Affirmed and Memorandum Opinion filed January 12, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00992-CV

KEVIN D. WHEELER, M.D., Appellant

V.

CHARLES F. LUBERGER, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2014-07070

M E M O R A N D U M O P I N I O N

Appellant, Kevin D. Wheeler, M.D. ("Dr. Wheeler"), appeals two orders denying motions to dismiss a suit filed by Charles F. Luberger ("Luberger"). In two issues, Dr. Wheeler asserts that the trial court abused its discretion by (1) granting an extension to cure deficiencies in Luberger's first expert report because it amounted to "no report," and (2) failing to dismiss the suit because the amended report was statutorily deficient. We affirm.

I. BACKGROUND

Luberger filed a medical malpractice action against Dr. Wheeler, alleging that Dr. Wheeler cut the wrong duct during a laparoscopic cholecystectomy (gallbladder removal) that he performed on Luberger. Pursuant to Texas Civil Practice and Remedies Code section 74.351(a), Luberger filed the medical expert report of Dr. Atif Iqbal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (West 2015). Dr. Wheeler timely objected to Dr. Iqbal's report and filed a motion to dismiss, claiming that the report did not satisfy the statutory requirements set forth in section 74.351(a) and was not merely deficient but was "no report." *See id*. § 74.351(a), (b) (West 2015). Luberger requested a thirty-day extension authorized by section 74.351(c) to cure the deficiencies. *See id*. § 74.351(c) (West 2015). On September 8, 2014, the trial court (a) found "Plaintiff's expert report [ ] deficient," (b) granted the requested extension, and (c) denied Dr. Wheeler's motion "at this time." Neither party immediately appealed the September interlocutory order.

Luberger then filed the report of Dr. Oluwole Fajolu within the thirty-day extension granted by the trial court. Dr. Wheeler also objected to this report and moved to dismiss, claiming the report was deficient. The trial court heard and denied Dr. Wheeler's second motion to dismiss in November 2014.

Dr. Wheeler filed this interlocutory appeal on December 8, 2014, complaining of the trial court's orders denying his first and second motions to dismiss. *See id*. § 51.014(a)(9) (West 2015); Tex. R. App. P. 26.1(b).

II. WE LACK APPELLATE JURISDICTION TO REVIEW THE TRIAL COURT'S SEPTEMBER ORDER

In his first issue, Dr. Wheeler challenges the trial court's denial of his first motion to dismiss. Luberger challenges our appellate jurisdiction to consider such alleged error.

Specifically, Luberger makes a two-pronged attack on jurisdiction. First, Luberger relies on Texas Civil Practice & Remedies Code section 51.014(a)(9)[1] and urges that under *Ogletree v. Matthews*, the decision to deny the initial section 74.351(b) motion to dismiss is not appealable because the trial court also granted an extension to cure the deficiencies. *See Ogletree v. Matthews*, 262 S.W.3d 316, 318, 321 (Tex. 2007) (holding that the trial court's actions denying the motion to dismiss and granting an extension are inseparable and not appealable). Dr. Wheeler counters that such an order is appealable when a plaintiff's initial expert report did not represent a good faith effort and was effectively "no report."

Here, we agree with Dr. Wheeler's jurisdictional analysis. In *Badiga v. Lopez*, the Supreme Court of Texas definitively held that when a plaintiff serves no Chapter 74 report, an immediate interlocutory appeal of the denial of the section 74.351(b) motion is not banned even though the trial court contemporaneously grants an extension of time to cure "deficiencies." 274 S.W.3d 681, 684–85 (Tex. 2009). Then, in *Scoresby v. Santillan*, the court further clarified that where the plaintiff serves a Chapter 74 report, but the report "is so lacking in substance that it does not qualify as an expert report," an interlocutory appeal is available under the *Badiga* rationale. 346 S.W.3d 546, 555 (Tex. 2011). Therefore, we hold that an interlocutory appeal was available to Dr. Wheeler to complain of the September 2014 order by urging that Dr. Iqbal's report was "no report," even though the trial court granted an extension.

This holding does not end our jurisdictional analysis because Luberger asserts, alternatively, that if the September 2014 order was subject to interlocutory

[1] Section 51.014(a)(9) authorizes the interlocutory appeal of an order that "denies all or part of the relief sought by a motion under Section 74.351(b)." *See* Tex. Civ. Prac. Rem. Code Ann. § 51.014(a)(9). However, this section explicitly forbids an appeal from "an order granting an extension under Section 74.351." *See id*.

appeal, then we lack appellate jurisdiction because Dr. Wheeler failed to timely perfect such interlocutory appeal within twenty days of the date of the order. *See* Tex. R. App. P. 26.1(b). Here, we agree with Luberger.

