Opinion issued December 29, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-01116-CV

VASUDEV SHENOY AND DARIO ZUNIGA, Appellant

V.

PENNY JEAN, INDIVIDUALLY, AND AS WRONGFUL DEATH BENEFICIARY OF WILLIE ANNE JEANE, DECEASED, AND ON BEHALF OF THE ESTATE OF WILLIE ANN JEAN, DECEASED, AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES OF WILLIE ANN JEAN, DECEASED, Appellee

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On Appeal from the 151st District Court
Harris County, Texas
Trial Court Case No. 2010-28302

MEMORANDUM OPINION

In this interlocutory appeal,[1] Dr. Shenoy and Dr. Zuniga appeal the trial court's orders denying their motion to dismiss Penny Jean's healthcare liability claim for failure to serve an adequate expert report. *See* TEX. CIV. PRAC. & REM. CODE ANN.§ 74.351(a) (West 2011). Penny's mother, Willie Ann Jean, died approximately three weeks after gallbladder surgery as a result of hypoxic encephalopathy. Dr. Zuniga performed the surgery. Dr. Shenoy, a cardiologist, cleared Jean for the surgery.

In two issues, Shenoy contends that the trial court abused its discretion in denying his motion to dismiss because Jean's expert, Dr. Mazzei, an anesthesiologist, is not qualified to opine on the applicable standard of care for a cardiologist, breach of that standard or causation, and his report does not adequately address standard of care, breach, or causation. In his sole issue, Zuniga contends that the trial court abused its discretion because (1) Mazzei is not qualified to offer an opinion on the applicable standard of care for a surgeon, (2) the report does not address how Zuniga caused Willie Ann's death beyond mere conclusions, and (3) it is "impermissibly cumulative"—that is, it does not adequately identify the particular breaches of the standard of care or causation with respect to each separate defendant. We reverse and render an order dismissing the claims against Shenoy and Zuniga.

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[1] *See* TEX. CIV. PRAC. & REM. CODE ANN.§ 51.014(a)(9) (West 2011).

Background

Mazzei's expert report provides the background facts in this case. The medical records are not before us, and we accept the factual statements for the limited purpose of this appeal.[2]

Willie Ann Jean, age 57, was taken by ambulance to the emergency room of Doctor's Hospital on February 15,2008, complaining of abdominal pain, vomiting, chest pain of three hours' duration, and difficulty breathing. As part of her admission, Willie Ann gave an extensive medical history that included diabetes, hypertension, angina, surgery for a brain aneurysm, coronary artery disease, chronic obstructive pulmonary disease, hypercholesterolemia, and a prior myocardial infarction. Willie Ann reported she had experienced abdominal and chest pain for years without treatment. Based on a physical examination and ultrasound, the emergency room physician, Dr. Mireles, determined that she had polyps and diagnosed symptomatic gallstones in her gallbladder. He recommended that she undergo surgery to remove her gallbladder. He ordered a surgical consultation and a cardiology consultation.

Shenoy, a cardiologist, saw her that same day, and noted that Willie Ann had atwo- to three-year history of epigastric and right upper quadrant abdominal pain as well as a history of a previous myocardial infarction and a cereberovascular

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[2] *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002) (review of Chapter 74 report is limited to four corners of report).

accident (i.e., a stroke). Shenoy noted that Willie Ann had suffered chest pain, accompanied by shortness ofbreath and sweating for four to six hours earlier that day. Willie Ann also had an abnormal electrocardiogram (EKG). Shenoy's diagnosis was that Willie Ann had sufferedan acute myocardial infarction, symptomatic gallstones, hypertension, and diabetes.

Zuniga, a surgeon, performed the surgical consultation three days after her initial admission, on February 18, 2008. Zuniga confirmed the presence of gallstones, diagnosed inflammation of the gallbladder, and cleared Willie Ann for surgery to remove her gallbladder the next day, February 19, subject to a cardiology assessment. Dr. Shenoy saw Willie Ann again on February 18. A nuclear test was negative for ischemia. Shenoy also ordered an EKG, the results of which are included in Mazzei's report but the significance of which are not explained. Shenoy cleared Willie Ann for the gallbladder surgery.

Dr. Amin-Sankar, an anesthesiologist, performed a preoperative anesthesia assessment on February 19. He noted Willie Ann's past medical history, including her acute myocardial infarction and abnormal EKG. Amin-Sankar cleared Willie Ann for surgery.

