In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00086-CV

COYE Q. MCMILLAN, Appellant

V.

JOE HARRIS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF RANDI HARRIS, Appellee

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On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 34610

MEMORANDUM OPINION

This interlocutory appeal concerns the adequacy of expert reports under the standards that apply to health care liability claims. *See* Tex. Civ. Prac. & Rem. Code. Ann. § 74.351 (West 2017). Dr. Coye Q. McMillan appeals the trial court's order denying his motion to dismiss a health care liability claim brought by Joe Harris, individually and as representative of the estate of Randi Harris. We affirm the order of the trial court.

Background

In April 2015, Harris filed a petition asserting wrongful death and survival claims against McMillan for medical malpractice that Harris alleged caused injuries to and the death of Harris's adult son, Randi Harris. In the petition, Harris alleged that on June 6, 2014, Randi suffered a "penetrating injury to the right radial artery[,]" and sought treatment at the emergency room in Jasper, Texas. Harris further alleged that on June 6, 2014, and on June 8, 2014, Randi was treated by McMillan, a physician in the emergency room.

Harris alleged that on June 6, McMillan "claims he performed an 'arterial bleed repair' using a combination of Nylon and Vicryl sutures[,]"and discharged Randi. When Randi returned to the emergency room on June 8, complaining of vomiting and increased swelling in his right arm, McMillan discharged Randi with instructions on how to check the pulse in his fingers. According to Harris, Randi returned to the hospital on July 1, 2014, "with a non-healing wound on his arm[,]" and was treated by another physician, who ordered an angiography. A large hematoma related to the development of a radial pseudoaneurysm had formed in Randi's forearm, and he was referred to a vascular surgeon. When Randi returned to the hospital on July 2, 2014, he was transferred to Christus St. Elizabeth Hospital in Beaumont (St. Elizabeth) for "extensive vascular surgery."

On July 5, 2014, Randi's artery was ligated at St. Elizabeth. Harris alleged that it was noted in Randi's July 8, 2014, discharge summary that McMillan had attempted to control the pulsatile bleeding in Randi's forearm with a superficial stitch, and that subsequent to the suturing performed by McMillan, Randi's bleeding in his forearm had never stopped. On July 12, 2014, Randi developed "severe respiratory distress and wheezing[,]" and returned to St. Elizabeth where he was diagnosed with infective endocarditis caused by methicillin-resistant staphylococcus aureus colonization in his prosthetic heart valve, and a surgery to replace the valve was required. During Randi's stay at St. Elizabeth, he became "'functionally [a] quadriplegic[.]'" In October 2014, Randi was released from St. Elizabeth, and because of the significant damage caused by the invasive infection, his prognosis was listed as poor. Randi returned to St. Elizabeth on Christmas Eve, and he was noted to have systemic staph infection and a mitral valve infection, and while at St. Elizabeth, he went into cardiopulmonary arrest and died.

Harris alleged in his petition that a history of pulsatile bleeding is a hard sign of vascular injury, and that failing to explore the wound will almost certainly result in uncontrolled bleeding leading to a pseudoaneurysm. Harris alleged that McMillan was aware that Randi had an arterial injury that had resulted in pulsatile bleeding, but instead of referring Randi to a competent vascular surgeon for ligation,

McMillan took it upon himself to perform the repair. Randi developed a pseudoaneurysm over the course of approximately three weeks following the repair. Harris alleged that a radial pseudoaneurysm is the result of a failure to properly ligate the perforated artery, and that McMillan's repair "was not only substandard, but it caused the emergency in question." According to Harris, McMillan had a second opportunity to correct the problem when Randi returned to the emergency room with a swollen arm that was not healing, but McMillan sent Randi home again, and the unrepaired artery resulted in a hemorrhage several weeks later.

Harris alleged in his petition that the care provided by McMillan fell below the standard of care for an emergency room physician treating a patient with the signs and symptoms Randi exhibited. According to Harris, McMillan's breach of the standard of care directly resulted in Randi's "immediate physical and mental decline and his tragic suffering and death." Harris alleged that the outcome could have been easily avoided if McMillan had recognized Randi's signs of vascular injury and referred him to a qualified surgeon to ligate the punctured artery, instead of performing an inadequate repair that resulted in Randi's open wound being colonized with bacteria that led to his untimely death.