Where an accelerated appeal is available, a party must file its notice of interlocutory appeal within twenty days of the order appealed. *See id.*; *see also In re K.A.F.*, 160 S.W.3d 923, 925 (Tex. 2005) (holding that "the language of rule 26.1(b) is clear and contains no exceptions to the twenty-day deadline."). The trial court signed its order as to Dr. Iqbal's report on September 8, 2014. Dr. Wheeler filed his notice of appeal on December 8, 2014, which falls outside the twenty-day period authorized by statute for perfecting an interlocutory order denying dismissal. Dr. Wheeler failed to comply with rule 26.1(b) with regard to the September order.

Dr. Wheeler argues that rule 26.1(b) simply does not apply to an interlocutory appeal of the initial section 74.351(b) order. Specifically, Dr. Wheeler urges that "[t]o give proper effect to the statute, a Defendant must wait thirty days and then complain that the trial court erred in determining that the initial report was not an expert report upon which an extension could be granted." However, none of Dr. Wheeler's authority supports such a construction of the statute. For example, *Jelinek v. Casas* holds that, in certain circumstances, a defendant may appeal the denial of a section 74.351(b) motion after trial on the merits. *See* 328 S.W.3d 526, 538 (Tex. 2010) (determining that because Dr. Jelinek was nonsuited after the denial of his motion to dismiss and, therefore, did not participate in the trial on the merits against his co-defendant, neither the statute nor public policy foreclose his post-judgment appeal seeking attorneys fees). *Jelinek* only stands for a related proposition that an interlocutory appeal is not mandatory; that is, a defendant is not always required to file an interlocutory

appeal to challenge a trial court's order on a motion to dismiss. *Id*. *Jelinek* does not authorize an untimely interlocutory appeal or suggest in any way that the rule 26.1(b) timetable for interlocutory appeal is not applicable to Chapter 74 cases. *Id*. at 538–39. Similarly, nothing in *Scoresby* or *Badiga* requires or authorizes a defendant to wait and cumulate into one interlocutory appeal its complaints about the denial of its first and second motions to dismiss. *See Scoresby*, 346 S.W.3d at 555; *Badiga*, 274 S.W.3d at 685. Instead, the Supreme Court of Texas, distinguishing a deficient report from no report, holds that *with regard to a (good faith) deficient report* a defendant must wait to challenge the trial court's order regarding the sufficiency of the report. *See Scoresby*, 346 S.W.3d at 556–57. But where, as here, the report is alleged to be so fatally flawed and deficient as to amount to "no report," a defendant should appeal immediately and timely. *See Badiga*, 274 S.W.3d at 684 (holding that "[allowing immediate appeal of the denial of [ ] a motion to dismiss [based upon no report] is appropriate even when the trial court has granted plaintiff's motion to extend time because there is no expert report for the claimant to cure.")

Dr. Wheeler's challenge to the original expert report is an untimely interlocutory appeal. We dismiss Dr. Wheeler's first issue for lack of jurisdiction.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING DR. FAJOLU'S EXPERT REPORT TO BE ADEQUATE

In his second issue, Dr. Wheeler contends the trial court erred by denying his motion to dismiss because Dr. Fajolu's report failed to set forth the standard of care, establish that Dr. Wheeler breached the standard of care, and link this alleged breach to the injuries suffered.

A. Standard of review

We review a trial court's ruling on a motion to dismiss a health care liability

claim for abuse of discretion. *See Rivenes v. Holden*, 257 S.W.3d 332, 336 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (citing *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001)). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *See Larson v. Downing*, 197 S.W.3d 303, 304–05 (Tex. 2006) (per curiam). When reviewing matters committed to the trial court's discretion, we may not substitute our opinion for that of the trial court. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam). We may not reverse a trial court's discretionary ruling simply because we might have decided the matter differently. *Id*. We will defer to the trial court's judgment in the event of a close call. *See Larson*, 197 S.W.3d at 304.

B. Analysis

The Medical Liability Act requires that, in a healthcare liability suit against a physician, a claimant must provide the defendant physician with an expert report explaining the physician's fault. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6) (West 2015); *see also Rivenes*, 257 S.W.3d at 337. "Expert report" is defined as:

> a written report by an expert that provides a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm or damages claimed.

Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6).

The report need not meet the standards for summary judgment or trial. *See Palacios*, 46 S.W.3d at 879. Instead, the expert report need only inform the defendant "of the specific conduct the plaintiffs have called into question" and provide "a basis for the trial court to conclude that the claims have merit." *Gannon*

v. Wyche, 321 S.W.3d 881, 892 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (citing *Palacios*, 46 S.W.3d at 879).

1. Standard of care

Dr. Fajolu's expert report describes the standard of care for this procedure:

> The treatment rendered by Dr. Wheeler was below the standard of care, specifically relating to the common bile duct injury. In treating Mr. Luberger, the standard of care required Dr. Wheeler to carefully identify the biliary tract anatomy, specifically the cystic duct, and only cut the cystic duct to remove the gallbladder. He fell below the standard of care in cutting the common bile duct.
>
> . . .
>
> [T]he standard of care required Dr. Wheeler to carefully identify the common bile duct and to not cut it. He violated the standard of care regarding Mr. Luberger by failing to properly identify the biliary anatomy and by cutting the common bile duct.

Finally, Dr. Fajolu concludes by describing how Dr. Wheeler should have proceeded:

> Instead, the treatment for Mr. Luberger should have included properly identifying the anatomy, avoiding cutting the common bile duct, and only cutting the cystic duct to laparoscopically remove the gallbladder. If he had avoided cutting the common bile duct, in reasonable medical probability, Mr. Luberger's procedure would not have had to be converted to an open surgery (lapratomy) and the Roux-en-Y hepaticojejunostomy would not have been needed.

Dr. Wheeler argues that the report does not indicate how he should have "carefully identified" the anatomy or what steps a prudent surgeon should take to avoid cutting the common bile duct. Dr. Wheeler cites one of this court's laparoscopic-cholecystectomy cases. *See Lopez v. Sinha*, 14-05-00606-CV, 2006 WL 2669355, at *4 (Tex. App.—Houston [14th Dist.] Sept. 19, 2006, no pet.) (mem. op.) (examining an expert report critical of the physician's "management of

a post cholecystectomy bile leak"). In evaluating the standard of care and concluding that the report was deficient, we stated:

> The expert report does not include "specific information about what the defendant should have done differently." (citation omitted) . . . There is no description of the procedure that should be followed when evacuating bile from an abdominal cavity, and there is no explanation as to how Dr. Seu failed to follow the procedure or what Dr. Seu should have done differently.

Id.

In contrast to the *Lopez* report, Dr. Fajolu's report makes clear what Dr. Wheeler should have done differently; specifically, Dr. Wheeler should not have cut the wrong duct while performing the surgery. Dr. Fajolu's report explains that Dr. Wheeler should have "carefully identified" the pertinent anatomical structures and cut the common cystic duct instead of the common bile duct and, if he had cut the proper duct, the laparotomy would not have been needed. The report need not marshal the claimant's proof, but it must inform Dr. Wheeler of the specific conduct called into question and gives the court a basis to conclude that Luberger's claim has merit. *See Baylor College of Medicine v. Pokluda*, 283 S.W.3d 110, 121 (Tex. App.—Houston [14th Dist.] no pet.) (citing *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 859 (Tex. App.—Houston [1st Dist.] 2006, no pet.)); *see also Gelber v. Hamilton*, No. 01-12-00751-CV, 2013 WL 867425, at *5 (Tex. App.—Houston [1st Dist.] Mar. 7, 2013, no pet.) (mem. op.) (concluding that expert report in laparoscopic cholecystectomy case was sufficient where it set out the appropriate standard of postoperative care requiring the surgeon to "avoid careless or avoidable injury to the multiple organs and anatomical areas that are encountered during the surgery . . . . Additionally, when problems occur identifying anatomical areas, or from adhesions, or other surgical difficulties, the

standard of care requires that the laparoscopic procedure be converted to an 'open,' more invasive procedure.").

Dr. Wheeler relies on another cholecystectomy case as an example of a "proper" expert report. *See Schmidt v. Escareno*, No. 09-11-00662-CV, 2012 WL 759063, at *2 (Tex. App—Beaumont, Feb. 29, 2012, no pet.) (mem. op.) (not designated for publication). The alleged medical errors in *Schmidt* and this case are virtually identical. In *Schmidt*, the plaintiff's expert criticized the defendant doctor for misidentifying the common bile duct as the cystic duct during the surgery and therefore transecting the wrong duct. *See id*. at *3. Dr. Wheeler construes *Schmidt* as requiring the expert report to state how the defendant doctor should have correctly identified or secured a "critical view" of the proper duct. Dr. Wheeler misreads *Schmidt*. Instead, the court found sufficient the expert report opining that "obtaining a 'critical view' of the structures attached to the gallbladder, 'alone or with cholangiography[,] will usually enable the surgeon to conclusively identify these structures . . . ." *Id*. The *Schmidt* report, like the report in this case, states that a defendant doctor falls below the accepted standard of care during a cholecystectomy by failing to anatomically identify the proper duct to cut. *Id*.

