**Opinion issued June 30, 2022**

**In The**

# Court of Appeals

**For The**

# First District of Texas

---

**NO. 01-20-00463-CV**

---

**JERRY M. KEEPERS, M.D., ERIC KAY-FUNG CHAN, M.D., AND VISTA COMMUNITY MEDICAL CENTER, LLP D/B/A SURGERY SPECIALTY HOSPITALS OF AMERICA, Appellants**

**V.**

**MICHAEL SMITH AND VALERIE SMITH, Appellees**

---

**On Appeal from the 295th District Court**
**Harris County, Texas**
**Trial Court Case No. 2019-47101**

---

## MEMORANDUM OPINION

In this interlocutory appeal,[1] appellants, Jerry M. Keepers, M.D., Eric Kay-Fung Chan, M.D., and Vista Community Medical Center, LLP, doing business as Surgery Specialty Hospitals of America ("Vista Community Medical Center") (collectively, "appellants"), challenge the trial court's order overruling their objections and denying their motions to dismiss the health care liability claims[2] brought against them by appellees, Michael Smith ("Michael") and Valerie Smith ("Valerie") (collectively, "the Smiths"), in the Smiths' suit for negligence. In multiple issues, appellants contend that the trial court erred in overruling their objections and denying their motions to dismiss the Smiths' claims against them.[3]

We affirm.

## Background

In their petition, the Smiths allege that on August 8, 2017, Michael suffered a severe anoxic brain injury[4] "while undergoing facet nerve blocks for severe lumbar

---

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

2 *See id.* § 74.001(a)(13) (defining "[h]ealth care liability claim" (internal quotations omitted)).

3 *See id.* § 74.351 (governing expert reports).

4 "[A]n anoxic brain injury . . . occurs when the brain does not receive enough blood flow or oxygen to maintain its activity and keep itself alive." *See Garcia v. State*, No. 08-02-00085-CR, 2004 WL 1895184, at *3 (Tex. App.—El Paso Aug. 25, 2004, pet. ref'd) (mem. op., not designated for publication) (expert witness testified "[t]here can be different causes of an anoxic brain injury such as cardiac arrest, strangulation, or suffocation which interrupts the flow of blood to the brain. Trauma can also lead to anoxic brain injury if it causes sufficient intercranial pressure.").

spine pain" (the "lumbar facet block procedure") at Vista Community Medical Center. At the time, Michael was under the care of Drs. Keepers and Chan and Vista Community Medical Center.

The Smiths bring health care liability claims against appellants. As to Drs. Keepers and Chan, the Smiths allege that they were negligent in their treatment and care of Michael related to the lumbar facet block procedure. According to the Smiths, Drs. Keepers and Chan failed to accurately and completely perform a pre-operative risk assessment, failed to obtain orthopedic and neurological surgery consultations, failed to provide appropriate disclosure of operating and anesthesia risks, failed to timely obtain and assess Michael's cardiology records, failed to perform appropriate pre-operative tests, failed to perform or obtain appropriate internal medicine and cardiology procedure clearance, failed to note Michael's pre-operative history of cardiac arrhythmias, failed to note pre-operative evidence of pneumonia, failed to provide intra-operative monitoring of Michael while he underwent monitored anesthesia care ("MAC"), failed to properly assess Michael's symptoms, failed to properly treat Michael's conditions, failed to properly and adequately recognize the extent of Michael's cardiovascular irregularity, inappropriately removed monitoring equipment from Michael while he was in a

prone position,[5] inappropriately removed monitors from Michael who was unconscious, failed to stabilize Michael before removing monitors, failed to timely assess arterial blood gases, failed to correct metabolic acidosis, failed to monitor and treat Michael's low serum magnesium levels, entered inaccurate information in Michael's medical records, failed to timely transfer Michael, who was critically ill, to a facility with staff and equipment commensurate with his needs, and failed to protect Michael from preventable injury. The Smiths allege that the negligence of Drs. Keepers and Chan proximately caused injuries to Michael and damages to Valerie.

As to Vista Community Medical Center, the Smiths allege both vicarious and direct liability health care liability claims. They allege that Vista Community Medical Center, under the theory of agency or respondeat superior, is vicariously liable for the negligent treatment and care of Michael by its "agents, servants, employees, parent agents, ostensible agents, agents by estoppel[,] and/or representatives, including but not limited to its doctors and nurses." And the negligence of its agents, servants, employees, parent agents, ostensible agents, agents by estoppel, representatives, doctors, and nurses proximately caused injuries to Michael and damages to Valerie. The Smiths also allege that Vista Community

---

[5] *See Prone*, OXFORD DICTIONARY OF ENGLISH (2d ed. 2009) (defining "prone" as "lying flat, especially face downwards").

Medical Center was negligent in failing to provide adequate policies and procedures regarding MAC, failing to provide appropriate policies and procedures for the pre-anesthesia and pre-operative assessments of patients "undergoing facet blocks under MAC," failing to provide nursing policies and procedures for risk assessments of surgical and anesthesia patients, failing to assess Michael's risks, failing to provide continuous nursing care and assessments of an anesthetized Michael, abandoning Michael while he was anesthetized and unconscious, failing to prevent and report inappropriate actions of Dr. Chan in removing monitors from Michael when he was unresponsive, failing to provide for the timely transfer of Michael to a facility with staff and equipment commensurate with Michael's needs, failing to complete the pre-surgical checklist, "including confirmation of [l]aboratory, chest x[-]rays, [h]istory and [p]hysical, anesthesia evaluation[,] and signed consent form as listed on the 'Pre Surgical Checklist for All Patients,'" and failing to hire, supervise, train, and retain competent agents and employees. The negligence of Vista Community Medical Center proximately caused injuries to Michael and damages to Valerie.

The Smiths request, as to Michael, damages for past and future physical pain and suffering, past and future mental anguish, past and future physical impairment, past and future disfigurement, past and future medical expenses, and past and future

loss of earning capacity. As to Valerie, the Smiths request damages "relating to . . . loss of consortium and household services."

To support their claim, the Smiths timely served appellants with an initial expert report authored by Robert Groysman, M.D.[6] Appellants objected to the initial expert report, and the trial court signed an order allowing the Smiths thirty days to cure any deficiencies in Dr. Groysman's initial expert report.[7] The Smiths timely served appellants with a supplemental expert report authored by Dr. Groysman.[8]

In his expert reports, Dr. Groysman states that he is a licensed physician trained in anesthesiology and pain medicine who is currently practicing medicine. He is a Diplomate of the American Board of Anesthesiology and a Diplomate of the American Board of Pain Medicine. Dr. Groysman was an anesthesiology resident at Robert Wood Johnson University Hospital. He also served as an attending anesthesiologist, a director of anesthesia, and the chief of anesthesiology at various healthcare facilities during his career, including surgery centers and pain management facilities. As an attending anesthesiologist, director of anesthesia, and chief of anesthesiology, he supervised nurse anesthetists, evaluated patients pre-operatively, handled post-operative patient issues, and ensured efficient flow of

---

6 Dr. Groysman attached his curriculum vitae ("CV") to his expert report.

7 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c).

8 Dr. Groysman attached his CV to his supplemental expert report. He incorporated it by reference in his supplemental expert report.

patients. Dr. Groysman also developed policies and procedures for the healthcare facilities where he worked, and he served as a consultant to several surgery centers.

Dr. Groysman states that he is familiar with the "issues suffered by Michael . . . that led to him suffering an anoxic brain injury." He has treated patients like Michael. He has performed a lumbar facet block procedure—the procedure performed on Michael—and knows the standard of care for a physician who performs a lumbar facet block procedure.[9] He also knows the outcomes that can reasonably be expected in patients who undergo a lumbar facet block procedure as such procedures are part of his medical practice. Further, Dr. Groysman has provided anesthesia for patients undergoing a lumbar facet block procedure—the procedure performed on Michael—and he knows the standard of care for an anesthesiologist who provides anesthesia for a lumbar facet block procedure.

In his expert reports, Dr. Groysman states that on August 8, 2017, Michael "suffered severe complications during and following a bilateral L3-L4, L4-L5[,] and L5-S1 'facet block,'" or a "diagnostic medial branch block," which led to an anoxic brain injury. According to Dr. Groysman, an anoxic brain injury occurs when the

---

[9] Dr. Groysman has also performed the following procedures: "cervical and lumbar facet joint injections, medial branch blocks, [cervical epidural steroid injections], [lumbar epidural steroid injections], cervical and lumbar [transforaminal epidural steroid injections], [sacroiliac joint] injections, nerve blocks[,] including genicular and occipital nerve, major joint injections, rhizotomies (cervical, lumbar, [sacroiliac joint], and genicular), trigger points, and [spinal cord stimulation] trial."

brain is deprived oxygen. "The neural cells begin to die through[] a process called apoptosis." An anoxic brain injury results in diminished brain function, and if the brain is deprived oxygen for too long, an anoxic brain injury may become fatal. Once a person who suffers an anoxic brain injury regains consciousness, the effects of the injury are often similar to a person who has suffered a traumatic brain injury.

As to Michael, Dr. Groysman explains that Michael had a complicated medical history involving hypertension, diabetes, and hypercholesterolemia. He had previously undergone at least three lumbar epidural injections. He also previously had a lumbar radiofrequency thermocoagulation ("RFTC") procedure. And he underwent multiple pain treatments, including ultrasound lumbar trigger point injections, lumbar facet blocks, and lumbar rhizotomies. Dr. Keepers performed all of these procedures on Michael in the past.

On February 21, 2017, Michael underwent a lumbar rhizotomy, and on May 2, 2017, Michael underwent repeat rhizotomies at "L3-L4, L4-L5, [and] L5-S1." According to Dr. Groysman, rhizotomies, when performed on the lumbar medial branch nerves typically last six months to one year, and "[i]t is often unnecessary to perform additional diagnostic medial branch blocks once a rhizotomy is proven successful for a particular area." Thus, the lumbar facet block procedure, like the one Michael underwent on August 8, 2017, would have been considered an elective

procedure rather than an urgent or emergency procedure and a patient, such as Michael, "should be optimized prior to any elective procedure."

