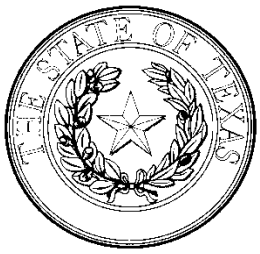
Opinion issued January 27, 2011



In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00106-CV

CERTIFIED EMS, INC. D/B/A CPNS STAFFING, Appellant

V.

CHERIE POTTS, Appellee

On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2009-42236

O P I N I O N

In this interlocutory appeal, appellant, Certified EMS, Inc. d/b/a/ CPnS Staffing ("Certified EMS"), challenges the trial court's order denying its motion to dismiss the health care liability claims of appellee, Cherie Potts. Potts sued Certified EMS alleging that it was directly and vicariously liable for an assault by

one of its employees. On appeal, Certified EMS contends that the trial court erred by (1) granting Potts an extension of time to cure deficiencies in her expert reports because the original reports served by Potts do not qualify as expert reports and, therefore, the first motion to dismiss should have been granted, and (2) denying Certified EMS's second motion to dismiss based on deficiencies in the ultimate reports filed by Potts. We conclude that we lack jurisdiction over Certified EMS's appeal of the first motion to dismiss, which concerns Potts's reports that were filed before the court granted an extension of time to file corrected reports. Although the expert reports ultimately filed by Potts were inadequate as to the theories for direct liability she filed, we conclude the trial court properly denied Certified EMS's motion to dismiss because Potts's expert report was adequate for vicarious liability. We affirm the order of the trial court.

Background

Potts was admitted to Christus St. Catherine's Hospital in Katy, Texas, in November 2008 after experiencing complications from a recurring kidney infection. Potts alleged that, during her stay at Christus, Les Hardin, a male nurse, asked her and her husband several intimate questions concerning her sexual practices, which she or her husband answered. She further alleged that, on the day following the questioning, Hardin returned to her room in the late evening. She explained that Hardin, acting under the false pretense of performing a normal

examination, proceeded to examine her in a manner that left her breasts exposed and that he touched her breasts and other areas of her body in an inappropriate and unwelcome manner.

Potts reported Hardin's conduct to the nursing risk-management supervisor. Eventually, it was disclosed that Hardin was not a regular employee of the hospital but was temporarily working at the hospital as an employee of Certified EMS, a nurse staffing agency. After the incident, Potts complained of anxiety and panic attacks. She eventually brought suit against Certified EMS asserting that it was vicariously liable for Hardin's conduct under a respondeat superior theory and directly liable for its own negligence.

Potts timely served two reports that purported to be expert reports under Chapter 74 of the Texas Civil Practice and Remedies Code. The first report, by Nurse Foster, stated that Hardin's conduct was evidence of substandard nursing practice by Hardin, whom she identified as an employee of a "Temporary Nursing Agency/Service, Name of Agency or Director are unknown at this time." The second report, by Dr. Kit Harrison, Ph.D., stated that Potts is suffering psychological injuries due to assault. Asserting the reports were statutorily insufficient so that they effectively constituted no report, Certified EMS filed a motion to dismiss. The trial court denied Certified EMS's motion to dismiss and granted Potts a 30-day extension to amend or supplement her reports. Potts

subsequently filed a supplemental report from Nurse Foster and a report with curriculum vitae from a new expert, Dr. Milton Altschuler, M.D. Certified EMS timely filed a second motion to dismiss, which the trial court subsequently denied.

Standard of Review

We review the trial court's rulings concerning expert reports for abuse of discretion. *Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003); *Am. Transitional Care Ctrs. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001). A trial court abuses its discretion if it acts arbitrarily or unreasonably without reference to any guiding rules or principles. *See Walker*, 111 S.W.3d at 62. Statutory construction, however, is a legal question that we review de novo. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009).