Harris filed a report authored by Dr. Joe D. Haines Jr. along with the curriculum vitae of Haines to comply with the statutory requirements that apply to

health care liability claims. *See id.* McMillan filed objections to the sufficiency of the expert report, complaining that Haines was not qualified to testify regarding causation and that Haines's report was insufficient as a matter of law. Harris then filed a supplemental report authored by Haines. McMillan filed supplemental objections to the sufficiency of Haines's expert reports and argued that the original and supplemental reports failed to comply with the statutory requirements that apply to health care liability claims. McMillan also filed a motion to dismiss Harris's claims. The trial court overruled the objections and denied McMillan's motion to dismiss. McMillan appealed the trial court's ruling.

In a prior appeal, this Court concluded that Haines's report and curriculum vitae failed to establish that he was actively practicing health care or rendering health care services relevant to Harris's claims, and that he failed to establish that he had sufficient knowledge, skill, experience, training, or education to express an opinion regarding the necessity for an emergent referral to a vascular surgeon, the development of the pseudoaneurysm, MRSA, endocarditis, or the cause of Randi's injury and death. *McMillan v. Harris*, No. 09-15-00466-CV, 2016 WL 4040126, at *8 (Tex. App.—Beaumont July 28, 2016, no pet.) (mem. op.). This Court also concluded that Haines's report failed to adequately explain a causal relationship between McMillan's negligence and the injury, harm, and damages claimed. *Id.* at

*9. We reversed the trial court's order denying McMillan's motion to dismiss and remanded to the trial court to determine whether Harris should be afforded a thirty-day extension to cure the deficiencies in the expert report. *Id.* at *10.

The trial court subsequently granted Harris a thirty-day extension to provide a compliant supplemental report. Harris filed Haines's third supplemental report, and Harris also filed a new expert report authored by Dr. Brian Camazine along with the curriculum vitae of Camazine. McMillan objected to the sufficiency of Haines's and Camazine's expert reports and moved to dismiss. The trial court overruled the objections and denied the motion to dismiss. This interlocutory appeal followed. On appeal, McMillan argues that Haines and Camazine are not qualified to render opinions on the causal link between McMillan's care and Randi's death, and that the expert reports fail to constitute a good faith report on standard of care and causation.

Applicable Law

Section 74.351 requires a health care liability claimant to timely file sufficient expert reports. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a), (*l*). When considering a motion to dismiss for failure to comply with section 74.351, the trial court must determine "whether 'the report' represents a good-faith effort to comply with the statutory definition of an expert report." *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001); *see Bowie Mem'l Hosp. v.*

Wright, 79 S.W.3d 48, 52 (Tex. 2002); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a), (*l*). Section 74.351 defines an "expert report" as follows:

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

Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). "Because the statute focuses on what the report discusses, the only information relevant to the inquiry is within the four corners of the document." *Palacios*, 46 S.W.3d at 878; *see also Wright*, 79 S.W.3d at 52.

"A report need not marshal all the plaintiff's proof, but it must include the expert's opinion on each of the elements identified in the statute." *Palacios*, 46 S.W.3d at 878; *see also Wright*, 79 S.W.3d at 52. An expert report constitutes a good-faith effort when the expert sets out his opinions on the standard of care, breach, and causation with enough specificity to: (1) "inform the defendant of the specific conduct the plaintiff has called into question[,]" and (2) "provide a basis for the trial court to conclude that the claims have merit." *Palacios*, 46 S.W.3d at 879; *see also Wright*, 79 S.W.3d at 52. "'[T]he expert must explain the basis of his statements to link his conclusions to the facts.'" *Wright*, 79 S.W.3d at 52 (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). "A report that merely states the

expert's conclusions about the standard of care, breach, and causation does not fulfill these two purposes." *Palacios*, 46 S.W.3d at 879. "Nor can a report meet these purposes and thus constitute a good-faith effort if it omits any of the statutory requirements." *Id*. "The report can be informal in that the information in the report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial." *Palacios*, 46 S.W.3d at 879.

We review a trial court's ruling on a motion to dismiss pursuant to section 74.351 under an abuse-of-discretion standard. *Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 878. "A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Wright*, 79 S.W.3d at 52. We may not substitute our own judgment for the trial court's judgment. *Id*. Section 74.351(i) does not require that a single expert address all liability and causation issues with respect to a defendant. *Packard v. Guerra*, 252 S.W.3d 511, 526 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Thus, we may consider the expert reports Harris provided in the aggregate to determine whether the trial court abused its discretion when it determined that Haines's and Camazine's expert reports constituted an objective good faith effort to comply with the definition of an expert report in section 74.351(r)(6). *See id.*; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(*l*).

