiss this cause for failure to file an adequate report and conclude that the trial court should be permitted the opportunity to consider whether to dismiss this cause or to grant a thirty-day extension to cure the deficiencies in the report. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c); *Scoresby*, 346 S.W.3d at 557. We overrule Golucke's third issue.

V. CONCLUSION

We reverse the trial court's order denying Kimberly Golucke's motion to dismiss Lopez's healthcare liability claim against her. We remand this case to the trial court to consider whether Lopez should be granted a thirty-day extension to cure the deficiencies in the report, as well as for other proceedings consistent with this opinion.

GINA M. PALAFOX, Justice

September 30, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.