Yet, on July 31, 2017, Michael was seen by a nurse practitioner. The nurse practitioner "reorder[ed] facet blocks to be done on the lower three levels bilaterally." (Internal quotations omitted.) Dr. Keepers reviewed this decision by the nurse practitioner on July 31, 2017. The lumbar facet block procedure was "planned and quickly approved" for August 8, 2017. There was no physical examination of Michael before the lumbar facet block procedure. There was no "cardiovascular assessment or clearance for the procedure." Nor was there a consultation with Michael's cardiologist, despite Michael having risk factors, including: age, hypercholesterolemia, hypertension, diabetes, obesity, history of cardiac arrhythmias, an abnormal electrocardiogram ("EKG"), elevated white blood cell count, and evidence of pneumonia. These risk factors required an assessment of risk and an evaluation of the general health and safety of the procedure related to Michael.

The pre-operative assessment form related to the lumbar facet procedure listed general anesthesia as the "anesthesia plan" for the facet block procedure. According to Dr. Groysman, there did not appear to be an "informed anesthesia consent/disclosure form" for Michael's lumbar facet block procedure. "The consent

for anesthesia [was] very broad," and "[t]here [were] no appropriate evaluation results noted in [Michael's medical] records."

On August 8, 2017, Dr. Keepers performed the lumbar facet block procedure on Michael. At 9:00 a.m., "an IV was started." The anesthesia records list the procedure time from 9:00 a.m. to 9:13 a.m. Dr. Chan, the anesthesiologist, initiated anesthesia at 9:01 a.m. The "anesthesia agents included Versed 2 mg and Fentanyl 100 mg . . . with Propofol 30 mg." According to Dr. Groysman, Propofol, a "sedative/hypnotic," is a general anesthetic that can induce unconsciousness and respiratory depression or respiratory arrest when used with Fentanyl, a potent narcotic, and Versed, a benzodiazepine. "The use of these three agents together is controversial," and "[t]he combination of the[] drugs is known to be associated with hypoventilation, upper airway obstruction and apnea, due in part to the effect on the pharyngeal muscles." The combination also has significant cardiovascular effects, and so constant monitoring of a patient is required and essential to the prevention of complications. Failure to appropriately monitor a patient's airway patency and ventilation falls below the applicable standard of care.

Dr. Keepers, Dr. Chan, certain nurses, and other staff members were in the operating room during the lumbar facet block procedure. At the end of the procedure, Dr. Chan "removed all monitors," while Michael "was still in a prone position and still unresponsive." Dr. Chan removed the "cardiac leads, [the] blood

pressure cord and 02 saturation (pulse oximeter) from" Michael. When Michael was turned over onto the stretcher, he was a "bluish-purple" color. According to Dr. Groysman, the monitors were removed from Michael "before [he] was alert and in a supine position[10] where his face and chest could at least [have] be[en] visible to assess breathing and color." The medical records showed a fifteen-minute gap in vital signs after the procedure ended. In other words, there was a fifteen-minute gap "with no monitoring while [Michael] was in need of emergent care."

Dr. Chan initiated oxygen via a mask and nurses began reconnecting Michael to "cardiac, blood pressure and oxygen saturation monitors." (Internal quotations omitted.) A "Code Blue was initiated[,] and other employees began to assist with the code." (Internal quotations omitted.) Another physician began chest compressions while Michael was connected to an automated external defibrillator ("AED"). The AED determined that "no shock was needed," and chest compressions were continued by another person. (Internal quotations omitted.) After a couple of minutes, the AED analyzed Michael again and determined that "no shock was needed." (Internal quotations omitted.) Dr. Chan stated that Michael had a pulse so chest compressions could be stopped.

---

10 *Supine*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014) (defining "supine" as "lying on the back or with the face upward").

At 9:43 a.m., another physician started "a second peripheral IV." And there were several attempts to obtain blood from Michael, including an attempt by Dr. Chan. Those areas later evolved into wounds that required treatment by a wound care specialist.

The various physicians' notes from the lumbar facet block procedure state that Michael suffered a respiratory arrest with resultant hypoxia[11] and bradycardia.[12] Dr. Keepers' report states that Michael "tolerated the procedure well" and "[a]s he was being turned over back to his bed he coded." (Internal quotations omitted.) "He was resuscitated[,] and his lab work looked normal, including his cardiac enzymes. He may have had a stroke . . . ." (Internal quotations omitted.) According to Dr. Groysman, it is more likely than not that the heavy sedation that Michael was provided for the lumbar facet block procedure and the prone position during the procedure produced an unrecognized pulmonary aspiration or prolonged airway

---

11 *See Tex. Health Care, P.L.L.C. v. E.D.*, No. 02-18-00300-CV, 2020 WL 1057332, at *5 n.19 (Tex. App.—Fort Worth Mar. 5, 2020) (mem. op.) (noting expert defined "[h]ypoxia" as "reduced oxygen in blood and[/]or tissue"), *rev'd*, 644 S.W.3d 660 (Tex. 2022); *Hypoxia*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014) (defining "hypoxia" as "a deficiency of oxygen reaching the tissues of the body").

12 Bradycardia "means a slow heart rate, usually less than sixty beats per minute." *Grotti v. State*, 273 S.W.3d 273, 278 n.10 (Tex. Crim. App. 2008); *see also Bradycardia*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014) (defining "bradycardia" as "relatively slow heart action").

obstruction inducing respiratory arrest and the resulting hypotension[13] and bradycardia. Although he was mask ventilated and intubated and "the actions of [cardiopulmonary resuscitation ("CPR") were] started," Michael was hypoxic or anoxic for a prolonged period before the start of CPR. "It is unclear from the records if [Michael] was ever pulseless, [but] he became bradycardic and hypotensive as well as in respiratory arrest."

The "case manager" was notified at 12:30 p.m. to obtain a transfer for Michael from Vista Community Medical Center to a hospital. (Internal quotations omitted.) An ambulance transported Michael to a hospital at 2:40 p.m.

Dr. Groysman states in his expert reports that Michael's medical records from the hospital show that on August 9, 2017—the day after the lumbar facet block procedure—a cardiologist noted that Michael had a history of mild coronary artery disease and hypertension with "some irregular heartbeats and [premature ventricular contractions]" and he may have had "some atrial fibrillation in the past." (Internal quotations omitted.) Atrial fibrillation carries a risk of blood clots and stroke. At the time that the cardiologist evaluated Michael, he was "stable from a cardiac standpoint with normal enzymes." An EKG "showed sinus rhythm but prolonged QT interval and was therefore abnormal." Michael was comatose and unresponsive,

---

13 *Hypotension*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2014) (defining "hypotension" as "abnormally low blood pressure").

with "sluggish and unequal papillary response to light stimulation." Michael's magnesium level was critically low, and Dr. Groysman noted that the magnesium level had not been monitored at Vista Community Medical Center. Michael was "placed on an Arctic Sun whole body cooling system," in order to "reduce brain adverse reaction to hypoxic insults."

A neurologist also evaluated Michael and the prognosis for neurologic recovery was "felt guarded." "Plans were made for electroencephalogram [("EEG")] and brain contrast [computed tomography ("CT")] once the cooling was reversed." Michael was receiving Propofol because of ventilator sedation, but that caused hypertension, so instead he was given Versed and Fentanyl. Because Michael's white blood count was elevated and nurses heard abnormal breath sounds, a chest CT Arteriogram was done "to rule out pulmonary embolism." "No emboli was seen but there was a right greater than left consolidation in the lungs with small bilateral effusions (fluid collections)." A non-contrast brain CT showed no acute changes.

On August 10, 2017, chest radiographs and echocardiogram were done, which showed no significant structural or motion abnormalities "with preserved left ventricular ejection fraction ('pump efficiency')." On August 11, 2017, physical restraints were ordered because of Michael's "mental status [of] agitation and [his] attempts to interfere with treatment." A CT of Michael's brain was also done, which

was unchanged, as "was the chest pathology." On August 12, 2017, an EEG showed "no discernable posterior basic rhythm with low voltage consistent with [a] very severe diffuse cerebral dysfunction." (Internal quotations omitted.) "A trial of extubation was started and initially well tolerated," but "the persistent lung infiltrated may [have] represent[ed] aspiration pneumonia." (Emphasis omitted.) Antibiotics were begun.

On August 14, 2017, Michael exhibited some questionable purposeful movements and a questionable ability to follow some commands. He remained agitated despite sedation; exit alarms were placed on his bed. He "continued to have abnormal EKGs suggesting ischemia and . . . atrial fibrillation was seen." Michael was given multiple medications for heart rate and rhythm control and anticoagulation and an "Amiodarone IV" was started. Michael began opening his eyes more consistently and trying to speak, but he did not consistently follow commands.

On August 15, 2017, while being weaned from the ventilator, Michael began gurgling and "desaturating to 90% SaO2." He became agitated and began breathing rapidly, so he was reintubated and sedated. "A nasogastric tube was . . . placed to prevent aspiration." On August 17, 2017, Michael was weaned from the ventilator. A heel wound was observed which was likely a decubitus or pressure ulcer.

Michael slowly improved neurologically. On August 19, 2017, he had slurred but intelligible speech, and he was increasingly alert and arousable. Physical and speech therapy was begun. Michael could verbalize his birthday and address, but he required maximum assistance and "cueing to maintain orientation[] and he showed poor insight and pragmatic behavior." (Internal quotations omitted.) The physicians at the hospital believed this was due to hypoxic encephalopathy.[14]

On August 22, 2017, magnetic resonance imaging ("MRI") of Michael's brain showed no evidence of stroke or any other acute injury such as a mass, midline shift of the ventricles or infarctions. There was atrophy or wasting that could be related to brain trauma.