Expert Qualifications

In issue one, McMillan argues that Haines and Camazine are not qualified as experts under section 74.402 of the Civil Practice and Remedies Code. McMillan argues that Haines's third supplemental report has not provided additional information to show that he is qualified to render an opinion in this case. According to McMillan, Haines has not shown that he has certification or substantial training or experience in the necessity of an urgent referral, the treatment of a pseudoaneurysm, vascular surgery, cardiology, or infectious disease. Harris argues that Camazine is not qualified as an expert because he is not a credentialed vascular surgeon and because he has not shown that he possesses certifications or substantial experience in the medical conditions which form the basis of his opinions.

A person may qualify as an expert on whether a health care provider departed from accepted standards of care only if the person:

> (1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;
> (2) has knowledge of accepted standards of care for health care providers for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and
> (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of health care.

Tex. Civ. Prac. & Rem. Code Ann. § 74.402(b) (West 2017). Under the literal language of section 74.402(b)(1), an expert is only required to practice health care in a field of practice involving the same type of care or treatment and need not be practicing health care in the same field as the defendant health care provider. *Group v. Vicento*, 164 S.W.3d 724, 731 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Whether a witness is qualified on the basis of training or experience depends on whether, at the time the claim arose or at the time testimony is given, the witness:

> (1) is certified by a licensing agency of one or more states of the United States or a national professional certifying agency, or has other substantial training or experience, in the area of health care relevant to the claim; and
> (2) is actively practicing health care in rendering health care services relevant to the claim.

Tex. Civ. Prac. & Rem. Code Ann. § 74.402(c). The expert must have "'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996). An expert's qualifications must be evident from the four corners of his report and curriculum vitae. *See Christus Health Se. Tex. v. Broussard*, 267 S.W.3d 531, 536 (Tex. App.—Beaumont 2008, no pet.); *Tenet Hosps. Ltd. v. Barnes*, 329 S.W.3d 537, 546-47 (Tex. App.—El Paso 2010, no pet.).

In our prior opinion, we ruled that Haines was not qualified to render causation opinions regarding McMillan's treatment of Randi which allegedly caused Randi's subsequent demise. *See McMillan*, 2016 WL 4040126, at *8. Haines's third supplemental report provides the additional information to show that he is qualified as an expert under section 74.402. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.402. Haines's supplemental report establishes that he is actively practicing health care or rendering health care services relevant to Harris's claims. *Id.* § 74.402(b)(1). Haines is a licensed, practicing, board-certified physician in family medicine who has primarily practiced family and emergency medicine. Haines has been practicing medicine continuously since 1982, has over thirty years of experience practicing emergency medicine in both military and private settings, was actively practicing emergency medicine at Camp LeJeune from 2013 to 2014, and was actively practicing emergency medicine at The Marine Corps Mountain Warfare Training Center in 2015 and 2016.

Haines's supplemental report addresses his knowledge, skill, experience, and training regarding the necessity for an emergent referral to a vascular surgeon. Haines explains that as an emergency physician he has treated patients who had penetrating trauma to the radial artery and that the injuries and expected treatment in this case are well within his scope of expertise, knowledge, and training.

According to Haines, "[a]ny penetrating injury to the radial artery requiring repair is done . . . by a vascular surgeon[,]" and he has referred countless patients to vascular surgeons for arterial repair. Haines states that he has "direct experience in diagnosing penetrating, radial artery injury in the emergency room setting and referring those patients to a higher level of care for repair."

Haines's supplemental report also addresses his knowledge, skill, experience, and training regarding the development of the pseudoaneurysm and post-operative infections. Haines maintains that the concept of a pseudoaneurysm is not outside his realm of expertise. Haines also states that development of post-operative infections is within the realm of expertise of an emergency room physician because "[m]ost often, patients who return to the hospital with post-operative surgical complications are admitted to an attending physician or hospitalist practicing family or emergency medicine." According to Haines, as an emergency room physician, he knows that when the radial artery is left unrepaired, blood can pool within that area, causing the radial artery to burst. Haines states that this is why emergency room physicians refer patients with a penetrating injury to the forearm to the proper surgeon for repair. Haines also states that in his practice he has seen hundreds of patients who have been re-admitted to the hospital with post-operative infections involving staphylococcus. According to Haines, it is "well within my knowledge, skill, experience, and training

to opine on whether a post-operative infection has any relationship to a prolonged, undiagnosed, and untreated injury to the radial artery."