First Motion to Dismiss

In its first four issues, Certified EMS contends that the trial court abused its discretion by granting an extension of time to cure deficiencies because the initial reports filed by Potts were so inadequate as to constitute no expert report. In light of the trial court's extension of time to cure deficiencies in the original reports filed by Potts, we conclude we lack jurisdiction over Certified EMS's first four issues, in which it challenges the deficiencies in her original reports.

A. Applicable Law

Pursuant to Section 74.351, medical-malpractice plaintiffs must serve each defendant physician and health care provider with an expert report or voluntarily nonsuit the action. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). If a claimant timely furnishes an expert report, a defendant may file a motion challenging the report's adequacy. *Id.* The trial court shall grant the motion only if it appears, after a hearing, that the report does not represent a good faith effort to comply with the statutory definition of an expert report. *See id.* § 74.351(*l*). "'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); *Palacios*, 46 S.W.3d at 877–78 (report need not marshal all plaintiff's proof, but must include expert's opinions on three statutory elements—standard of care, breach, and causation); *Gray v. CHCA Bayshore, L.P.*, 189 S.W.3d 855, 859 (Tex. App.—Houston [1st Dist.] 2006, no pet.). "If an expert report has not been 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." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c).

Section 51.014(a)(9) of the Texas Civil Practice and Remedies Code authorizes an interlocutory appeal from an order that denies all or part of the relief sought by a motion under Section 74.351(b). TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West 2006). If no report is filed by the deadline, a defendant may properly appeal an order denying its motion to dismiss. *Morris v. Umberson*, 312 S.W.3d 764, 766 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). When a report has been timely served, however, a defendant may not appeal from an order denying a motion to dismiss if the trial court also grants an extension under section 74.351(c) of the Texas Civil Practice and Remedies Code. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9)). "If a defendant could immediately appeal the denial of his motion to dismiss, the court of appeals would be reviewing the report's sufficiency while its deficiencies were presumably being cured in the trial court." *Badiga v. Lopez*, 274 S.W.3d 681, 684 (Tex. 2009).

B. Analysis

Potts did file timely reports that she asserts would satisfy the requirements for an expert report. Certified EMS asserts that these reports were so inadequate as to constitute as no expert reports. *See Ogletree v. Matthews*, 262 S.W.3d 316, 323 (Tex. 2007) (Willett, J., concurring) (describing some reports as so deficient as to constitute no report). Assuming that a purported report could be so deficient that it

is effectively no report, we find that these reports do not meet that standard. *See id.*

In examining whether an inadequate report is effectively no report, courts have considered whether the inadequate report implicates the conduct of the defendant, regardless of whether the defendant is actually identified by name. *Morris*, 312 S.W.3d at 768 (citing *Ogletree*, 262 S.W.3d at 321) ("Even though the report did not mention the healthcare defendant by name, the Supreme Court held, '[b]ecause a report that implicated [the healthcare defendant's] conduct was served and the trial court granted an extension, the court of appeals could not reach the merits of the motion to dismiss,' and 'the court of appeals correctly determined that it lacked jurisdiction over [the healthcare defendant's] appeal.'"); *McKeever v. Cerny*, 266 S.W.3d 451, 454 (Tex. App.—Corpus Christi 2008, no pet.) (report that implicates doctor but not physician assistant who assisted doctor is considered to be more than "no report" so that trial court may grant extension of time to cure its deficiency).[1]

[1] We distinguish this situation from *Rivenes v. Holden*, 257 S.W.3d 332, 340–41 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (holding appellate court had jurisdiction over appeal despite motion for extension of time that was granted by trial court because no expert report was filed as report tendered by claimant did not "implicate appellant's conduct" or "refer to appellant by name or position"). We also distinguish *Garcia v. Marichalar*, 185 S.W.3d 70, 73 (Tex. App.—San Antonio 2005, no pet.) (holding appellate court had jurisdiction over appeal because defendant was not mentioned at all or focus of expert reports that were

Although they do not mention the employer specifically by name, the first reports timely filed by Potts implicate the conduct of Hardin and his employer. 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 Hardin's employer, Certified EMS, for the purposes of the trial court granting an extension of time to Potts to cure the deficiencies in her reports. *Id.*; *Morris*, 312 S.W.3d at 768; *see also Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671–72 (Tex. 2009) ("When a party's alleged health care liability is purely vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient."); *Univ. of Tex. Sw. Med. Ctr. v. Dale*, 188 S.W.3d 877, 879 (Tex. App.—Dallas 2006, no pet.) (expert report not required to mention UT Southwestern by name for vicarious liability).