On August 23, 2017, Michael was evaluated for rehabilitation. A hospital physician noted that Michael was not consistently able to follow one-step directions. He demonstrated significant difficulty with thought formulation and expression. He had tangential speech, circumlocution, and word finding errors in conversation. His safety awareness was not intact, and he was impulsive. He "demonstrated moderate to severe deficits in pragmatics." (Internal quotations omitted.) The hospital

---

[14] *See Shenoy v. Jean*, No. 01-10-01116-CV, 2011 WL 6938538, at *2 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, pet. denied) (mem. op.) (defining "hypoxic encephalopathy" as "brain damage caused by lack of oxygen"); *Constancio v. Bray*, 266 S.W.3d 149, 165 n.4 (Tex. App.—Austin 2008, no pet.) (Patterson, J., dissenting) (noting "hypoxic encephalopathy" "is a degenerative disease of the brain caused by hypoxia from either decreased rate of blood flow or decreased oxygen content of arterial blood").

physician concluded that Michael's "cognitive-linguistic abilities f[e]ll within the severe range of impairment." (Internal quotations omitted.) It was believed that Michael had multifactorial encephalopathy[15] with hypoxic encephalopathy. Michael required rehabilitation, but there was a concern that he would be uncooperative with his participation.

On August 24, 2017, Michael could feed himself, but still required maximum assistance and supervision. Although there were attempts to arrange in-patient rehabilitation, Michael frequently refused to cooperate with therapy, and the Smiths chose home care. In home nursing care as well as physical, occupational, and speech therapy were arranged for Michael. On August 31, 2017, Michael was discharged from the hospital to his home.

As to the standard of care and breach of the standard of care for Drs. Keepers and Chan, Dr. Groysman states in his expert reports that Drs. Keepers and Chan, in their treatment and care of Michael related to the lumbar facet block procedure, were required to: accurately and completely perform a pre-operative risk assessment before the procedure and anesthesia, consult Michael's cardiologist, adequately

---

15 *See Hancock v. Rosse*, No. 02-19-00126-CV, 2020 WL 479589, at *8 (Tex. App.—Fort Worth Jan. 30, 2020, pet. denied) (mem. op.) ("Encephalopathy is a disease of the brain involving alteration of the brain structures." (internal quotations omitted)); *Morrell v. Finke*, 184 S.W.3d 257, 275 n.12 (Tex. App.—Fort Worth 2005, pet. denied) ("Encephalopathy is injury to the brain cells." (internal quotations omitted)).

document Michael's pre-operative history of cardiac arrhythmias and history of pneumonia, obtain an informed anesthesia consent/disclosure form from Michael, provide intra-operative monitoring of Michael while he was undergoing MAC[16] as required by the American Society of Anesthesiology ("ASA"), use proper equipment to continuously monitor Michael's condition, ensure that monitoring equipment was not removed before Michael was rotated to the supine position, regained consciousness, and was stabilized, monitor and treat Michael's low serum magnesium levels, record complete and accurate information in Michael's medical records, and upon Michael becoming critically ill, ensure that Michael was timely transferred to a facility with staff and equipment commensurate with Michael's needs.

According to Dr. Groysman, Drs. Keepers and Chan breached the applicable standard of care in several ways. First, Drs. Keepers and Chan failed to accurately and completely perform a pre-operative risk assessment of Michael before the lumbar facet block procedure and anesthesia. Drs. Keepers and Chan failed to do

---

[16] Dr. Groysman explained that MAC "is a planned procedure during which the patient undergoes local anesthesia, together with sedation, and analgesia provided by an anesthesiologist. In all cases, patients should be comprehensively assessed. . . . [P]atients undergoing MAC [should] be screened pre[-]operatively just as patients undergoing general inhalation anesthesia because unlike intubate patients, their airways are not protected by endotracheal intubation. . . . [A] dedicated person [should be] in constant observation of breathing activity in addition to the person delivering the MAC" in the operating room.

pre-operative testing, "such as labs, x[-]rays[,] or EKGs," to prepare for the procedure. Second, Drs. Keepers and Chan failed to consult Michael's cardiologist before the lumbar facet block procedure, despite Michael's cardiac medical history. Michael's risk factors included his age, hypercholesterolemia, hypertension, diabetes, obesity, a history of cardiac arrhythmias, an abnormal EKG, elevated white blood cell count, and evidence of pneumonia. There was no cardiovascular assessment of clearance done for the procedure, and no pre-operative risk assessment or cardiovascular evaluation performed. Third, Drs. Keepers and Chan did not adequately document Michael's pre-operative history of cardiac arrhythmias and history of pneumonia and did not "comprehensively assess[]" Michael before the procedure. Fourth, Drs. Keepers and Chan did not maintain intra-operative monitoring of Michael while he was undergoing MAC, and there was not a "dedicated person in constant observation of breathing activity in addition to the person delivering the MAC." Drs. Keepers and Chan did not ensure that Michael's airway patency and ventilation were appropriately monitored during the lumbar facet block procedure. Fifth, Drs. Keepers and Chan did not use proper equipment to continuously monitor Michael's condition during the lumbar facet block procedure and removed the monitoring equipment from Michael while he was still in a prone position and before he was rotated to a supine position, regained consciousness, and was stabilized. Sixth, Drs. Keepers and Chan failed to monitor and treat Michael's

low serum magnesium levels. Seventh, Drs. Keepers and Chan did not record complete and accurate information in Michael's medical records. And eighth, Drs. Keepers and Chan did not facilitate a timely transfer of Michael to a facility with staff and equipment commensurate with Michael's needs. Instead, attempts to transfer Michael did not begin until "three hours after [he] coded," and "it took approximately three additional hours for the transfer [of Michael to a hospital] to actually occur."

As to causation related to Drs. Keepers and Chan, Dr. Groysman states that because of the breaches by Drs. Keepers and Chan, Michael encountered complications and suffered a severe anoxic brain injury in connection with the lumbar facet block procedure, and without such breaches, Michael would not have been injured. More specifically, Dr. Groysman explains that Drs. Keepers' and Chan's failure to accurately and completely perform a pre-operative risk assessment before the lumbar facet block procedure and anesthesia, failure to consult Michael's cardiologist, and failure to adequately document Michael's pre-operative history of cardia arrhythmias and history of pneumonia, caused them to be unaware of the specific health risks associated with Michael's condition. Had Drs. Keepers and Chan complied with the applicable standard of care, they would have known that Michael was not a "good candidate" for the lumbar facet block procedure under general anesthesia and local anesthesia could have been used instead. Drs. Keepers

and Chan also would have been able to explain the specific risks of the lumbar facet block procedure to Michael. Had those things occurred, Michael would not have suffered the aforementioned injuries, including the anoxic brain injury, and Michael likely would have been able to go home on the day of the procedure as expected. Additionally, Drs. Keepers' and Chan's failure to use proper equipment to continuously monitor Michael's condition during the procedure, as required by the ASA, failure to maintain intra-operative monitoring of Michael while he was undergoing MAC, and removal of monitoring equipment while Michael was still in the prone position, resulted in Michael's injuries, including the anoxic brain injury. Had Drs. Keepers and Chan complied with the standard of care, including by having Michael's airway patency and ventilation appropriately monitored during the procedure, it is likely that Michael's injuries could have been prevented, or at least lessened. And Drs. Keepers' and Chan's failure to facilitate a timely transfer of Michael to a facility with staff and equipment commensurate with his needs, likely resulted in an exacerbation of his injuries or a delay in their improvement. Hours passed with no transfer of Michael to a hospital in a situation where timing was critical to address Michael's injuries. In all, Drs. Keepers' and Chan's breaches of the standard of care prevented Michael from being fully capable of going home after the lumbar facet block procedure on August 8, 2017 and caused him to suffer an

anoxic brain injury and the consequential damages that resulted from the anoxic brain injury.

As to the standard of care and breach of the standard of care for Vista Community Medical Center, Dr. Groysman states that Vista Community Medical Center was required to: provide its employees with adequate policies and procedures regarding the monitoring of anesthesia care, provide appropriate policies and procedures for the pre-anesthesia and pre-operative assessment of a patient undergoing a lumbar facet block procedure under MAC, provide nursing policies and procedures for the risk assessment of surgical and anesthesia patients, provide continuous nursing care and assessments of an anesthetized patient, never abandon an anesthetized, unconscious patient, report inappropriate actions, such as the removal monitors from an unresponsive patient, complete a pre-surgical checklist, including a history and physical anesthesia evaluation and signed informed consent form "as listed on the 'Pre Surgical Checklist for All Patients,'" assess Michael's risks before the lumbar facet block procedure, and upon Michael becoming critically ill, timely transfer him to a facility with the staff and equipment commensurate with his needs.

According to Dr. Groysman, Vista Community Medical Center breached the standard of care in several ways. First, Vista Community Medical Center failed to provide its employees with adequate policies and procedures about the monitoring

of anesthesia care or, if policies and procedures were provided, they were not enforced or complied with. Second, Vista Community Medical Center failed to provide appropriate policies and procedures for the pre-anesthesia and pre-operative assessments of a patient undergoing a facet block under MAC, and if such policies and procedures were provided, they were not enforced or complied with. Third, Vista Community Medical Center failed to provide nursing policies and procedures for risk assessments of surgical or anesthesia patients, and if they were provided, they were not enforced or complied with. Fourth, Vista Community Medical Center failed to provide continuous nursing care and assessments to an anesthetized patient. Fifth, Vista Community Medical Center abandoned an anesthetized and unconscious patient as there was a fifteen-minute gap when Michael was not being monitored. Vista Community Medical Center failed to use proper equipment to continuously monitor Michael while he was undergoing MAC, as required by the ASA, removed monitoring equipment from Michael while he was still in a prone position, and failed to monitor Michael's airway patency and ventilation during the lumbar facet block procedure. Sixth, Vista Community Medical Center failed to prevent and report inappropriate actions that occurred during Michael's lumbar facet block procedure, such as the removal of monitors from an unresponsive patient. Seventh, Vista Community Medical Center failed to complete the pre-surgical checklist, including a history and physical anesthesia evaluation and a signed informed consent form

related to Michael's lumbar facet block procedure. Eighth, Vista Community Medical Center failed to assess Michael's risks for the lumbar facet block procedure. And ninth, Vista Community Medical Center failed to facilitate the timely transfer for Michael to a facility with the staff and equipment commensurate with Michael's needs. Attempts to transfer Michael did not start until around three hours after he "coded," and it took about three more hours for the transfer of Michael to a hospital to actually occur.