Haines has knowledge of the standards of care that apply to a physician who cares for a patient with Randi's condition. *See id.* § 74.402(b)(2). Haines has the training, background, and experience to testify regarding the appropriate evaluation and treatment of penetrating wounds to the extremities. By virtue of his credentials, experience, training, and practice in the relevant area of health care, which involves the care and treatment of patients like Randi, Haines has the requisite training or experience to offer an expert opinion on the subject before the trial court. *See id.* § 74.402(b)(3), (c); *see also Broders*, 924 S.W.2d at 153. We conclude that Haines is qualified as an expert to opine on the standard of care applicable to McMillan's and on the issue of whether McMillan departed from the accepted standard of care. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.402.

Camazine's report and curriculum vitae indicate that he also satisfies the statutory requirements. Camazine is a licensed, practicing, board-certified physician in thoracic surgery who has been actively practicing medicine since 1993. Camazine has been practicing emergency medicine since 2009. He previously practiced general, vascular, and thoracic surgery. Camazine has worked on lacerations and vascular injuries throughout his career and has trained residents in this area.

Camazine has knowledge of the standards of care that apply to physicians who are treating patients with lacerations and vascular injuries. *See id.* § 74.402(b)(1), (2). By virtue of his credentials, experience, training, and practice in the relevant area of health care, which involves the care and treatment of patients like Randi, Camazine has the requisite training or experience to offer an expert opinion on the subject before the trial court. *See id.* § 74.402(b)(3), (c); *see also Broders*, 924 S.W.2d at 153. We conclude that Camazine is qualified as an expert to opine on McMillan's standard of care and on the issue of whether McMillan departed from the accepted standard of care. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.402. In summary, we conclude that the trial court did not abuse its discretion in ruling that Haines and Camazine are qualified as experts under section 74.402. *See id.* We overrule issue one.

In issue two, McMillan argues that the reports of Haines and Camazine fail to constitute a good faith report on standard of care and causation because the reports are based on conclusory statements and are full of analytical gaps. McMillan complains that the reports fail to explain how his alleged breaches of the standard of care were a substantial factor in causing Randi's death.

Harris was not required to marshal all his proof or present evidence in the reports as if he were actually litigating the merits. *See Palacios*, 46 S.W.3d at 878-

79. The reports need not meet the same requirements as evidence offered in a summary-judgment proceeding or at trial. *Id*. at 879. The report need only: (1) inform McMillan of the specific conduct the appellee has called into question; and (2) provide a basis for the trial court to conclude that the claims have merit. *See id.*; *Wright*, 79 S.W.3d at 52.

The Expert Report of Dr. Haines

In our prior opinion, we concluded that Haines's report was insufficient because it failed to adequately explain a "'causal relationship between' Dr. McMillan's negligence and the injury, harm, or damages claimed." *McMillan*, 2016 WL 4040126, at *9. We noted that Haines's opinion failed to state that McMillan was unqualified or state what type of qualifications an emergency room physician should have before attempting to repair an arterial injury; in what respects the performed repair fell below the standard of care; how the repair should have been performed; or how the alleged lack of qualifications, deficient repair, and alleged failure to make an emergent referral to a vascular surgeon caused the injury to or death of Randi. *Id.*

Haines's supplemental report answers these questions and provides a fair summary of the standards of care, breach, and causation. *See Palacios*, 46 S.W.3d at 875. In his supplemental report, Haines states that he is aware of the standards of

care in treating a suspected vascular injury in an emergency room setting. Haines states that an emergency room physician's responsibility is "to stabilize the extremity and control the hemorrhage with direct pressure, utilizing a tourniquet if necessary[,]" and to refer the patient to a higher level of care if necessary. According to Haines, an emergency room physician is not qualified to perform an arterial repair. Haines states that vascular injuries are never repaired in the emergency room because to repair the artery, the surgeon must have access to the proper equipment, such as a vascular microscope and proper surgical tools. Haines states that if a vascular injury is suspected in the emergency room, a vascular surgeon is called and the patient is taken to the operating room. Haines maintains that a vascular surgeon is responsible for all procedures relating to suspected arterial repair.

Haines states that McMillan's indication on the June 6, 2014, medical record that he performed an arterial bleed repair would have been "far outside the scope of his qualifications and below the standard of care for an emergency room physician." Haines maintains that the standard of care for McMillan would have been to stop and control Randi's bleeding and then refer him to a proper surgeon. According to Haines, "McMillan should have never performed this procedure, [and] it is beyond all medical reasoning why he would have failed to consult a surgeon on June 8, 2014[,] in the face of markedly increased swelling in the forearm." Instead,

McMillan made a call to an outside hospital and released Randi with the phone number of a different physician to set up an appointment. Haines maintains that while McMillan attempts to justify his release of Harris by claiming that he contacted an outside facility, "the fact is that he did nothing more for [Randi] other than hand him the name of a surgeon to call." According to Haines, "[n]o immediate referral was initiated, no consultation was called in, and therefore, there was no discovery made that [Randi's] artery was not completely closed and repaired."