On February 19, 2008, Zuniga performed the surgery. The surgery was an "uneventful" procedure. After leaving the post-anesthesia careunit (PACU), Willie Ann was to be sent to the intensive care unit because she had fluctuating oxygen

saturation levels, inadequate ventilation, and shallowness of breath. Shortly thereafter, she was transported back to the PACU and was placed on a ventilator. According to Mazzei's report, Amin-Sankar prematurely extubated Willie Ann ten minutes later.Within a few minutes, Willie Ann was in respiratory arrest. She received CPR and medications, and Amin-Sankarreintubated her.

Thirty minutes later, Willie Ann was returned to the ICU. According to Mazzei's report, Jean became "agitated" and had trouble with the ventilator. She extubated herself and suffered a second respiratory arrest. She was re-intubated and given medications. An EEG the following day showed possible hypoxic encephalopathy—brain damage caused by lack of oxygen. A follow-up EEG the next day also indicated hypoxic encephalopathy. Mazzei's report does not discuss whether the EEGs differentiate between any damage caused by the first extubation and arrest and the second extubation and arrest. Willie Ann was unresponsive to stimuli, including painful stimuli. On February 25, Willie Ann was transferred to another facility for long-term care. She died on March 5, 2008 due to the hypoxic encephalopathy.

Penny filed a wrongful death medical malpractice suit against Doctor's Hospital, Mireles, Amin-Sankar, Shenoy, and Zuniga.[3] Penny alleged that Shenoy and Zuniga were negligent in clearing her mother for surgery. Specifically, Penny

[3] Only Shenoy and Zuniga are parties to this appeal.

alleged that there was no emergency or urgent reason to remove her mother's gallbladder and that her mother had experienced abdominal and chest pain for years without treatment. In addition, Willie Ann had suffered an acute myocardial infarction before the gallbladder surgery and had a history of numerous health problems. Although she was stable, her history created additional risks that made her a poor candidate for surgery, and therefore Shenoy and Zuniga negligently cleared Willie Ann for the surgery.

Penny timely served an expert report from Mazzei, an anesthesiologist.[4] Mazzei's report focused primarily on the anesthesiologist, Amin-Sankar. Concerning Shenoy and Zuniga, Mazzei stated that if Willie Ann "had not undergone elective surgery on February 19, 2008, she would not have experienced the respiratory arrests that resulted from her extubation and she would have, in all probability, survived."

Concerning Amin-Sankar, Mazzei's report states, "In reasonable medical probability, if Ms. Jean had not been prematurely extubated, she would not have had the increased demands placed on her body which caused her subsequent respiratory arrest, anoxic brain injury and death." He further explained in his general discussion of causation that the anesthesiologist should have been aware of

[4] *See* TEX. CIV. PRAC. & REM. CODE ANN.§ 74.351(a).

the risks of premature extubation. A fair reading of Mazzei's report is that the premature extubation was the immediate cause of death:

> The time it takes for a patient's anesthesia effect to lessen enough for them to be able to breathe independently varies from patient to patient and is affected by a patient's physiology and underlying disease processes. For a patient like Ms. Jean who had recently suffered a MI, it should have been expected that it would take her a significant period of time before she was capable of being extubated to breathe on her own. This was not taken into account nor was her clinical picture when she was untimely extubated [by the anesthesiologist]. This caused her to suffer a respiratory arrest which further stressed Ms. Jean's ability to recover from surgery and lead to another respiratory arrest with anoxic encephalopathy and death . . . . When Ms. Jean extubated herself, the failure to address her increasing respiratory distress resulted in a subsequent respiratory arrest causing the anoxic encephalopathy which lead to her death.

Shenoy and Zuniga moved to dismiss, asserting that the report was inadequate to them. The trial court granted Penny an opportunity to amend the report. After receiving the amended report, Shenoy and Zuniga again moved to dismiss due to inadequacies in the report. The trial court denied the motions to dismiss, and this interlocutory appeal followed.

Standard of Review

We review a trial court's ruling on a motion to dismiss a healthcare liability lawsuit pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code under an abuse of discretion standard.*See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001) (reviewing dismissal under

predecessor statute, section 13(e) of article 4590i); *Runcie v. Foley*, 274 S.W.3d 232, 233 (Tex. App.—Houston [1st Dist.] 2008, no pet.). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles or if it clearly fails to analyze or apply the law correctly. *Runcie*, 274 S.W.3d at 232. In reviewing whether an expert report complies with Chapter 74, we evaluate whether the report "represents a good-faith effort" to comply with the statute. *Strom v. Mem'l Hermann Hosp. Sys*., 110 S.W.3d 216, 221 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). In making this evaluation, we must look only at the information contained within the four corners of the report. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002).