As to causation related to Vista Community Medical Center, Dr. Groysman states that because of the breaches by Vista Community Medical Center, Michael encountered complications and suffered a severe anoxic brain injury in connection with the lumbar facet block procedure, and without such breaches, Michael would not have been injured. More specifically, Vista Community Medical Center's failure to provide adequate policies and procedures caused its staff to be unaware of the proper actions to take "in situations in which such knowledge could have prevented . . . [Michael's] injuries." For instance, if the nurses knew that a risk assessment was required to be completed before the lumbar facet block procedure, they could have addressed the issue with the physicians before Michael's procedure. Further, Vista Community Medical Center's failure to use proper equipment to continuously monitor Michael's condition, failure to maintain intra-operative monitoring of Michael while he was undergoing MAC, as required by the ASA,

removal of the monitoring equipment while Michael was still in a prone position, and failure to appropriately monitor Michael's airway patency and ventilation during the lumbar facet block procedure resulted in Michael's injuries, including the anoxic brain injury. Vista Community Medical Center's staff was complacent in the neglectful monitoring of Michael during the lumbar facet block procedure, and such complacency allowed Michael to be neglected which resulted in his injuries. Additionally, Vista Community Medical Center's failure to facilitate a timely transfer of Michael to a facility with the staff and equipment commensurate with Michael's needs caused Michael's injuries, including his anoxic brain injury, to be exacerbated or his improvement to be delayed. In all, Vista Community Medical Center's breaches of the standard of care prevented Michael from being fully capable of going home after the lumbar facet block procedure on August 8, 2017 and caused him to suffer an anoxic brain injury and the consequential damages that resulted from the anoxic brain injury.[17]

Dr. Keepers objected to Dr. Groysman's expert reports and requested that the Smiths' health care liability claim against him be dismissed. Dr. Keepers asserted that Dr. Groysman's expert reports fail to identify the standard of care and breach of the standard of care as to Dr. Keepers. The expert reports only contain "vague

[17] Dr. Groysman also states in his expert reports that Vista Community Medical Center is vicariously liable for the negligence of Drs. Keepers and Chan as they "are employed by and/or principals of" Vista Community Medical Center.

assertions and generalized statements concerning [the] standard[] of care" and "[t]he breaches described by Dr. Groysman are all vague, ambiguous, and do not specifically implicate Dr. Keepers or his conduct, or inform him of what he did or should have done instead." And the expert reports "fail[] to adequately describe the causal connection between the alleged breaches of the standard of care and the harm allegedly suffered by [the Smiths]."

Dr. Chan objected to Dr. Groysman's expert reports and requested that the Smiths' health care liability claim against him be dismissed. Dr. Chan asserted that Dr. Groysman's expert reports are inadequate as to the applicable standard of care and breach of the standard of care related to Dr. Chan. The expert reports make conclusory statements as to the standard of care and breach of the standard of care, include an "identical standard of care" for Drs. Keepers and Chan, and assert "the identical opinion that both" Dr. Keepers and Chan breached the standard of care. Additionally, Dr. Groysman's "opinions as to causation are conclusory and not specific as to Dr. Chan."

Vista Community Medical Center objected to Dr. Groysman's expert reports and requested that the Smiths' health care liability claim against it be dismissed. Vista Community Medical Center asserted that Dr. Groysman's expert reports are inadequate as to the standard of care and breach of the standard of care related to Vista Community Medical Center. The expert reports are "vague, ambiguous, and

conclusory." The reports also "fail[] to adequately describe the causal connection between the alleged breaches of the standard of care and the harm allegedly suffered by [the Smiths]." Additionally, Vista Community Medical Center asserts that Dr. Groysman is not qualified to offer an opinion on the standard of care and breach of the standard of care as to Vista Community Medical Center.

After the Smiths responded to appellants' objections and motions to dismiss, the trial court overruled appellants' objections to Dr. Groysman's expert reports and denied appellants' motions to dismiss the health care liability claims against them.

**Standard of Review**

We review a trial court's decision on a motion to dismiss a health care liability claim for an abuse of discretion. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 858 (Tex. App.—Houston [1st Dist.] 2006, no pet.). We apply the same standard to a trial court's determination that an expert is qualified. *See Broders v. Heise*, 924 S.W.2d 148, 151–52 (Tex. 1996); *San Jacinto Methodist Hosp. v. Bennett*, 256 S.W.3d 806, 811 (Tex. App.—Houston [14th 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. *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010). When reviewing matters committed to a trial court's discretion, we may not substitute our own judgment for that of the trial court. *Bowie Mem'l*

*Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). A trial court does not abuse its discretion merely because it decides a discretionary matter differently than an appellate court would in a similar circumstance. *Harris Cty. Hosp. Dist. v. Garrett*, 232 S.W.3d 170, 176 (Tex. App.—Houston [1st Dist.] 2007, no pet.). But a trial court has no discretion in determining what the law is or in applying the law to the facts. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). In conducting our review, we always consider that the Legislature's goal in requiring expert reports is to deter baseless claims, not block earnest ones. *Jackson v. Kindred Hosps. Ltd. P'ship*, 565 S.W.3d 75, 81 (Tex. App.—Fort Worth 2018, pet. denied); *Gonzalez v. Padilla*, 485 S.W.3d 236, 242 (Tex. App.—El Paso 2016, no pet.); *see also Scoresby v. Santillan*, 346 S.W.3d 546, 554 (Tex. 2011).

Under the Texas Medical Liability Act ("TMLA"), a plaintiff asserting a health care liability claim must timely serve each defendant physician and health care provider[18] with at least one expert report, with a CV for the expert whose opinion is offered, to substantiate the merits of the plaintiff's claim. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (i); *see also Mangin v. Wendt*, 480 S.W.3d 701, 705 (Tex. App.—Houston [1st Dist.] 2015, no pet.). The expert report must provide a "fair summary" of the expert's opinions on (1) the applicable standard of care,

---

[18] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(A) (defining "[h]ealth care provider" (internal quotations omitted)).

(2) the manner in which the care rendered by the defendant physician or health care provider failed to meet the standard of care, and (3) the causal relationship between that failure and the injury, harm, or damages claimed. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6); *see also Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex. 2013). A "fair summary" of the expert's opinions means that, at the least, the report must state more than the expert's mere conclusions as to the standard of care, breach, and causation; it must instead explain the basis of the expert's opinion so as to link the expert's conclusions to the facts of the case. *See Jelinek*, 328 S.W.3d at 539; *Wright*, 79 S.W.3d at 52.

If the plaintiff fails to timely serve an expert report, then, on the motion of a defendant physician or health care provider, the trial court must dismiss the pertinent health care liability claim with prejudice and award attorney's fees. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b); *Baty v. Futrell*, 543 S.W.3d 689, 692 (Tex. 2018). But if the plaintiff timely serves an expert report and a defendant physician or health care provider files a motion challenging the adequacy of that report, then the trial court may only grant the motion "if it appears to the court, after [a] hearing, that the report does not represent an objective good faith effort to comply with the [TMLA's] definition of an expert report." TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l); *Baty*, 543 S.W.3d at 692–93; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6) ("[e]xpert 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" (internal quotations omitted)).

An expert report qualifies as an "objective good faith effort" to avoid dismissal if it discusses each element with sufficient specificity so that it (1) informs the defendant physician or health care provider of the specific conduct that the plaintiff questions or about which the plaintiff complains and (2) provides a basis for the trial court to conclude that the plaintiff's health care liability claim has merit. *Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 513 (Tex. 2017); *see also Baty*, 543 S.W.3d at 693–94. The expert report need not use any particular words, and it may be informal, "but bare conclusions will not suffice." *Scoresby*, 346 S.W.3d at 555–56.

In determining whether an expert report constitutes an "objective good faith effort" to address each element, "a trial court may not draw inferences; instead, it must exclusively rely upon the information contained within the four corners of the report." *Puppala v. Perry*, 564 S.W.3d 190, 197 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (internal quotations omitted). And when the issue of adequacy hinges on an expert's qualifications, the trial court may also consider the "four corners" of

the expert's CV. *Id.*; *Mangin*, 480 S.W.3d at 706. Courts must view the report in its entirety, rather than isolating specific portions or sections, to determine whether it is sufficient. *See Baty*, 543 S.W.3d at 694; *see, e.g.*, *Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 144 (Tex. 2015); *see also Austin Heart, P.A. v. Webb*, 228 S.W.3d 276, 282 (Tex. App.—Austin 2007, no pet.) ("The form of the report and the location of the information in the report are not dispositive."). In reviewing the adequacy of an expert report, a trial court may not consider an expert's credibility, the data relied on by the expert, or the documents that the expert failed to consider at this pre-discovery stage of the litigation. *See Mettauer v. Noble*, 326 S.W.3d 685, 691–92 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Gonzalez*, 485 S.W.3d at 245.

Multiple expert reports may be considered together in determining whether a plaintiff has provided a report meeting the statutory requirements. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(i); *Salias v. Tex. Dep't of Aging & Disability Servs.*, 323 S.W.3d 527, 534 (Tex. App.—Waco 2010, pet. denied); *Walgreen Co. v. Hieger*, 243 S.W.3d 183, 186 n.2 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). A single report addressing both liability and causation issues related to a defendant physician or health care provider is not required. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(i); *Gannon v. Wyche*, 321 S.W.3d 881, 896 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). When an expert report has been

supplemented, a court considers both the original expert report and the supplemental expert report when reviewing the adequacy. *See Kuhn v. Sam*, No. 01-20-00260-CV, 2021 WL 3359171, at *7 (Tex. App.—Houston [1st Dist.] Aug. 3, 2021, no pet.) (mem. op.); *Scherer v. Gandy*, No. 07-18-00341-CV, 2019 WL 988174, at *2 n.4 (Tex. App.—Amarillo Feb. 28, 2019, no pet.) (mem. op.); *see also Packard v. Guerra*, 252 S.W.3d 511, 527 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). The multiple expert reports, when read together, must provide a "fair summary" of the expert's opinions on (1) the applicable standard of care, (2) the manner in which the care rendered by the defendant physician or health care provider failed to meet the standard of care, and (3) the causal relationship between that failure and the injury, harm, or damages claimed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(i), (r)(6); *see also Gannon*, 321 S.W.3d at 896.