The original reports were sufficient to implicate the conduct of Certified EMS. Because the trial court granted an extension of time to cure deficiencies in the reports originally filed by Potts, we lack jurisdiction over Certified EMS's appeal of the denial of its first motion to dismiss and dismiss its first four issues. *See Ogletree*, 262 S.W.3d at 321 ("[I]f a deficient report is served and the trial court grants a thirty day extension, that decision—even if coupled with a denial of a motion to dismiss—is not subject to appellate review.").

---

filed). Unlike these cases, Certified EMS was implicated by the report and described as a temporary nursing agency.

Second Motion to Dismiss

In its fifth issue, Certified EMS contends that the trial court erred by denying its second motion to dismiss. Specifically, Certified EMS asserts that Nurse Foster is not qualified to render the expert opinion and that her supplemental report is deficient because it does not identify the standard of care applicable to Certified EMS or the alleged breaches of the standard of care. Certified EMS also challenges the report of Dr. Altschuler by contending it does not implicate the conduct of Certified EMS.

A. Qualifications of Nurse Foster

Section 74.402, in pertinent part, provides,

> [A] person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person: (1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose . . . .

TEX. CIV. PRAC. & REM. CODE ANN. § 74.402(b) (West 2005). "Practicing health care" includes "serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider." *Id.* § 74.401(a).

Certified EMS objected to Nurse Foster's qualifications because she "does not state that she actively practices in a field requiring her to provide nursing care

to a patient in a hospital setting." Certified EMS's objection ignores the plain language of Section 74.402(a) that provides a consulting health care provider is "practicing health care." *Id.* Nurse Foster's curriculum vitae states that she is a "Nurse Consultant/Expert Witness" and a "Quality Review Nurse" for the Texas Department of Aging and Disability Services. Her curriculum vitae and report also show that she is licensed as a nurse and holds a number of nursing certifications. Thus, the record contains evidence that Nurse Foster "serv[es] as a consulting health care provider and [is] licensed, certified, or registered in the same field as the defendant health care provider." *See id.* Accordingly, the trial court did not abuse its discretion in determining Nurse Foster is qualified to offer an expert report in this case.

B. Sufficiency of Reports to Implicate Certified EMS's Conduct

Certified EMS contends that the reports by Nurse Foster and Dr. Altschuler are deficient because the reports do not implicate Certified EMS's conduct. Potts responds that she asserts in her petition both direct liability and vicarious liability theories against Certified EMS. Potts explains that the trial court properly denied the motion to dismiss because Certified EMS only challenged the direct liability theories and left the vicarious liability theory unchallenged by accepting the adequacy of the report's treatment of Hardin's conduct. In addressing whether the trial court erred in denying the second motion to dismiss, we must address the

parties' dispute as to whether the expert report must address both vicarious and direct liability theories for both theories to move past the expert report stage or whether an adequate report as to one of those theories is sufficient for the entire cause of action to move to the next stage. We address (1) the law concerning construction of a statute, (2) the plain language of the statute, (3) the objectives of the legislation and consequences of the construction of the statute, and (4) the conflict in the existing case law.

1. Law Concerning Construction of Statute

In construing a statute, we must "ascertain and give effect to the Legislature's intent." *HCBeck, Ltd.*, 284 S.W.3d at 352. We begin with the "plain and common meaning of the statute's words" to ascertain the Legislature's intent. *Id.* (citing *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)). "If the Legislature provides definitions for words it uses in statutes, then we use those definitions in our task." *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) (citing TEX. GOV'T CODE ANN. § 311.011(b) (West 2005)). We rely on the plain meaning of the text unless such a construction leads to absurd results. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008). We consider the statute as a whole and not its provisions in isolation. *Cont'l Cas. Co. v. Downs*, 81 S.W.3d 803, 805 (Tex. 2002). "We also consider the objective the Legislature sought to achieve through the statute, as well as the consequences of a

particular construction." *HCBeck, Ltd.*, 284 S.W.3d at 352 (citing TEX. GOV'T CODE ANN. § 311.023(1), (5) (West 2005)).