According to Haines, such conduct was below the standard of care because as of June 8, 2014, McMillan had "actual knowledge that his repair may have failed, as sudden swelling in the arm is a symptom of potential bleeding." Haines states that the failure to have Randi assessed on June 8, 2014, allowed Randi to return home with instructions to self-check his pulse and allowed the pseudoaneurysm to continue to form. Haines maintains that over the course of several weeks, a predictable outcome occurred, that being that blood pooled at the origin of the opening of the artery until it eventually burst, causing the bleeding that Randi presented with on July 1, 2014. According to Haines, it is well within his knowledge as emergency room physician, that if left untreated, an open radial artery can result in the formation of a radial pseudoaneurysm, and that is what occurred in this case. Haines explained that this result was directly caused by McMillan being "negligent

in attempting a vascular repair by himself in an unequipped emergency room without consulting the proper trauma surgeon."

Haines also maintains that McMillan violated the proper standard of care for evaluating and treating penetrating wounds to the upper extremities in patients like Randi. Haines's report lists the standards of care for the evaluation and treatment of penetrating wounds to the extremities. Haines states that McMillan fell below the standard of care by "failing to perform a thorough and proper examination of the penetrating wound to [Randi's] right forearm" on June 6, 2014, and in doing so, McMillan failed to rule out a neurovascular injury to the forearm. According to Haines, the initial negligence was compounded two days later when Randi returned complaining of a swollen right arm, which the nurse indicated was two to three times larger than the other arm. Haines notes that while the medical records show that Randi had a strong radial and ulnar pulse, the records show that "no comparison with the contralateral extremity was made as a basis of comparison." Haines states that this massive amount of swelling could have only been caused by continued hemorrhage due to a lacerated artery, and this was not understood or appreciated by McMillan, who discharged Randi with no further treatment or immediate referral to a vascular surgeon. Haines further states that "[t]o further complicate matters, [Randi] was taking Coumadin which undoubtedly increased the hemorrhage, another

fact not appreciated by Dr. McMillan." According to Harris, despite strong evidence that an arterial injury had taken place, these findings were "either not recognized, were ignored or overlooked" by McMillan. Haines concludes that McMillan breached the standard of care by failing to perform an adequate examination to rule out arterial injury and by negligently allowing Harris to be discharged twice without establishing the diagnosis.

Concerning causation, Haines states that every patient presents with different co-morbidities, and Randi had a prosthetic heart valve prior to suffering the penetrating injury. Haines opines that Randi's "post-operative infection was related to his extensive vascular surgery." According to Haines, because Randi's infection became symptomatic three days following his discharge from the hospital, "it is within a reasonable medical certainty that the infection was a post-operative complication from his surgery." Haines states that "had the radial artery injury been properly treated before the psuedoaneurysm burst, [Randi's] outcome would have been different, and he would have avoided the extensive treatment he underwent in the hospital following his readmission."

Harris concludes that significant delay in the diagnosis and treatment of Randi's obvious arterial injury led to the surgical repair and post-operative infection involving the colonization of MRSA, which "certainly within reasonable medical

probability could have seeded into his arm by the time of his 7/5/2014 ligation." According to Haines, it is "within a reasonable medical probability that [Randi] could have avoided the development of the bacterial endocarditis had his arterial injury been properly recognized and treated by the appropriate vascular surgeon on his initial visit to Dr. McMillan . . . or his second visit." Haines states that had McMillan followed the standard of care in diagnosing an arterial injury and not deviated from the standard of care by negligently failing to take proper measures to rule out an arterial injury, Randi would not have, "in [a] reasonable degree of medical probability, developed an aneurysm and infection which resulted in considerable morbidity, infection[,] and ultimately his death."

We conclude that Haines sets forth in his supplemental report the applicable standards of care and how they were allegedly breached by McMillan. We also conclude that Haines's supplemental report explains how and why McMillan's breach of the standards of care may have caused or contributed to Randi's injuries and death. *See Jelinek v. Casas*, 328 S.W.3d 526, 539-40 (Tex. 2010); *Palacios*, 46 S.W.3d at 879.