**Drs. Keepers and Chan**

In his first and second issues, Dr. Keepers argues that the trial court erred in overruling his objections to Dr. Groysman's expert reports and denying his motion to dismiss the Smiths' health care liability claim against him because Dr. Groysman's expert reports do not adequately address the standard of care, breach of the standard of care, and causation as it relates to Dr. Keepers. In his sole issue, Dr. Chan argues that the trial court erred in overruling his objections to Dr. Groysman's expert reports and denying his motion to dismiss the Smiths' health care liability

claim against him because Dr. Groysman's expert reports do not adequately address the standard of care, breach of the standard of care, and causation as it relates to Dr. Chan.

### A. Standard of Care and Breach Related to Drs. Keepers and Chan

In his first issue, Dr. Keepers argues that Dr. Groysman's expert reports do not adequately address the standard of care and breach of the standard of care as they relate to him because the expert reports contain "only vague assertions and generalized statements concerning [the] standard[] of care," fail to "provide any explanation of how each defendant [physician or health care provider] specifically breached the standard of care," and contain the same standard of care and breaches of the standard of care for Dr. Keepers, the physician who performed the lumbar facet block procedure, and Dr. Chan, the anesthesiologist for the procedure.

In a portion of his sole issue, Dr. Chan argues that Dr. Groysman's expert reports do not adequately address the standard of care and breach of the standard of care as they relate to him because the expert reports "[i]nappropriately [a]ppl[y] [i]dentical [s]tandards of [c]are" to Drs. Keepers and Chan, fail to "identify the care that was expected of Dr. Chan, but not given," contain "incomplete and contradictory" opinions on breach of the standard of care, and are conclusory.

Identifying the standard of care in a health care liability claim is critical. *Palacios*, 46 S.W.3d at 880. To adequately identify the standard of care, an expert

report must set forth "specific information about what the defendant [physician] should have done differently." *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 226 (Tex. 2018) (internal quotations omitted). Thus, related to the standard of care and breach, the expert report must explain what the defendant physician should have done under the circumstances and what the physician did instead. *Palacios*, 46 S.W.3d at 880; *see also Kline v. Leonard*, No. 01-19-00323-CV, 2019 WL 6904720, at *7 (Tex. App.—Houston [1st Dist.] Dec. 19, 2019, pet. denied) (mem. op.) ("[A]n expert report must provide a fair summary of the expert's opinion regarding the applicable standard of care and the manner in which the care rendered by the health care provider failed to meet the standard." (internal quotations omitted)). It is not sufficient for the expert to simply state that he knows the standard of care and concludes that it was or was not met. *Palacios*, 46 S.W.3d at 880.

As to the applicable standard of care related to Drs. Keepers and Chan, Dr. Groysman, in his expert reports, states that the lumbar facet block procedure that Michael underwent on August 8, 2017 was an elective procedure that required that he "be optimized prior to [the] elective procedure." Yet Michael had a complicated medical history involving hypertension, diabetes, and hypercholesterolemia. And he had certain risk factors, including: age, hypercholesterolemia, hypertension, diabetes, obesity, history of cardiac arrhythmias, an abnormal EKG, elevated white blood cell count, and evidence of pneumonia. Michael's complicated medical

history and risk factors required an assessment of risk and an evaluation of the general health and safety of the procedure related to Michael. Further, Drs. Keepers and Chan, in their treatment and care of Michael related to the lumbar facet block procedure were required to: accurately and completely perform a pre-operative risk assessment before the procedure and anesthesia, consult Michael's cardiologist, adequately document Michael's pre-operative history of cardiac arrhythmias and history of pneumonia, obtain an informed anesthesia consent and disclosure form from Michael, screen Michael pre-operatively before he underwent MAC, provide intra-operative monitoring of Michael while he was undergoing MAC as required by the ASA, including providing for a dedicated person to be in constant observation of Michael's breathing activity and monitor his airway patency and ventilation, use proper equipment to continuously monitor Michael's condition, ensure that monitoring equipment was not removed before Michael was rotated to a supine position, regained consciousness, and was stabilized, monitor and treat Michael's low serum magnesium levels, record complete and accurate information in Michael's medical records, and upon Michael becoming critically ill, ensure that he was timely transferred to a facility with staff and equipment commensurate with Michael's needs. *See Baty*, 543 S.W.3d at 694 (courts must view report in its entirety, rather than isolating specific portions or sections, to determine whether it is

sufficient); *Webb*, 228 S.W.3d at 282 ("The form of the report and the location of the information in the report are not dispositive.").

As to breach of the applicable standard of care, Dr. Groysman explains that Drs. Keepers and Chan breached the applicable standard of care by: failing to accurately and completely perform a pre-operative risk assessment of Michael before the lumbar facet block procedure and anesthesia, failing to do pre-operative testing, "such as labs, x[-]rays[,] or EKGs," to prepare for the procedure, failing to consult Michael's cardiologist before the lumbar facet block procedure, despite Michael's cardiac medical history and his risk factors, failing to obtain a cardiovascular assessment of clearance for the procedure, a pre-operative risk assessment, or a cardiovascular evaluation, failing to adequately document Michael's pre-operative history of cardiac arrhythmias and history of pneumonia, failing to "comprehensively assess[]" Michael before the procedure, failing to maintain intra-operative monitoring of Michael while he was undergoing MAC, failing to have a "dedicated person in constant observation of [Michael's] breathing activity in addition to the person delivering the MAC," failing to ensure that Michael's airway patency and ventilation were appropriately monitored during the lumbar facet block procedure, failing to use proper equipment to continuously monitor Michael's condition during the lumbar facet block procedure, removing the monitoring equipment from Michael while he was still in a prone position and before

he was rotated to a supine position, had regained consciousness, and was stabilized, failing to monitor and treat Michael's low serum magnesium levels, failing to record complete and accurate information in Michael's medical records, and failing to facilitate a timely transfer of Michael to a facility with staff and equipment commensurate with Michael's needs. Instead, attempts to transfer Michael did not begin until "three hours after [he] coded" and "it took approximately three additional hours for the transfer [of Michael to a hospital] to actually occur." *See Baty*, 543 S.W.3d at 694 (courts must view report in its entirety, rather than isolating specific portions or sections, to determine whether it is sufficient); *Webb*, 228 S.W.3d at 282 ("The form of the report and the location of the information in the report are not dispositive.").

Dr. Groysman's statements in his expert reports about the standard of care and breach of the standard of care for Drs. Keepers and Chan are not vague or conclusory. Rather, the expert reports identify the specific actions that should have been taken by Drs. Keepers and Chan related to the treatment and care of Michael in connection with the lumbar facet block procedure but were not. *See Abshire*, 563 S.W.3d at 226–27; *see also Baty*, 543 S.W.3d at 695 (report not conclusory where it did not require one to infer what defendant physician should have done differently); *Keepers v. Blessett*, No. 01-18-01020-CV, 2019 WL 1523368, at *5 (Tex. App.—Houston [1st Dist.] Apr. 9, 2019, no pet.) (mem. op.) (expert report is adequate where

it informs defendant physician of expert's opinion on what defendant should have done and what the defendant did instead). The stated standard of care need not be complicated for it to be sufficient. *See, e.g.*, *Baty*, 543 S.W.3d at 697; *see also Keepers*, 2019 WL 1523368, at *5–6 ("At times, the standard of care can be fairly basic." (internal quotations omitted)). Any additional level of detail requested by Drs. Keepers and Chan is not required at this stage in the litigation. *See, e.g.*, *Whitmire v. Feathers*, No. 01-19-00094-CV, 2020 WL 4983321, at *14 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.) (mem. op.). Dr. Groysman clearly identifies the standard of care related to Drs. Keepers and Chan and their breaches of the standard of care. The expert reports provide "enough information" for the trial court to have concluded that they constitute a good-faith effort to set forth the standard of care and breach related to Drs. Keepers and Chan.[19] *See Miller*, 536 S.W.3d at 515–17; *see also New Med. Horizons, II, Ltd. v. Milner*, 575 S.W.3d

[19] To the extent Drs. Keepers and Chan assert that Dr. Groysman has not accurately stated the standard of care as to them or their breaches of the standard of care, those complaints do not support a dismissal at this stage of the litigation. *See Aggarwal v. Trotta*, No. 01-19-00012-CV, 2019 WL 2426172, at *4 n.5 (Tex. App.—Houston [1st Dist.] June 11, 2019, no pet.) (mem. op.) ("To the extent [the defendant physician] disputes that [the expert] has accurately stated the standard of care, his complaint does not support a Chapter 74 dismissal."); *Engh v. Reardon,* No. 01-09-00017-CV, 2010 WL 4484022, at *8 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet.) (mem. op.) ("The [physicians] also challenge the accuracy of [the expert's] opinions with respect to [the] standard of care. Whether [the expert's] opinions regarding the applicable standard[] of care are correct, however, is an issue for summary judgment, not a motion to dismiss under Chapter 74.").

53, 60, 64 (Tex. App.—Houston [1st Dist.] 2019, no pet.); *Mettauer*, 326 S.W.3d at 691 (not court's role to determine truth or falsity of expert's opinion, or truth or falsity of facts on which expert bases such opinion, but only to act as gatekeeper in evaluating sufficiency of report itself).