2. Analysis of Plain Language of Statute

We begin by examining the plain language of the statute. *Id.* In pertinent part, Chapter 74 of the Civil Practice and Remedies Code states,

> (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*. . . . 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 . . . enter an order that: . . . . (2) *dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim*.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (emphasis added).

Chapter 74 defines "claim" as "a health care liability claim." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(2). In turn, a "health care liability claim" is defined as:

> *a cause of action* against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which

> proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

Id. § 74.001(13) (West Supp. 2010) (emphasis added). Although not defined by Chapter 74, a cause of action has been described by the Texas Supreme Court as "a fact or facts entitling one to institute and maintain an action, which must be proved in order to obtain relief" and as a "group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person." *In re Jorden*, 249 S.W.3d 416, 421 (Tex. 2008) (orig. proceeding) (quoting *A.H. Belo Corp. v. Blanton*, 129 S.W.2d 619, 621 (Tex. 1939); BLACK'S LAW DICTIONARY 235 (8th ed. 2004)).

Replacing the word "claim" with the term "cause of action" and its definition, the plain language in Section 74.351(a) requires the claimant to file an expert report for each physician or health care provider against whom a cause of action — i.e., group of operative facts giving rise to one or more bases for suing — is asserted. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a); *In re Jorden*, 249 S.W.3d at 421 (defining "cause of action"). By focusing on a cause of action rather than particular liability theories that may be contained within a cause of action, the plain language does not require an expert report to set out each and every liability theory that might be pursued by the claimant as long as at least one liability theory within a cause of action is shown by the expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a); *In re Jorden*, 249 S.W.3d at 421.

Similarly, by replacing the word "claim" with the term "cause of action" and its definition, the plain language in Section 74.351(b) requires dismissal of the cause of action, or group of operative facts giving rise to one or more bases for suing, with respect to the physician or health care provider. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b); *In re Jorden*, 249 S.W.3d at 421. By focusing on a cause of action rather than particular liability theories that may be contained within a cause of action, the plain language establishes that the entire cause of action is dismissed with respect to the defendant when the claimant has failed to file an expert report that sets out at least one liability theory within a cause of action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b); *Yamada v. Friend*, No. 08-0262, 2010 WL 5135334, at *3 (Tex. Dec. 17, 2010) ("The TMLA requires the trial court to dismiss a suit asserting health care liability claims against a physician or health care provider if the plaintiff does not timely file an expert report as to that defendant."); *In re Jorden*, 249 S.W.3d at 421. But if at least one liability theory within a cause of action is shown by the expert report, then the claimant may proceed with the entire cause of action against the defendant, including particular liability theories that were not originally part of the expert report, as long as those liability theories are contained within the same cause of action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b); *Yamada*, 2010 WL 5135334, at *3; *In re Jorden*, 249 S.W.3d at 421. We conclude the plain language of the statute focuses

on each defendant and the cause of action against that defendant, not each basis for suing or theory of liability. *See Hughes*, 246 S.W.3d at 625–26 (stating courts must rely on plain language of statute).

3. Objectives of Legislation and Consequences of Construction

An examination of other sections in Chapter 74 suggests that the focus is on causes of action rather than particular individual liability theories contained within a cause of action. The expert report is due within 120 days of the filing of the original petition. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West Supp. 2010). Additionally, prior to the service of the expert report, discovery is limited to written discovery with no more than two depositions on written questions and no discovery from nonparties. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s), (u). The short deadline for filing an expert report and the limited discovery make it impractical to expect a claimant to know all possible liability theories within a cause of action when he files his expert report.