It is true that the report in this case does not use the magic words "critical view," but such magic words are not required. *See Patel v. Williams ex Rel. Estate of Mitchell*, 237 S.W.3d 901, 905 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (noting that "there is nothing in section 74.351 requiring standards of care to be described using any specific terms, phrases or magic words."). Thus, we conclude that the trial court did not abuse its discretion in finding sufficient Dr. Fajolu's description of the standard of care.

2. Breach of standard of care

Dr. Fajolu describes of Dr. Wheeler's breach of the standard of care as follows:

> The treatment rendered by Dr. Wheeler was below the standard of care, specifically relating to the common bile duct injury.
>
> . . .
>
> He fell below the standard of care in cutting the common bile duct
>
> . . .
>
> He violated the standard of care regarding Mr. Luberger by failing to properly identify the biliary anatomy and by cutting the common bile duct.

Dr. Fajolu's report also separately refers to the "substandard care of Dr. Wheeler" causing permanent scarring, additional pain, and additional otherwise unneeded surgical procedures. Dr. Wheeler contends that Dr. Fajolu's report is deficient because it does not identify how Dr. Wheeler breached the standard of care and specify how his cutting of the bile duct was negligent.

As with the standard of care, the adequacy of the breach element of a report does not depend on the expert's use of magic words or phrases, such as "Dr. Wheeler breached the standard of care." *See Bowie*, 79 S.W.3d 48. Thus, we are left to decide whether the report was specific enough on the element of breach. To fairly summarize an expert's opinion regarding breach, the report must "specify what action or inaction constituted a breach of the standard of care." *See Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex. 2013) (holding expert report sufficient where it sets out standard of care, breach, and causal relationship between the failure and harm alleged); *Bailey v. Amaya Clinic, Inc.*, 402 S.W.3d 355, 366 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (holding nonconclusory statement of standard of care and how it was breached is sufficient); *see also Clapp v. Perez*, 394 S.W.3d 254, 261 (Tex. App.—El Paso 2012, no pet.) (holding

insufficient a report stating, "Dr. Herrera never asserts in his report that Dr. Clapp or Dr. Gagot personally failed to order a nasal-gastric tube before surgery or, if ordered, failed to make certain it was inserted."). However, the expert opinion need not cover every alleged liability theory or include "litigation-ready" evidence. *See Certified EMS*, 392 S.W.3d at 630.

We conclude that Dr. Fajolu's report is sufficient because he states that "Dr. Wheeler violated the standard of care regarding Luberger by failing to properly identify the biliary anatomy and by cutting the common bile duct." The report informs Dr. Wheeler of the harm alleged and gives the court a basis to conclude that Luberger's claim has merit; thus, the analysis of Dr. Wheeler's breach presents a good-faith effort to summarize the harm alleged. *See Palacios*, 46 S.W.3d at 878–79; *see also Gelber*, 2013 WL 867425, at *6 (holding report was sufficient where it addressed the standard of care and explained "to a reasonable degree, how and why the breach caused the injury based on the facts presented.") (citing *Jelinek*, 328 S.W.3d at 539–40). Accordingly, we hold the trial court did not abuse its discretion in finding that Dr. Fajolu's analysis of Dr. Wheeler's alleged breach was sufficient.

3. Causation

Dr. Fajolou's report concludes:

> If [Dr. Wheeler] had avoided cutting the common bile duct, in reasonable medical probability, Mr. Luberger's procedure would not have had to be converted to an open surgery (laparotomy) and the Roux-en-Y hepaticojejunostomy would not have been needed. Also in reasonable medical probability, Mr. Luberger's post-operative cholangiograms, liver function tests, subsequent months of abdominal pain and subsequent surgical procedures (including the biliary drainage catheters) would not have occurred.
>
> As a consequence of these errors, the substandard care of Dr. Wheeler caused Mr. Luberger permanent scarring, additional pain and

> additional otherwise unneeded surgical procedures. Dr. Wheeler's substandard care resulted in additional injury to Mr. Luberger's abdominal area, which but for the common bile duct injury, would not have occurred.