We note that Drs. Keepers and Chan both complain that the standard of care and breaches of the standard of care as set out by Dr. Groysman in his expert reports are the same for Dr. Keepers, the physician who performed the lumbar facet block procedure on Michael, and Dr. Chan, the anesthesiologist for the procedure. Yet Texas law is clear that an expert report is not deficient merely because it states that the same standard of care applies to more than one physician or that more than one physician breached the standard of care in the same manner.[20] *See Methodist Hosp. v. Shepherd-Sherman*, 296 S.W.3d 193, 199 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("There is nothing inherently impermissible about concluding that different health care providers owed the same standard of care to [the patient] and breached that duty in the same way."); *Bennett*, 256 S.W.3d at 817 ("Although [expert]'s

[20] Although Drs. Keepers and Chan rely on *Taylor v. Christus Spohn Health System Corp.*, 169 S.W.3d 241 (Tex. App.—Corpus Christi–Edinburg 2004, no pet.) to support their position, the court in *Taylor* did not hold that the same standard of care could not apply to more than one defendant physician or that the defendant physicians could not breach the standard of care in the same manner. *See Livingston v. Montgomery*, 279 S.W.3d 868, 872 (Tex. App.—Dallas 2009, no pet.) ("The *Taylor* court did not hold that the same standard of care could not apply to more than one defendant . . . ."); *Sanjar v. Turner*, 252 S.W.3d 460, 466–67 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

opinion for each defendant is identical, he unquestionably provided an opinion for each [defendant]. That he held each defendant to the same standard of care, found the same time of breach, and analyzed causation in the same way does not render his opinion inadequate."); *see also Shah v. Kmiec*, No. 01-10-00437-CV, 2011 WL 1434676, at *3 (Tex. App.—Houston [1st Dist.] Apr. 14, 2011, no pet.) (mem. op.) ("Application of the same standard of care to both [physicians] does not render the expert report insufficient."); *Sanjar v. Turner*, 252 S.W.3d 460, 466–67 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (affirming trial court's refusal to dismiss based on expert report that applied same standard of care to multiple defendants); *In re Stacy K. Boone, P.A.*, 223 S.W.3d 398, 405–08 (Tex. App.—Amarillo 2006, orig. proceeding). And Dr. Groysman's expert reports sufficiently explain why both Drs. Keepers and Chan are to be held to the same standard of care and breached the standard of care in the same manner—because they were both involved in the lumbar facet block procedure performed on Michael. *Cf. Shah*, 2011 WL 1434676, at *3; *In re Stacy K. Boone, P.A.*, 223 S.W.3d at 405–06 (holding single standard of care applicable to physician and physician's assistant was sufficient because all participated in administering treatment to patient); *see also Livingston v. Montgomery*, 279 S.W.3d 868, 872–73 (Tex. App.—Dallas 2009, no pet.) (holding expert report that provided one standard of care for two physicians who attended to patient's labor and delivery not deficient); *Romero v. Lieberman*, 232 S.W.3d 385,

391–92 (Tex. App.—Dallas 2007, no pet.) (concluding expert report alleging "one size fits all" standard of care was sufficient as to defendant general practitioner and defendant psychiatrists because all three physicians participated in treating patient's condition (internal quotations omitted)). Whether Dr. Groysman's opinions that the same or similar standard of care applies to Drs. Keepers and Chan and that Drs. Keepers and Chan breached the standard of care in the same manner are correct is not the question at this stage in the litigation. *See Shepherd-Sherman*, 296 S.W.3d at 199 n.2 (noting expert may be incorrect in his conclusion that standard of care and breach were same for defendant physicians, but question of whether expert's opinions were correct was an issue for summary judgment, not in motion to dismiss under Texas Civil Practice and Remedies Code chapter 74); *In re Stacy K. Boone, P.A.*, 223 S.W.3d at 406 ("While [defendants] may disagree with [the expert's] opinions concerning the standard of care applicable to each of th[e] individual defendants, the report contains a fair summary of his opinions and adequately informs them of the specific conduct called into question."); *see also Christus Continuing Care v. Lam Pham*, No. 09-12-00153-CV, 2012 WL 2428339, at *7 (Tex. App.—Beaumont June 28, 2012, no pet.) (mem. op.) ("Whether expert['s] conclusions are correct is an issue either for trial or summary judgment.").

We conclude that the trial court could have reasonably determined that Dr. Groysman's expert reports represent an "objective good faith effort" to inform Drs.

Keepers and Chan of the specific conduct called into question, the standard of care that should have been followed, and what Drs. Keepers and Chan should have done differently. Thus, we hold that the trial court did not err in overruling Drs. Keepers' and Chan's objections and denying Drs. Keepers' and Chan's motions to dismiss the Smiths' health care liability claim against them on the ground that Dr. Groysman's expert reports do not adequately address the standard of care and breach of the standard of care as to Drs. Keepers and Chan.

We overrule Dr. Keepers' first issue and this portion of Dr. Chan's sole issue.

**B. Causation Related to Drs. Keepers and Chan**

In his second issue, Dr. Keepers argues that Dr. Groysman's expert reports do not adequately address causation as it relates to him because the expert reports do not "describe the causal connection between the alleged breaches of the standard of care to the harm allegedly suffered" by Michael. In the remaining portion of his sole issue, Dr. Chan argues that Dr. Groysman's expert reports do not adequately address causation as to him because the expert reports "merely offer conclusory [and speculative] opinions as to causality" and "fail[] to describe how the anoxic brain injury and other injuries . . . were causally linked" to the breaches of the standard of care. (Emphasis omitted.)

An expert report must provide a "fair summary" of the expert's opinion on the causal relationship between the failure of a defendant physician to provide care in

accord with the applicable standard of care and the claimed injury, harm, or damages. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6); *see also Potts*, 392 S.W.3d at 630. The expert report must explain how and why the defendant physician's breach of the standard of care proximately caused the plaintiff's injury. *Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 459–60 (Tex. 2017). An expert report need not marshal all the plaintiff's proof necessary to establish causation at trial, and it need not anticipate or rebut all possible defensive theories that may ultimately be presented to the trial court. *Wright*, 79 S.W.3d at 52; *Cornejo v. Hilgers*, 446 S.W.3d 113, 123 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). But an expert cannot simply opine that the breach caused the injury. *Jelinek*, 328 S.W.3d at 539.

Causation consists of two components: (1) cause-in-fact and (2) foreseeability. *Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018). A defendant physician's breach was a cause-in-fact of the plaintiff's injury if the breach was a substantial factor in bringing about the harm, and without the breach the harm would not have occurred. *Id.* Even if the harm would not have occurred without the defendant physician's breach, "the connection between the defendant and the plaintiff's injuries simply may be too attenuated" for the breach to qualify as a substantial factor. *Allways Auto Grp., Ltd. v. Walters*, 530 S.W.3d 147, 149 (Tex. 2017) (internal quotations omitted). A breach is not a substantial factor if it "does

no more than furnish the condition that makes the plaintiff's injury possible." *Id.* A defendant physician's breach is a foreseeable cause of the plaintiff's injury if a physician of ordinary intelligence would have anticipated the danger caused by the negligent act or omission. *Puppala*, 564 S.W.3d at 197.

As stated above, as to the standard of care related to Drs. Keepers and Chan, Dr. Groysman, in his expert reports, states that the lumbar facet block procedure that Michael underwent on August 8, 2017 was an elective procedure that required that he "be optimized prior to [the] elective procedure." Yet Michael had a complicated medical history involving hypertension, diabetes, and hypercholesterolemia. And he had certain risk factors, including: age, hypercholesterolemia, hypertension, diabetes, obesity, history of cardiac arrhythmias, an abnormal EKG, elevated white blood cell count, and evidence of pneumonia. Michael's complicated medical history and risk factors required an assessment of risk and an evaluation of the general health and safety of the procedure related to Michael. Further, Drs. Keepers and Chan, in their treatment and care of Michael related to the lumbar facet block procedure were required to: accurately and completely perform a pre-operative risk assessment before the procedure and anesthesia, consult Michael's cardiologist, adequately document Michael's pre-operative history of cardiac arrhythmias and pneumonia, obtain an informed anesthesia consent and disclosure form from Michael, screen Michael pre-operatively before he underwent MAC, provide

intra-operative monitoring of Michael while he was undergoing MAC as required by the ASA, including providing for a dedicated person to be in constant observation of Michael's breathing activity and monitor his airway patency and ventilation, use proper equipment to continuously monitor Michael's condition, ensure that monitoring equipment was not removed before Michael was rotated to a supine position, regained consciousness, and was stabilized, monitor and treat Michael's low serum magnesium levels, record complete and accurate information in Michael's medical records, and upon Michael becoming critically ill, ensure that he was timely transferred to a facility with staff and equipment commensurate with Michael's needs.

As to breach of the standard of care related to Drs. Keepers and Chan, Dr. Groysman explains that Drs. Keepers and Chan breached the standard of care by: failing to accurately and completely perform a pre-operative risk assessment of Michael before the lumbar facet block procedure and anesthesia, failing to do pre-operative testing, "such as labs, x[-]rays[,] or EKGs," to prepare for the procedure, failing to consult Michael's cardiologist before the lumbar facet block procedure, despite Michael's cardiac medical history and his risk factors, failing to obtain a cardiovascular assessment of clearance for the procedure, a pre-operative risk assessment, or a cardiovascular evaluation, failing to adequately document Michael's pre-operative history of cardiac arrhythmias and history of pneumonia,

failing to "comprehensively assess[]" Michael before the procedure, failing to maintain intra-operative monitoring of Michael while he was undergoing MAC, failing to have a "dedicated person in constant observation of [Michael's] breathing activity in addition to the person delivering the MAC," failing to ensure that Michael's airway patency and ventilation were appropriately monitored during the lumbar facet block procedure, failing to use proper equipment to continuously monitor Michael's condition during the lumbar facet block procedure, removing the monitoring equipment from Michael while he was still in a prone position and before he was rotated to a supine position, had regained consciousness, and was stabilized, failing to monitor and treat Michael's low serum magnesium levels, failing to record complete and accurate information in Michael's medical records, and failing to facilitate a timely transfer of Michael to a facility with staff and equipment commensurate with Michael's needs. Instead, attempts to transfer Michael did not begin until "three hours after [he] coded" and "it took approximately three additional hours for the transfer [of Michael to a hospital] to actually occur."