Adequacy of Dr. Mazzei's report

In their respective appeals, Shenoy and Zuniga attack various aspects of the adequacy of Mazzei's report, asserting it fails to meet the requirements of section 74.351 of the Texas Civil Practice and Remedies Code.*See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

I. Chapter 74 expert report requirements

Pursuant to section 74.351, medical-malpractice plaintiffs must provide each defendant physician and health care provider with an expert report or voluntarily nonsuit the action. *Id.* 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 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*). The statute defines an expert report as a written report by an expert that provides, as to each defendant, a fair summary of the expert's opinions, as of the date of the report, regarding: (1) the applicable standards of care; (2) the manner in which the care provided failed to meet the standards; and (3) the causal relationship between that failure and the injury, harm, or damages claimed. *See id.* § 74.351(r)(6);*Gray v. CHCA Bayshore, L.P.*, 189 S.W.3d 855, 858−59 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Although the report need not marshal all the plaintiff's proof, it must include the expert's opinions on the three statutory elements—standard of care, breach, and causation. *See Palacios*, 46 S.W.3d at 878; *Gray*, 189 S.W.3d at 859. In detailing these elements, the report must provide enough information to fulfill two purposes if it is to constitute a good faith effort: first, it must inform the defendant of the specific conduct the plaintiff has called into question, and, second, it must provide a basis for the trial court to conclude that the claims have merit. *Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011) (citing*Palacios*, 46 S.W.3d at 879). A report that merely states the expert's conclusions as to the standard of care, breach, and causation does not fulfill these two purposes. *Id.* "'[T]he expert must explain the basis of his statements and link his conclusions to the facts.'" *Wright*, 79

S.W.3d at 52 (quoting*Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). Furthermore, in assessing the report's sufficiency, the trial court may not draw any inferences, and instead must rely exclusively on the information contained within the report's four corners. *See Scoresby*, 346 S.W.3d at 556 (citing*Palacios*, 46 S.W.3d at 878).

II. Adequacy of report concerning causation

Within his second issue, Shenoy contends that Mazzei's report does not adequately address causation of Jean's injuries as a result of any negligence by Shenoy. As part of his sole issue, Zuniga similarly argues that the report is inadequate in its statement of causation for his alleged malpractice.

An expert report must include a fair summary of the causal relationship between the defendant's failure to meet the appropriate standard of care and the injury, harm, or damages claimed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6). An expert cannot merely state his conclusions or "provide insight" about the plaintiffs' claims, but must instead "explain the basis of his statements to link his conclusions to the facts."*Wright*, 79 S.W.3d at 52.In explaining causation, the report must explain how the physician's conduct caused the plaintiff's injuries. *Id.* at 53.

A. Assertions in Mazzei's expert report regarding causation

Mazzei's report asserts that the applicable standard of care breached by Shenoy included the responsibility to consider all of Willie Ann's co-morbidities because these conditions placed Willie Ann"at an unacceptably high risk for complicationsfrom surgery and anesthesia." The report identifies two risks from the surgery and anesthesia: (1) the stresses placed upon the cardiovascular and respiratory system during surgery and anesthesia and (2) the depression of the central nervous system and the resulting risk of "experiencing cardiovascular and respiratory problems." It also generally states that a patient'smedical history may increase these risks. It does not, however, quantify or otherwise describe the magnitude of risk for respiratory problems for a person undergoing this surgery with normal health or compare that risk to the risk for a person with pre-existing medical conditions like Willie Ann's. According to the report, these risks are addressed by intubating the patient "so the anesthesiologist can ventilate the patients while their central nervous system is depressed" and that intubation normally continues "until the patient is able to again breathe on [his] own." The report continues:

> . . . . Although complications arose as Ms. Jean was extubated followingsurgery, these complications occurred because of the medical conditions that shouldhave lead Dr. Shenoy to conclude that Ms. Jean was not an appropriate surgicalcandidate. If Ms. Jean had not undergone elective surgery on February 19, 2008, shewould not have experienced the respiratory arrests that resulted

> from her extubation andshe would have, in all probability, survived.
>
> In the "Causation" section, the report further states:
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> Ms. Jean was a patient who was still recovering from her MI who never shouldhave undergone elective surgery. By continuing to recommend the gallbladder removalsurgery, clearing her for surgery and performing surgery, Ms. Jean's healthcareproviders breached and violated the standards of care as set forth above andproximately caused her death.