The Expert Report of Dr. Camazine

Our review of the record shows that Camazine's report also provides a fair summary of the standards of care, breach, and causation. *See Palacios*, 46 S.W.3d

at 875. In his report, Camazine states that the standard of care applicable to McMillan includes the identification of a significant arterial injury and immediate referral of the patient to a vascular surgeon, and recognition that an expanding hematoma in the area of an arterial injury suggests continued bleeding, especially in a patient on Coumadin, and that in such a situation, an immediate referral to a vascular surgeon is necessary. Camazine states that McMillan breached the standard of care in treating Randi by: (1) failing to immediately refer Randi to a vascular surgeon when he discovered an injury to the radial artery and by attempting to repair an arterial bleed; and (2) failing to realize on the follow-up visit on June 8, 2014, that Randi had a significant ongoing bleeding problem that was complicated by Coumadin use and by failing again to immediately refer Randi to a vascular surgeon.

Camazine states that the repair of a significant arterial injury is not the province of the emergency physician. According to Camazine, no hospital would give an emergency physician privileges to perform such a repair because specialized training is needed to evaluate and repair an arterial injury and to know when the arteries can simply be ligated, and because special equipment that is not available in the emergency room is necessary to repair the injury. Camazine maintains that the role of the emergency physician in this type of case is to stabilize the patient so that the vascular specialist can do the definitive repair. Camazine states that an arterial

repair "would have been far outside the scope of Dr. McMillan's qualifications and attempting a repair would be below the standard of care for an emergency room physician[,]" and that "[t]hese principles are supported by the fact that Dr. McMillan's repair failed."

Camazine further states that the breaches of the standard of care by McMillan were the proximate and direct cause of Randi's death. According to Camazine, if Randi's injured radial artery had been ligated on June 6, 2014, or June 8, 2014, "to a reasonable degree of medical certainty, [Randi] would [have] never, at a minimum, developed a ps[e]udoaneurysm with a large hematoma that eventually ruptured requiring extensive surgery." Camazine states that secondly, Randi "wouldn't have suffered from such a massive post[-]operative infection that became systemic and eventually claimed his life." According to Camazine, "[i]t is without question that Dr. McMillan's attempted repair was deficient because the artery continued to bleed and a pseudoaneurysm formed[,]" resulting in the development of a large hematoma that eventually ruptured.

Camazine states that despite the evident complications, McMillan failed to realize the critical nature of the situation on June 8, 2014, and as a result, Randi required an extensive surgery to evacuate the hematoma and properly deal with the radial artery injury. According to Camazine, the proximate failure to immediately

refer Randi to a vascular surgeon resulted in the development of a severe, post-operative infection requiring a "heroic major surgery" to replace Randi's infected valve. Camazine states that based on his experience, if properly treated, Randi's injury "to a reasonable degree of medical certainty would likely not have become infected and hence, his aortic root would not have become infected." According to Camazine, if McMillan "had simply referred [Randi] to a vascular surgeon as the standard requires, rather than performing a repair that failed, [Randi] would not have developed an infected pseudoaneurysm that subsequently infected his mechanical aortic root and [led] to massive medoastinal infection and ultimately death." Camazine maintains that had McMillan referred Randi to a vascular surgeon, Randi "would almost certainly have survived his laceration." Camazine also states that all the opinions expressed in his report are based upon "reasonable medical probability."

We conclude that Camazine's report sets forth the applicable standards of care and how they were allegedly breached by McMillan. We also conclude that Camazine's report explains how and why McMillan's breach of the standards of care may have caused or contributed to Randi's injuries and death. *See Jelinek*, 328 S.W.3d at 539-40; *Palacios*, 46 S.W.3d at 879.

In considering Harris's expert reports in the aggregate, we conclude that the trial court was justified in finding that Haines's and Camazine's reports are sufficient to provide a fair summary of the applicable standards of care, to explain how McMillan allegedly breached those standards, to inform McMillan of the specific conduct called into question, and to explain how McMillan's failure to follow the standards caused Randi's injuries and death. *See Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 879; *Guerra*, 252 S.W.3d at 526; *see also* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6). The reports provide a basis for the trial court to conclude that Harris's claims have merit. *See Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 879. We overrule issue two.

In summary, we conclude that the trial court did not abuse its discretion in ruling that Haines's and Camazine's reports met the requirements of expert reports under Texas law. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351. We further conclude that the trial court did not abuse its discretion in overruling McMillan's objections and denying McMillan's motion to dismiss. We affirm the order of the trial court.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on June 14, 2017
Opinion Delivered August 17, 2017

Before McKeithen, C.J., Horton and Johnson, JJ.

DISSENTING OPINION

I respectfully disagree.