As to causation, Dr. Groysman, in his expert reports, states that if Drs. Keepers and Chan had not breached the standard of care, Michael would not have encountered complications and been injured, including suffering a severe anoxic

brain injury,[21] in connection with the lumbar facet block procedure. Additionally, Dr. Groysman explains that Dr. Keepers' and Chan's failure to accurately and completely perform a pre-operative risk assessment before the lumbar facet block procedure and anesthesia, failure to consult Michael's cardiologist, and failure to adequately document Michael's pre-operative history of cardia arrhythmias and history of pneumonia, caused them to be unaware of the specific health risks associated with Michael's condition. And had Drs. Keepers and Chan complied with the standard of care, they would have known that Michael was not a "good candidate" for the lumbar facet block procedure under general anesthesia and local anesthesia could have been used instead. Drs. Keepers and Chan also would have been able to explain the specific risks of the lumbar facet block procedure to Michael. Had those things been done, Michael would not have suffered injuries, including the anoxic brain injury, and Michael likely would have been able to go home on the day of the procedure as expected. Further, Dr. Keepers and Chan's failure to use proper equipment to continuously monitor Michael's condition during the procedure, as required by the ASA, failure to maintain intra-operative monitoring

[21] According to Dr. Groysman, an anoxic brain injury occurs when the brain is deprived of oxygen. "The neural cells begin to die through[] a process called apoptosis." An anoxic brain injury results in diminished brain function, and if the brain is deprived oxygen for too long, an anoxic brain injury may become fatal. Once a person who suffers an anoxic brain injury regains consciousness, the effects of the injury are often similar to a person who has suffered a traumatic brain injury.

of Michael while he was undergoing MAC, and removal of monitoring equipment while Michael was still in the prone position, resulted in Michael's injuries. According to Dr. Groysman, Michael suffered respiratory arrest with resultant hypoxia and bradycardia during the lumbar facet block procedure. And it was more likely than not that the heavy sedation provided to Michael for the procedure along with the prone positioning during the procedure produced an unrecognized pulmonary aspiration or prolonged airway obstruction, inducing respiratory arrest and the resulting hypotension and bradycardia. Michael was hypoxic or anoxic for a prolonged period of time. Had Drs. Keepers and Chan complied with the standard of care, including by having Michael's airway patency and ventilation appropriately monitored during the procedure, it is likely that Michael's injuries could have been prevented, or at least lessened. And Dr. Keepers' and Chan's failure to facilitate a timely transfer of Michael to a facility with staff and equipment commensurate with his needs, likely resulted in an exacerbation of his injuries or a delay in their improvement. Instead, during a period when timing was critical to address Michael's injuries, hours passed with no transfer for Michael to a hospital. In all, Dr. Keepers' and Chan's breaches of the standard of care prevented Michael from being fully capable of going home after the lumbar facet block procedure and caused him to suffer an anoxic brain injury and the consequential damages that resulted from the anoxic brain injury. *See Baty*, 543 S.W.3d at 694 (courts must view report

in its entirety, rather than isolating specific portions or sections, to determine whether it is sufficient); *Webb*, 228 S.W.3d at 282 ("The form of the report and the location of the information in the report are not dispositive.").

In determining whether an expert's causation opinion is conclusory, we must remain mindful that expert-report challenges are made at an early, pre-discovery stage in the litigation, not when the merits of the health care liability claim are being presented to the fact finder to determine liability. *Puppala*, 564 S.W.3d at 198. To provide more than a conclusory statement on causation, an expert report must include an "explanation tying the conclusion to the facts" and showing "how and why the breach caused the injury based on the facts presented." *Jelinek*, 328 S.W.3d at 539–40; *see also Puppala*, 564 S.W.3d at 197. The expert report need only provide some basis that the defendant physician's act or omission proximately caused injury. *Owens v. Handyside*, 478 S.W.3d 172, 187–88 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *see also Palacios*, 46 S.W.3d at 879 (explaining "a plaintiff need not present evidence in the report as if it were actually litigating the merits. . . . [T]he information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial").

An expert may show causation by explaining a chain of events that begins with the defendant physician's negligence and ends in injury to the plaintiff. *See*

*Whitmire*, 2020 WL 4983321, at *16; *Owens*, 478 S.W.3d at 189; *McKellar v. Cervantes*, 367 S.W.3d 478, 485–86 (Tex. App.—Texarkana 2012, no pet.*); see also Christus Spohn Health Sys. Corp. v. Hinojosa*, No. 04-16-00288-CV, 2016 WL 7383819, at *6 (Tex. App.—San Antonio Dec. 21, 2016, no pet.) (mem. op.) (expert report specified signs and symptoms that should have prompted defendant physician to admit patient to hospital for treatment; expert then opined that if patient had been admitted at least two things would have occurred). Further, the description of causation in an expert report need not provide an extreme level of detail to give notice of the basis of the plaintiff's claim. *Wheeler v. Luberger*, No. 14-14-00992-CV, 2016 WL 146008, at *6 (Tex. App.—Houston [14th Dist.] Jan. 12, 2016, no pet.) (mem. op.).

Here, Dr. Groysman's expert reports explain the connection between Dr. Keepers' and Chan's negligent conduct—their breaches of the standard of care—and the claimed injury, harm, or damages. *See THN Physicians Ass'n v. Tiscareno*, 495 S.W.3d 599, 614 (Tex. App.—El Paso 2016, no pet.) ("[T]he expert must at a minimum explain the connection between [the physician's] conduct and the injury to the patient."); *see also Whitmire*, 2020 WL 4983321, at *16; *Owens*, 478 S.W.3d at 189 (expert may show causation by explaining chain of events that begins with defendant physician's negligence and ends in injury to plaintiff); *McKellar*, 367 S.W.3d at 485–86. Dr. Groysman's expert reports set forth a chain of events,

involving breaches of the standard of care by Drs. Keepers and Chan, which resulted in Michael's complications and injuries related to the lumbar facet block procedure. *See, e.g.*, *Woofter v. Benitez*, No. 01-09-00161-CV, 2009 WL 3930839, at *7–8 (Tex. App.—Houston [1st Dist.] Nov. 19, 2009, no pet.) (mem. op.) ("[S]ection 74.351 expert reports are a preliminary method to show a plaintiff has a viable cause of action that is not frivolous or without expert support . . . ."). The correctness of Dr. Groysman's opinion is not at issue in this stage of the litigation. *See Potts*, 392 S.W.3d at 632; *Whitmire*, 2020 WL 4983321, at *16.

To the extent Drs. Keepers and Chan complain that "Dr. Groysman's opinion on causation as to Dr. Keepers is merely a word for word recitation of his opinions concerning" Dr. Chan, we reiterate: "[An expert]'s opinion for each defendant [may be] identical[;] . . . [t]hat [the expert] held each defendant to the same standard of care, found the same type of breach, and analyzed causation in the same way does not render his opinion inadequate." *Bennett*, 256 S.W.3d at 817.

And although Dr. Chan asserts that Dr. Groysman, in his expert reports, failed to discuss a few of Dr. Chan's purported breaches of the standard of care, such as his alleged failure to treat Michael's low serum magnesium levels, in the "causation points" portion of the expert reports, we note that an expert report need not marshal all the plaintiff's proof necessary to establish causation at trial, and it need not anticipate or rebut all possible defensive theories that may ultimately be presented

to the trial court. *See Wright*, 79 S.W.3d at 52; *Cornejo*, 446 S.W.3d at 123; *see also Potts*, 392 S.W.3d at 631–32 ("Summary judgment motions permit trial courts to dispose of claims that lack evidentiary support. But while a full development of all liability theories may be required for pretrial motions or to convince a judge or jury during trial, there is no such requirement at the expert report stage."); *Naderi v. Ratnarajah*, 572 S.W.3d 773, 781–82 (Tex. App.—Houston [14th Dist.] 2019, no pet.) ("To satisfy the how and why requirement, the expert need not prove the entire case or account for every known fact; the report is sufficient if it makes a good-faith effort to explain, factually, how proximate cause is going to be proven." (internal quotations omitted)). And it cannot be said that Dr. Groysman's expert reports fail to include an expert opinion on causation as it relates to Drs. Keepers and Chan. *See Palacios*, 46 S.W.3d at 878–79 (expert report must include expert's opinion on each element identified in statute—standard of care, breach, and causation).

We conclude that the trial court could have reasonably determined that Dr. Groysman's expert reports represent an "objective good faith effort" to inform Drs. Keepers and Chan of the causal relationship between Drs. Keepers' and Chan's purported failure to provide care in accord with the standard of care and the claimed injury, harm, or damages. *See Zamarripa*, 526 S.W.3d at 460 (as long as report makes "a good-faith effort to explain, factually, how proximate cause is going to be proven," it satisfies TMLA's threshold requirement); *Kelly v. Rendon*, 255 S.W.3d

665, 679 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (emphasizing expert reports "are simply a preliminary method to show a plaintiff has a viable cause of action that is not frivolous or without expert support"). Thus, we hold that the trial court did not err in overruling Drs. Keepers' and Chan's objections and denying Drs. Keepers' and Chan's motions to dismiss the Smiths' health care liability claim against them on the ground that Dr. Keepers' expert reports do not adequately address causation as to Drs. Keepers and Chan.

We overrule Dr. Keepers' second issue and this portion of Dr. Chan's sole issue.[22]

**Vista Community Medical Center**

In its first, second, and third issues, Vista Community Medical Center argues that the trial court erred in overruling its objections to Dr. Groysman's expert reports and denying its motion to dismiss the Smiths' health care liability claim against it because Dr. Groysman is not qualified to opine on the standard of care or breach of the standard of care related to Vista Community Medical Center and Dr. Groysman's expert reports do not adequately address the standard of care, breach of the standard of care, and causation as it relates to Vista Community Medical Center.

[22] Due to our disposition, we need not address the requests of Drs. Keepers and Chan for attorney's fees and costs. *See* TEX. R. APP. P. 47.1.

In a portion of its first issue, Vista Community Medical Center acknowledges that the Smiths sued it "using a theory of vicariously liability for the actions of its agents and employees," but it asserts that Dr. Groysman's expert reports, "for the first time, attempt[] to hold [Vista Community Medical Center] liable for the actions of Dr[s]. Keepers and . . . Chan by merely stating that 'it is [Dr. Groysman's] understanding that Dr[s]. Keepers and . . . Chan [were] employed by and/or . . . principals of [Vista Community Medical Center], and therefore [Vista Community Medical Center] is vicariously liable for the negligence of Dr[s]. [K]eepers and . . . Chan.'"