Section 74.351 serves as a "gate-keeper." *TTHR, L.P. v. Guyden*, No. 01-09-00523-CV, 2010 WL 3448099, at *2 (Tex. App.—Houston [1 Dist.] Aug. 31, 2010, no pet.) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351; *Murphy v. Russell*, 167 S.W.3d 835, 838 (Tex. 2005)). The expert report requirement "establishes a threshold over which a claimant must proceed to continue a lawsuit." *Murphy*, 167 S.W.3d at 838. Because it is a preliminary threshold, the expert

report may not be admitted as evidence, used in a deposition, trial or other proceeding, or even referred to for any purpose during the suit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(k); *see also id.* § 74.351(t) (providing if claimant uses expert report then prohibition in sub-section (k) is waived). Once the expert report requirement is met, the gate-keeping purpose has been achieved, and the claimant's case may proceed, including full discovery. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(s) (providing all but limited discovery is stayed until expert report required by § 74.351(a) is served). Therefore, if the claimant timely serves an expert report that adequately addresses at least one liability theory against a defendant health care provider, the suit can proceed, including discovery, without the need for every liability theory to be addressed in the report. *See Baylor Coll. of Med. v. Pokluda*, 283 S.W.3d 110, 123 n.3 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

4. Conflict in the Case Law

The Supreme Court of Texas has not directly decided whether an expert report must set out each and every liability theory within a cause of action. The court has discussed the meaning of "cause of action" as used by Chapter 74 by stating, "The statute here confirms in several places that the term 'cause of action' was used in the general sense relating to underlying facts rather than a more limited sense." *In re Jorden*, 249 S.W.3d at 421 (determining rule 202 depositions

disallowed by statutory language in chapter 74). Though indirect, the court has expressed approval of an examination of the general, underlying facts to determine what constitutes a cause of action under Chapter 74. *See Yamada*, 2010 WL 5135334, at *5 ("Our prior decisions are to the effect that if the gravamen or essence of a cause of action is a health care liability claim, then allowing the claim to be split or spliced into a multitude of other causes of action with differing standards of care, damages, and procedures would contravene the Legislature's explicit requirements."); *In re Jorden*, 249 S.W.3d at 421.[2]

Intermediate courts of appeal are split concerning whether an expert report is adequate when it establishes at least one liability theory within a cause of action or whether, to be adequate, it must establish all the asserted liability theories within a cause of action. *Compare Pokluda*, 283 S.W.3d at 123 n.3 (declining to address

---

[2] The Texas Supreme Court has detailed various liability theories when discussing whether the Chapter 74 requirements had been met. *In re McAllen Medical Center*, 275 S.W.3d 458, 464–65 (Tex. 2008). First, the court said that the expert report was inadequate to show that the hospital was negligent in hiring, retaining, and supervising the doctor because the purported expert was not qualified to make the report. *Id*. at 463. Second, the court stated that the expert report was inadequate to show vicarious liability because the report failed to suggest the hospital controlled the details of the doctor's medical tasks. *Id*. at 464. Third, the court explained that the fraud, fraudulent concealment, civil conspiracy, and misrepresentation claims were clandestine credentialing claims that required an expert report, which had not been provided by the claimant. *Id*. Although it examined each of the theories presented by the claimant, the court did so to explain why none of the theories presented could support the cause of action against the hospital. *Id*. The court did not express any comment concerning whether the expert report would have been adequate as to all the theories within the cause of action if any of the theories had been found to be supported by the report. *Id*.