Finally, Mazzei states for a patient like Willie Ann "it should have been expected that it would take her a significant period of time before she was capable of being extubated to breathe on her own."

B. Adequacy of the report concerning Shenoy

Mazzei's report states that the medical conditions that rendered Willie Ann unfit for surgery caused the complications that arose when she was extubated ("these complications occurred because of the medical conditions"). What he fails to do is provide a factual underpinning for that conclusion explaining why or how this occurred and whether it was all her medical conditions listed in his report or her myocardial infarction in particular that made the risk unacceptable and caused her respiratory arrest. These omissions make the report conclusory and deficient for purposes of section 74.351.

1. Expert reports cannot be conclusory to satisfy section 74.351.

An opinion on causation stated without the underlying facts is conclusory.

Jelinek v. Casas, 328 S.W.3d 526, 536 (Tex. 2010); *Arkoma Basin Exploration Co., Inc. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 n.32 (Tex. 2008). A conclusory opinion is not probative. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 818 (Tex. 2009); *see Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d874, 881 (7th Cir. 2011) (stating that mere conclusions are useless to the court).

This rule is not a mere procedural hurdle. Juries—or in the case of expert reports, judges—are often confronted with conflicting expert testimony. One expert may testify that X caused the plaintiff's injuries while a different expert may testify that X did not cause the plaintiff's injuries. The factfinder typically lacks the expertise necessary to form an opinion without expert assistance—this is why expert testimony is admitted in the first place. *See* TEX. R. EVID. 702. It is the expert's explanation of "how" and "why" causation exists that allows the factfinder to weigh the credibility of the expert's opinion and, when expert opinions conflict, to decide which testimony to disregard. *Cf. In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 440 (Tex. 2007) (detailing reasons why it is essential that the jury have access to the facts and data underlying an expert's testimony in order "to accurately assess the testimony's worth."). With respect to expert reports in healthcare liability claims, the expert's explanation is what allows the trial court to determine whether the claim has merit.*See Jelinek*, 328 S.W.3d at 539; *see also*

Scoresby, 346 S.W.3d at 552 (observing that Legislature enacted expert report requirement to elicit expert opinions at an early stage of the litigation to allow the trial court to determine that a basis exists for concluding that the claims have merit). Expert testimony that merely states a final conclusion on an essential element of a cause of action—such as causation—without providing a factual basis for that conclusion does not aid the jury in its role as factfinder but, rather, supplants it. This, an expert may not do. *See Greenberg Traurig of N.Y., P.C.v. Moody*, 161 S.W.3d 56, 97 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("Expert testimony is admissible to aid the jury in its decision, but it may not supplant the jury's decision."). Similarly, an expert report that merely asserts that a defendant physician's breach caused the plaintiff's injury without providing a factual basis does not provide the trial court with the information necessary to evaluate the merits of the plaintiff's claim. *See Jelinek*, 328 S.W.3d at 529.

The requirement that the expert's opinion must not be conclusory applies not only to trial testimony, but to expert reports required by section 74.351(a).*See Jelinek*, 328 S.W.3d at 539–40; *Wright*, 79 S.W.3d at 53.In *Jelinek*, the Texas Supreme Court found the trial court abused its discretion in denying a motion to dismiss because the expert's opinion on causation was conclusory. 328 S.W.3d at 539–40. The expert's report stated that "[the defendant's] breach of the appropriate standard of care in 'reasonable medical probability, resulted in a prolonged

hospital course and increased pain and suffering being experienced by [the plaintiff].'" *Id.* at 539. The Court emphasized, "[T]he report says nothing more regarding causation." *Id.* The Court faulted the report for offering no explanation "tying the conclusion to the facts" or of "how and why the breach caused the injury based on the facts presented." *Id.* at 539–40. This is precisely the information missing here: the how and the why.

In *Gray*, this court held that the expert report contained a conclusory statement concerning causation. 189 S.W.3d at 860. The report stated that "[t]he failure to monitor and detect the malpositioned left knee resulted in a dislocated left patella, severe pain and suffering, and subsequent medical treatment." *Id.* at 858. Like the Supreme Court in *Jelinek*, this court faulted the causation opinion for failing to "convincingly tie the alleged departure from the standard of care to specific facts of the case." *Id.* at 860.