In their petition, the Smiths named Drs. Keepers and Chan and Vista Community Medical Center as "defendants" in the case. The Smiths then allege that on August 8, 2017, Michael underwent a lumbar facet block procedure at Vista Community Medical Center and suffered a severe anoxic brain injury while under the care of Drs. Keepers and Chan and Vista Community Medical Center. The Smiths allege both direct liability and vicarious liability health care liability claims against Vista Community Medical Center. Related to their vicarious liability claim, the Smiths allege that Vista Community Medical Center, under the theory of agency or respondeat superior, is vicariously liable for the negligent treatment and care of Michael by its "agents, servants, employees, parent agents, ostensible agents, agents

by estoppel[,] and/or representatives, including but not limited to its doctors and nurses."

The Texas Rules of Civil Procedure require that the pleadings "consist of a statement in plain and concise language of the plaintiff's cause of action" and contain "a short statement of the cause of action sufficient to give fair notice of the claim involved." TEX. R. CIV. P. 45(b), 47(a). "A petition is sufficient if it gives fair and adequate notice of the facts on which the pleader bases his claim." *DeRoeck v. DHM Ventures, LLC*, 556 S.W.3d 831, 835 (Tex. 2018) (internal quotations omitted)). "The key inquiry is whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Id.* (internal quotations omitted). "When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 897 (Tex. 2000).

The allegations in the Smiths' petition were sufficient to put Vista Community Medical Center on fair notice that the Smiths were claiming that it was vicariously liable for the negligence of its agents, servants, employees, parent agents, ostensible agents, agents by estoppel, representatives, doctors, and nurses, including Drs. Keepers and Chan, who were named as defendants in the case. *Cf. Seton Family of Hosps. v. White*, 593 S.W.3d 787, 793–94 (Tex. App.—Austin 2019, pet. denied). Moreover, even if the pleadings were insufficient as to the legal nexus establishing

Vista Community Medical Center's vicarious liability for Drs. Keepers and Chan's alleged negligent conduct, the appropriate remedy would have been for Vista Community Medical Center to challenge the pleadings, not Dr. Groysman's expert reports, which it could have done by filing special exceptions to the petition, or if it believed the Smiths' vicarious liability health care liability claim to be "baseless," a motion to dismiss under Texas Rule of Civil Procedure 91a. *See id.*; *see also* TEX. R. CIV. P. 91 (providing for special exceptions to pleadings), 91a (providing for dismissal of cause of action that has no basis in law or fact); *CHCA Clear Lake, L.P. v. Stewart*, No. 01-19-00874-CV, 2021 WL 3412461, at *17 n.23 (Tex. App.—Houston [1st Dist.] Aug. 5, 2021, no pet.) (mem. op.). Yet Vista Community Medical Center did not challenge the Smiths' pleadings in this case. *See Seton Family*, 593 S.W.3d at 794; *Stewart*, 2021 WL 3412461, at *17 n.23.

The Texas Supreme Court has made clear that the TMLA requires a plaintiff to timely file an adequate expert report as to each defendant in a suit involving a health care liability claim, but it does not require an expert report as to each liability theory alleged against that defendant. *See TTHR Ltd. P'ship v. Moreno*, 401 S.W.3d 41, 45 (Tex. 2013) ("[B]ecause the trial court did not abuse its discretion in finding [the plaintiff's expert] reports adequate as to her theory that [the defendant health care provider] is vicariously liable for the [physician's] actions, her suit against [the defendant health care provider]—including her claims that [it] has direct liability

and vicarious liability for actions of the nurses—may proceed."); *Potts*, 392 S.W.3d at 632 ("[W]hen a health care liability claim involves a vicarious liability theory, either alone or in combination with other theories, an expert report that meets the statutory standards as to the employee is sufficient to implicate the employer's conduct under the vicarious theory. And if any liability theory has been adequately covered, the entire case may proceed."); *see also Whitmire*, 2020 WL 4983221, at *21. Thus, an expert report need not cover every alleged liability theory to make the defendant health care provider aware of the conduct at issue, nor is it required that the report include "litigation-ready" evidence. *Potts*, 392 S.W.3d at 630–31; *Whitmire*, 2020 WL 4983221, at *21; *see also SCC Partners, Inc. v. Ince*, 496 S.W.3d 111, 114–15 (Tex. App.—Fort Worth 2016, pet. dism'd). An expert report that adequately addresses at least one pleaded liability theory against a defendant health care provider is enough to defeat that defendant's motion to dismiss challenging the adequacy of the report. *See Moreno*, 401 S.W.3d at 45; *Potts*, 392 S.W.3d at 632; *Whitmire*, 2020 WL 4983221, at *21; *McAllen Hosps., L.P. v. Gonzalez*, 566 S.W.3d 451, 457–58 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.).

When a health care liability claim involves a vicarious liability theory, either alone or combined with other theories, an expert report that meets the statutory standard as to the agent or employee of a defendant health care provider is enough

to implicate the defendant health care provider. *Potts*, 392 S.W.3d at 632; *Whitmire*, 2020 WL 4983321, at *22; *see also Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671–72 (Tex. 2008) ("When a party's alleged health care liability is . . . vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient."); *Owens*, 478 S.W.3d at 191. In other words, when a plaintiff brings a health care liability claim based on a vicarious liability theory against a defendant health care provider, an expert report that is sufficient as to that party's agent or employee, on whose alleged negligent conduct the vicarious liability health care liability claim is based, is also sufficient as to the defendant health care provider. *Whitmire*, 2020 WL 49833321, at *22; *Owens*, 478 S.W.3d at 191–92; *see, e.g.*, *Ctr. for Neurological Disorders, P.A. v. George*, 261 S.W.3d 285, 295 (Tex. App.—Fort Worth 2008, pet. denied) ("[I]f the expert report is sufficient as to the claims against [the physician employee], and we have held that it is[,] . . . then the report is sufficient as to claims against [the employer health care provider] that are based on [the physician employee's] alleged negligence." (internal footnote omitted)).

Here, we have held that the trial court did not err in overruling Drs. Keepers' and Chan's objections and in denying their motions to dismiss the Smiths' health care liability claims against them because Dr. Groysman's expert reports represent an "objective good faith effort to comply with the [TMLA's] definition of an expert

report."[23] TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(l); *Baty*, 543 S.W.3d at 692–93 (internal quotations omitted); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(r)(6) ("[e]xpert 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" (internal quotations omitted)). Thus, because the Smiths may proceed on their health care liability claims against Drs. Keepers and Chan, they may also proceed on their vicarious liability health care liability claim against Vista Community Medical Center based on the conduct of Drs. Keepers and Chan. *See Potts*, 392 S.W.3d at 632; *Whitmire*, 2020

---

[23] To the extent Vista Community Medical Center asserts that Dr. Groysman is not qualified to "render opinions as to Dr[s]. Keepers and . . . Chan," we hold that it has not preserved this complaint for appellate review. *See* TEX. R. APP. P. 33.1(a); *Kuhn v. Sam*, No. 01-20-00260-CV, 2021 WL 3359171, at *22–23 (Tex. App.—Houston [1st Dist.] Aug. 3, 2021, no pet.) (mem. op.) (because defendant physician and health care providers did not raise in trial court their complaints that expert was not qualified to offer opinion on standard of care, complaints not preserved for appellate review); *see also* TEX. R. APP. P. 38.1(i); *Wilson v. Empire Towing LLC*, No. 01-18-01145-CV, 2019 WL 3484216, at *2 (Tex. App.—Houston [1st Dist.] Aug. 1, 2019, no pet.) (mem. op,) ("The failure to provide substantive analysis of an issue or cite appropriate authority waives a complaint on appeal."). Further, if Vista Community Medical Center disagrees as to whether it is vicariously liable for the alleged negligent conduct of Drs. Keepers and Chan, such an argument is not a proper basis for dismissing a health care liability claim at this stage in the litigation. *See Whitemire v. Feathers*, No. 01-19-00094, 2020 WL 4983321, at *22 n.12 (Tex. App.—Aug. 25, 2020, no pet.) (mem. op.); *McAllen Hosps., L.P. v. Gonzalez*, 566 S.W.3d 451, 459 & n.5 (Tex. App.—Corpus Christi–Edinburg 2018, no pet.).

WL 49833321, at *22–23; *see also Gardner*, 274 S.W.3d at 671–72; *Owens*, 478 S.W.3d at 191–92.

Still yet, because the Smiths may proceed on their vicarious liability health care liability claim against Vista Community Medical Center based on the conduct of Drs. Keepers and Chan, they may also proceed on their vicarious liability claim based on the conduct of other agents, servants, employees, parent agents, ostensible agents, agents by estoppel, representatives, doctors, and nurses as well as their direct liability health care liability claim against Vista Community Medical Center. *See Potts*, 392 S.W.3d at 629–33 (plaintiff entitled to proceed with her entire suit against defendant health care provider so long as expert report valid as to one theory of liability against defendant); *Whitmire*, 2020 WL 4983321, at *23; *Owens*, 478 S.W.3d at 191–92 *see also Moreno*, 401 S.W.3d at 45 (holding plaintiffs' vicarious liability claim against defendant health care provider for actions of nurses could proceed because expert report adequate on plaintiffs' vicarious liability claim for negligent acts of physicians); *Huepers v. St. Luke's Episcopal Hosp.*, No. 01-11-00074-CV, 2013 WL 1804470, at *3–5 (Tex. App.—Houston [1st Dist.] Apr. 30, 2013, no pet.) (mem. op.) (holding no further report required where amended petition added new theory of vicarious liability against defendant health care provider based on nurse's negligence because initial report sufficient as to plaintiff's vicarious liability claim against defendant health care provider based on physician's

conduct); *Children's Med. Ctr. of Dallas v. Durham*, 402 S.W.3d 391, 403–04 (Tex. App.—Dallas 2013, no pet.) (concluding, because expert report valid as to vicarious liability claims against defendant health care provider, plaintiffs' direct liability claims against health care provider "may proceed as well").

Thus, we hold that the trial court did not err in overruling Vista Community Medical Center's objections and in denying its motion to dismiss the Smiths' health care liability claim against it.

We overrule this portion of Vista Community Medical Center's first issue.[24]

## Conclusion

We affirm the order of the trial court.

Julie Countiss
Justice

Panel consists of Justices Goodman, Landau, and Countiss.

[24] Due to our disposition, we need not address the remaining portions of Vista Community Medical Center's first, second, and third issues nor its request for attorney's fees and costs. *See* TEX. R. APP. P. 47.1.