adequacy of report concerning pre-surgery breaches of standard of care when expert report adequately addressed breaches occurring during surgery),[3] *Pedroza v. Toscano*, 293 S.W.3d 665, 668 (Tex. App.—San Antonio 2009, no pet.) (concluding that when testifying expert relied on different acts than those disclosed by the Chapter 74 expert report, testifying expert was not precluded from testifying because he was "not asserting a different cause of action, only a different negligence theory"), *and Schmidt v. Dubose*, 259 S.W.3d 213, 218 (Tex. App.—Beaumont 2008, no pet.) ("Multiple causes of action do not arise dependent on whether the physician was negligent before, during, or after the wrong cut.") *with Benson v. Vernon*, 303 S.W.3d 755, 759, 762 (Tex. App.—Waco 2009, no pet.) (affirming denial of dismissal as to one injury but ordering dismissal as to other injury where appellant's petition alleged negligence resulting in two injuries yet expert report only addressed first injury) *and Farishta v. Tenet Healthsystem Hosps. Dallas, Inc.*, 224 S.W.3d 448, 455 (Tex. App.—Fort Worth 2007, no pet.) (same).

---

[3] Unlike *Pokluda*, The Fourteenth Court of Appeals has also suggested that an expert report is required to separately address direct and vicarious liability theories against a single defendant for the report to be adequate as to those theories. *See Obstetrical & Gynecological Assocs. v. McCoy*, 283 S.W.3d 96, 103 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) ("If OGA is correct that McCoy has asserted claims of direct negligence against it, then McCoy was required to serve OGA with an expert report specifically addressing its conduct rather than just the conduct of Drs. Jacobs and Gunn for which OGA is vicariously liable."). The court, however, ultimately held that no expert report was required in that case.

Our court has suggested that an expert report need not set forth each claim within a cause of action. *See Clear Lake Rehab. Hosp. L.L.C. v. Karber*, No. 01-09-00883-CV, 2010 WL 987758, at *5 n.7, (Tex. App.—Houston [1st Dist.] 2010, no pet.). In *Karber*, we stated:

> We recognize that, in his report, Evans opines that Clear Lake's breach of the standard of care proximately caused not only Karber's fracture but also the subsequent infection and amputation. However, because Karber has asserted a healthcare liability claim based, at least in part, upon her fracture, and because we have concluded that Evans is qualified to opine on the causal relationship between Clear Lake's breach and Karber's injury of a fracture, we conclude that the trial court acted within its discretion in determining that Evans was qualified to offer causation opinions in support of Karber's claim.

Id. We, therefore, found that the adequacy of the report as to the fracture was sufficient for the entire cause of action, which included liability theories about the subsequent infection and amputation, to move forward. *Id.* This Court has also required that the claimant establish a cause of action as to each defendant. *Univ. of Tex. Med. Branch v. Railsback*, 259 S.W.3d 860, 864 (Tex. App. —Houston [1st Dist.] 2008, no pet.) (affirming denial of motion to dismiss concerning Railsback's vicarious liability theories against hospital with respect to acts of one doctor, and reversing denial of motion to dismiss direct liability theory against second doctor or any acts of UTMB based upon second doctor's acts). Reconciling our holdings in *Karber* and *Railsback*, we conclude that this Court has determined that each defendant must be timely served with an expert report that makes a good faith

effort to establish at least one liability theory within a cause of action. *See Karber*, 2010 WL 987758, at *5 n.7; *Railsback*, 259 S.W.3d at 864.

5. Analysis of Report Filed by Potts

Here, the facts giving rise to Potts's right to institute and maintain an action include Hardin's actions and the actions of Certified EMS in employing, hiring, training, and supervising Hardin. This group of operative facts give rise to at least two bases for suing Certified EMS—direct liability and vicarious liability. In other words, although Potts has asserted two bases for a potential recovery from Certified EMS, it is one "cause of action" and thus one "claim" under chapter 74. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (defining "health care liability claim") *with In re Jorden*, 249 S.W.3d at 421 (defining "cause of action"). Additionally, focusing on Certified EMS and not on each theory of liability asserted by Potts, an expert report implicating Hardin's conduct and Certified EMS status as Hardin's employer was served on Certified EMS. Thus, the requirements of the statute were met.

We overrule Certified EMS's fifth issue.

Conclusion

Because we lack jurisdiction, we do not address Certified EMS's appeal concerning its first motion to dismiss. We affirm the trial court's order denying Certified EMS's second motion to dismiss.

Elsa Alcala
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.