In this appeal, the Appellant challenges whether the expert reports adequately address the wrongful death claim, complaining solely about the experts' qualifications and failures as to the cause of Harris's death, therefore I do not address the survival claim.[1] *See Courtney v. Pennington*, No. 05-16-01124-CV, 2017 Tex.

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[1] The parties have not raised an issue on appeal as to whether the care and treatment provided by Dr. McMillan was "emergency care." But, the amended petition states that "[t]his lawsuit arises out of two emergency room visits" and Harris alleges that "Dr. McMillan's care fell below the standard of care for an emergency room practitioner treating a patient with the signs and symptoms of Mr. Harris." Harris seeks damages "related to the negligent care provided by Dr. McMillan[]" as well as exemplary damages based on "grossly reckless conduct[.]"

Under Texas statutory law, a person who in good faith administers emergency care is not liable in civil damages for care and actions performed during the emergency unless the "act is wilfully or wantonly negligent[.]" Tex. Civ. Prac. & Rem. Code Ann. § 74.151(a) (West 2017). Therefore, assuming without deciding that Dr. McMillan was providing emergency care at the time in question, the plaintiff will have the burden to prove that McMillan's conduct deviated from the standard of care with willful and wanton negligence. *See Ho v. Johnson*, No. 09-15-00077-CV, 2016 Tex. App. LEXIS 1668, at **34–36 (Tex. App.—Beaumont Feb. 18, 2016, pet. denied) (mem. op.) (citing *Dill v. Fowler*, 255 S.W.3d 681, 682–84 (Tex. App.—Eastland 2008, no pet.)).

A decision regarding the threshold requirement under Chapter 74 would not preclude a defendant from filing a subsequent motion for summary judgment, once the facts are further developed. *See, e.g.*, *Mangin v. Wendt*, 480 S.W.3d 701, 713 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (Chapter 74 "contemplates that the amount and quality of evidence available at the time of drafting the expert reports will be less than that available at trial on the merits or even the summary-judgment stage."); *Estate of Klovenski v. Kapoor*, No. 14-13-00850-CV, 2015 Tex. App. LEXIS 1616, at **2 n.1, 15–16 (Tex. App.—Houston [14th Dist.] Feb. 19, 2015, no

App. LEXIS 6844, at **2–11 (Tex. App.—Dallas, July 21, 2017, no pet. h.) (mem. op.) (where defendant's objections and motion to dismiss addressed plaintiff's wrongful death claim but not the survival claim, the court of appeals limited its review to the wrongful death claim). I disagree with the majority in two respects.

First, I conclude that Dr. Haines's new report suffers from several of the same deficiencies we identified in our previous opinion, including but not limited to the conclusory opinions regarding causation. *See generally McMillan v. Harris*, No. 09-15-00466-CV, 2016 Tex. App. LEXIS 8073 (Tex. App.—Beaumont July 28, 2016, no pet.) (mem. op.). Second, I also conclude that the reports of Dr. Haines and Dr. Camazine, whether taken individually or together, are insufficient and fail to link Dr. McMillan's alleged breaches to Harris's death. Because the second conclusion is dispositive as to both Camazine and Haines, I will limit any further discussion to the second point.

An expert report must explain, to a reasonable degree of medical probability, how and why the alleged negligence caused the complained-of injury. *See Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010). The expert must explain the basis of his conclusions and link the conclusions to the facts. *See Bowie Mem'l Hosp. v. Wright*,

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pet.) (mem. op.) (defendant physician prevailed on summary judgment after the court of appeals had twice found plaintiffs' expert report was adequate under Chapter 14).

79 S.W.3d 48, 52 (Tex. 2002) (quoting *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). A Chapter 74 expert report may not have an "analytical gap" or a "missing link" between the expert's allegation that the healthcare provider defendant breached the standard of care and the plaintiff's injuries. *See HealthSouth Rehab. Hosp. of Beaumont, LLC v. Abshire*, No. 09-16-00107-CV, 2017 Tex. App. LEXIS 2730, at *49 (Tex. App.—Beaumont Mar. 30, 2017, no pet. h.) (mem. op.) (expert report failed to set forth a specific link between the alleged omissions and the injuries); *THN Physicians Ass'n v. Tiscareno*, 495 S.W.3d 914, 922 (Tex. App.—El Paso 2016, no pet.) (citing *Clark v. HCA, Inc.*, 210 S.W.3d 1, 11 (Tex. App.—El Paso 2005, no pet.)). An opinion on causation that contains an obvious gap in the chain of causation does not meet the statute's requirements. *See Wright*, 79 S.W.3d at 53 (expert report failed to explain how not reading x-rays led to injury); *Estorque v. Schafer*, 302 S.W.3d 19, 29 (Tex. App.—Fort Worth 2009, no pet.) (an expert report that leaves gaps by not explaining how or why a provider's failure to act or his actions worsened the progression of the listed conditions is insufficient). An expert's simple *ipse dixit* is insufficient, and an expert must explain the basis of his statements linking his conclusions to the facts. *See Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, No. 15-0909, 2017 Tex. LEXIS 523, at *11 (Tex. June 9, 2017). An expert report must make a good-faith effort to explain how proximate cause is going