2. Mazzei's report was conclusory on the issue of causation

Mazzei's causation opinion regarding Shenoy's decision to clear Willie Ann for surgery was conclusory. Although Mazzei's report states that anesthesia depresses the respiratory system and places stress on the heart, the report does not state that Willie Ann's history of heart problems or other conditions somehow made her more likely to suffer respiratory arrest after premature extubation than a person without those medical conditions. It does not state that her risks for the

complications that she experienced—respiratory arrest—were enhanced because of her medical conditions. The report does generally discuss why Willie Ann's other conditions affected her suitability for surgery, but does not link her medical conditions to the complication she experienced, respiratory arrest. It recognizes that a depressed central nervous system and the resulting risk of respiratory problems are normal byproducts of anesthesia for even a person with normal health. In other words, Mazzei's report shows that the surgery itself created the risk and does not state how or why Willie Ann's pre-existing conditions changed those risks except in conclusory terms. The report also states that those risks can be addressed by leaving her intubated for "a significant period of time" before extubation. Mazzei's report makes it clear that he believes that the premature extubation was the immediate cause of her death.

A report may be sufficient if it states a chain of events that begin with a health care provider's negligence and end in a personal injury. *SeePatel v. Williams,* 237 S.W.3d 901, 905 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *see alsoEnghv. Reardon*, No. 01-09-00017-CV, 2010 WL 4484022, at *8 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet.) (mem. op.). But neither case involved an event as remote as that involved here.

In *Patel*, the Fourteenth Court of Appeals held that an expert report sufficiently set forth causation when it presented a chain of events beginning with

an allegedly negligent prescription and ending with the patient's death. *Patel*, 237 S.W.3d at 905–06. Patel prescribed Williams an anti-dementia drug.*Id.* at 903. The report explained that the drug was not FDA-approved for patients with Williams's ailment and that known side-effects of the drug included restlessness or a need to keep moving.*Id.* Williams's family withdrew consent for the drug, but Patel continued to prescribe it. *Id.* Williams was being fed via feeding tube, and allegedly due to the restlessness from the drug, she removed the tube. *Id.*The report identified nurses' notes that described Williams as agitated and stated that she kept pulling at her feeding tube. *Id.* The nursing staff improperly re-inserted the tube, causing a small cut, which became infected because of the contents of the feeding tube entering the cut. *Id.* The cut developed into an abscess requiring multiple surgeries. *Id.* The report concluded that Williams's death was caused by the infection from the improperly re-inserted feeding tube. *Id.* at 904. The Fourteenth Court held that the trial court did not abuse its discretion in determining the report was not conclusory or speculative concerning causation. *Id.* at 905–06.

The report in this case is distinguishable. The report identifies the alleged breach—clearing Willie Ann for surgery with her medical history—as did the report in Patel—prescribing an unapproved drug without consent. *See id.* But there the similarities end. In *Patel*, the report explained that a known side effect of the drug was restlessness, and the restlessness caused Williams to become agitated

and remove her feeding tube. *Id.* Willie Ann likewise became agitated and removed her breathing tube. The report, however does not explain any connection between clearing Willie Ann for surgery or her medical history and her agitation. While the report in *Patel* explained each step on the path of causation, the report in this case does not.[5]

There were "many links in the chain of events" that began with the pre-surgical clearance and ended with her death, but Mazzei failed to explain and support each link. While Mazzei explains how Willie Ann's premature extubation prevented her from "maintain[ing] the oxygenation in the blood," increasing her risk for respiratory arrest, he fails to explain what role her pre-existing medical conditions played in her respiratory arrest. It is here that we part company with the trial court and find that it abused its discretion. Mazzei does not link the alleged negligence—clearing Jean for surgery—with the premature extubation except that one occurred before the other. That is not enough; it is only a statement of "but for" causation. If that is all that section 74.351 requires to demonstrate causation,

[5] The report in this case is similarly distinguishable from the report in *Engh*. In *Engh*, the report identified the alleged breach—placing a surgical clip on the ureter during surgery. 2010 WL 4484022 at *6. The report also explained the consequences of a clipped ureter. Specifically, the report detailed how damage to and, eventually, loss of the kidney would result from clipped ureter. *Id.* Thus, this court found the report adequate, although Engh saw multiple other doctors and several months passed after his surgery and before he lost his kidney. *Id.* at *10. The report explained how the alleged breach caused the loss of Engh's kidney, while the report here contains no explanation of how clearing a patient with a history like Willie Ann's causes premature extubation, self-extubation, or the eventual death of the patient.

almost any prior action taken by a health care provider could be said to cause the ultimate outcome. For example, the referral by the emergency room physician for the surgical consultation with Dr. Shenoy also was a cause of Willie Ann's death if all that is necessary is for an event to have preceded the injury.