Dr. Wheeler argues that this analysis of proximate cause fails to "actually connect some specific act or omission of [Dr. Wheeler] to Luberger's alleged injuries and damages."

A report is sufficient if it informs the defendant of the specific conduct about which the plaintiff complains and provides a basis for the trial court to conclude the claims have merit. *See Jelinek*, 328 S.W.3d at 539 (citing *Bowie*, 79 S.W.3d at 52). In deciding whether a report is sufficient, the trial court should not look outside the four corners of the report. *Id*. Causation cannot be inferred; rather, the report must link the result to the alleged breach. *See Bowie*, 79 S.W.3d at 53. A description of only a possibility of causation does not constitute a good-faith effort to comply with the statute. *Id*. On the other hand, the description of causation need not provide an extreme level of detail in order to give notice of the basis of the claim. *See e.g. Kelly v. Rendon*, 255 S.W.3d 665, 677 n.7 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

For example, in *San Jacinto Methodist Hospital v. Bennett*, a wrongful death claim arising from failure to adequately treat a bed sore known as a decubitus ulcer, we held that the trial court did not abuse its discretion by denying the defendant's motion to dismiss on the issue of causation where the report stated:

> By failing to perform an initial survey of skin integrity, assessment for risk for ulcers . . . following up with skin care nursing and protocol interventions when decubitus ulcers were detected, as well as failing to optimize the patient's nutrition and hydration . . . as well as failing to perform ongoing assessment, reassessment and care planning to prevent, . . . decubitus ulcers, and treatable predisposing factors such as poor nutrition and hydration. [sic] The staff . . . allowed the patient

> to develop decubitus formation and further promoted failure to heal through poor nutrition and poor hydration.

256 S.W.3d 806, 816–17 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Methodist urged that this report was conclusory because it failed to explain the mechanism of injury. *Id*. at 816. We concluded that this chain of events demonstrated how negligence on the behalf of a hospital staff lead to medical complications for the patient. *Id*. at 818–19. In this respect, the report's causation analysis is similar to that found in Dr. Fajolu's report because his report demonstrates how a physician's failure to carefully identify anatomical structures forced the procedure's conversion to an open surgery which, in turn, required Luberger to endure follow-up tests, procedures, and months of pain.

Dr. Fajolu's assertion that Dr. Wheeler's transection of the common bile duct led to complications resulting from an open surgery is sufficient to establish causation; the report need not explain precisely how every causal link connects. *See Hilton v. Wettermark*, No. 14-14-00697-CV, 2015 WL 2169516, at *4 (Tex. App.—Houston [14th Dist.] May 7, 2015, no pet.) (mem. op.). In *Hilton*, an expert opined that, had the patient's cancer been identified earlier, the patient would have likely survived; however, we did not require an exhaustive explanation of the underlying medical details:

> [T]his court did not require the Chapter 74 expert report to explain, for example, why a stage I cancer was surgically resectable, why a stage IV cancer was incurable, or how a cancer will spread without surgical removal. Apparently, these are the types of underlying details Hilton would require of Cyprus's report. But, this level of detail is unnecessary for the defendant to be informed of the conduct complained of and for the trial court to conclude that the claims have sufficient merit to withstand a challenge at the expert-report stage.

Id.

A plaintiff is not required to marshal all of his evidence at this early stage. *See Obstetrical and Gynecological Associates, P.A. v. McCoy*, 283 S.W.3d 96, 101 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (citing *Palacios*, 46 S.W.3d at 878). We conclude that Dr. Fajolu's causation analysis sufficiently notified the defendant of the error alleged and provided the trial court with a basis to evaluate the claim's merit. *Id.* at 878–79.

When reviewing matters solely within the trial court's discretion, we must not substitute our judgment for that of the trial court. *See Bowie*, 79 S.W.3d at 52. Because the statements in the report sufficiently speak to the standard of care, breach of the standard, and causation, we cannot conclude the trial court abused its discretion by denying Dr. Wheeler's motion to dismiss. We overrule Dr. Wheeler's second issue.

We lack jurisdiction to consider Dr. Wheeler's appeal of the trial court's September 8, 2014 order. We affirm the trial court's November 21, 2014 order denying Dr. Wheeler's second motion to dismiss.

/s/ John Donovan
Justice

Panel consists of Justices Boyce, McCally, and Donovan.