to be proven. *Id.* Proximate cause has two components: (1) foreseeability and (2) cause-in-fact. *Id.* "For a negligent act or omission to have been a cause-in-fact of the harm, the act or omission must have been a substantial factor in bringing about the harm, and absent the act or omission—*i.e.*, but for the act or omission—the harm would not have occurred." *Id.* (quoting *Rodriguez-Escobar v. Goss*, 392 S.W.3d 109, 113 (Tex. 2013) (per curiam)). This is the causal relationship between the breach and injury that an expert report must explain to satisfy Chapter 74. *Id.*; *Hendricks v. Perales*, No. 05-16-01258-CV, 2017 Tex. App. LEXIS 2385, at *16 (Tex. App.—Dallas Mar. 21, 2017, no pet.) (mem. op.). In my opinion, the reports from both experts are conclusory and would be nothing more than mere *ipse dixit*, when they state "the patient subsequently died of complications of the infection" and that "the breaches of the standard of care by Dr. McMillan as set forth above, were the proximate cause of Mr. Harris's death[.]"

The care or treatment about which plaintiff and plaintiff's experts complain is the emergency room treatment provided by Dr. McMillan on June 6th and June 8th. Haines and Camazine opine that McMillan's breach was failing to immediately refer Harris to a vascular surgeon, and instead attempting to perform a repair of a significant arterial injury, and then failing to recognize on June 8th that Harris had

ongoing bleeding, exacerbated by Harris's ongoing use of Coumadin, and again not immediately referring Harris to a vascular surgeon.

Dr. Camazine indicates that Harris developed a staph infection following a subsequent surgery which was performed on Harris. Thereafter, Harris also had another surgery to replace an "infected aortic" valve. These additional surgeries were done by a thoracic and cardiovascular surgeon, and not by Dr. McMillan. According to Dr. Camazine's report, after spending two months in the hospital following the aortic surgery, Harris was discharged. Camazine then states in his report, "Mr. Harris subsequently died of complications of the infection approximately three months later on 12/24/2014."

Therefore, according to the reports, Randi Harris's death was approximately six months after the June 6th and 8th emergency room care by Dr. McMillan. While the additional surgeries, the complications, and eventual death follow one another in time, and may in some respects be linked by proximity, based on the four corners of the reports, we cannot, without impermissible inferences and assumptions, determine from the reports that the alleged negligence of Dr. McMillan proximately caused the infection and Harris's death. *See Courtney*, 2017 Tex. App. LEXIS 6844, at **8–10 (concluding that an expert report had not adequately addressed how a 2012 surgery caused death after a 2015 surgery where plaintiff alleged no negligence

in the intervening 2015 surgery and provided no factual support connecting the death and the 2012 surgery); *St. Joseph Reg'l Health Ctr. v. Gonzales*, No. 10-17-00088-CV, 2017 Tex. App. LEXIS 5444, at *10 (Tex. App.—Waco June 14, 2017, pet. filed) (mem. op.) (citing *Regent Health Care Ctr. of El Paso, L.P. v. Wallace*, 271 S.W.3d 434, 441 (Tex. App.—El Paso 2008, no pet.) (causation opinion "premised solely upon [] close temporal proximity" was deficient as to causation); *see also Zamarripa*, 2017 Tex. LEXIS 523, at *12 (explaining that an expert report must make a good-faith effort to explain how proximate cause will be proved). Accordingly, I conclude that Appellee's expert reports are still deficient and do not establish how Dr. McMillan's alleged breach proximately caused Harris's death. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6) (West 2017); *see also Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015); *Jelinek*, 328 S.W.3d at 539–40; *Tenet Hosps. Ltd. v. Barnes*, 329 S.W.3d 537, 543 (Tex. App.—El Paso 2010, no pet.); *Austin Heart, P.A. v. Webb*, 228 S.W.3d 276, 279 (Tex. App.—Austin 2007, no pet.).

LEANNE JOHNSON
Justice

Dissent Delivered August 17, 2017