To establish cause in fact, Mazzei had to discuss why the act or omission was a substantial factor in causing the injury and without which the harm would not have occurred.*W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005); *see alsoTranscon. Ins. Co. v. Crump*, 330 S.W.3d 211, 214 (Tex. 2010) (stating that plaintiff must prove "cause in fact (or substantial factor)"); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007) (stating that producing cause requires that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred). The report does not do so. Mazzei's report does not link facts from the alleged negligence in clearing her for surgery to Willie Ann's death. Willie Ann did not suffer a cardiac arrest during or after the surgery; she suffered respiratory arrest and only after a premature extubation. Mazzei does not state that Willie Ann suffered any unusual respiratory issue during the surgery itself; the surgical procedure was "uneventful." And based on Mazzei's report, it appears that any patient—healthy or with a history of medical conditions—who is prematurely extubated will not sufficiently "maintain the oxygenation in the blood" and

therefore is at risk for respiratory arrest. The mere fact that Willie Ann was cleared for surgery before her death does not mean that the clearance for surgery caused her death. *Jelinek*, 328 S.W.3d at 533 (cautioning against the *post hoc ergo propter hoc*fallacy, that is, reasoning that an earlier event caused a later event simply because it occurred first).

A causal link can be too attenuated to satisfy the causation requirement for an expert report. *See Gonzalez v. Sebile*, No. 09-09-00363-CV, 2009 WL 4668892, at *4 (Tex. App.—Beaumont Dec. 10, 2009, pet. denied) (mem. op.). In *Gonzalez*, the physician was sued for clearing the patient for surgery without obtaining a cardiologist consultation despite an earlier open heart surgery. 2009 WL 4668892at *2. According to the plaintiffs, the defendant anesthesiologist fell below the standard of care by failing to disqualify the plaintiff as not fit for surgery in part because of the risks of general anesthesia. *Id.* The court held that the report's statement that the plaintiff would not have been injured if he had not undergone surgery in the first place was "too attenuated to set forth evidence of causation with sufficient specificity to inform" the physician of the alleged misconduct and to allow the trial court to conclude that the plaintiff's claims had merit. *Id.* at *3. Mazzei's report suffers from the same defect.

While Mazzei's report "provides insight" concerning the claims surrounding Jean's death, it does not link the facts of the decision to clear her for surgery to the

conclusion that Shenoy's alleged breach of the standard of care caused Jean's death. It does not, therefore, provide a basis for the trial court to have concluded that causation was demonstrated for Shenoy's decision to clear Willie Ann for surgery. *See Palaciois*, 46 S.W.3d at 879 (report must provide basis for concluding that claims have merit). We conclude, therefore, that the report is conclusory and inadequate with respect to Shenoy. *See Gray*, 189 S.W.3d at 860; *see also Jelinek*, 328 S.W.3d at 539–40 (finding report inadequate concerning causation because it did not explain "how and why the breach caused the injury based on the facts presented").

We sustain this portion of Shenoy's second issue.

B. Adequacy of the report concerning Zuniga

Penny has not alleged, and Mazzei's report does not assert, that Zuniga negligently performed surgery; rather, the surgery is described as "uneventful." For the same reasons that the report is inadequate as to causation for Shenoy, we conclude that, with respect to Zuniga, the report fails to explain how and why Zuniga's clearing of Willie Ann for surgery caused her death, fails to demonstrate the causal link necessary to have a meritorious claim, and is conclusory and inadequate. *See Gray*, 189 S.W.3d at 860; *Jelinek*, 328 S.W.3d at 539–40.

We sustain this portion of Zuniga's sole issue.[6]

Conclusion

We reverse and render an order dismissing the claims against Shenoy and Zuniga.

Harvey Brown
Justice

Panel consists of Chief Justice Radack and Justices Sharp and Brown.

Sharp, J., dissenting. Dissent to follow.

[6] Because we have sustained Shenoy's second issue in part and Zuniga's sole issue in part, we do not address the other arguments raised by the parties. *See* TEX. R. APP. P. 47.1.