In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00148-CV

ERIN JEPSON, N.P., Appellant

V.

SALINA S. WYRICK, Appellee

On Appeal from the 153rd District Court
Tarrant County, Texas
Trial Court No. 153-292369-17

Before Gabriel, Pittman, and Bassel, JJ.
Memorandum Opinion by Justice Gabriel

MEMORANDUM OPINION

Appellant Erin Jepson, N.P. brings this interlocutory appeal from the trial court's order denying her motion to dismiss the healthcare liability claim Appellee Salina S. Wyrick has asserted against her. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(9). In a single issue, Jepson contends that the report of Wyrick's expert, a board-certified diagnostic radiologist, failed to establish the expert's qualifications to provide an opinion concerning the standard of care applicable to Jepson, a nurse practitioner. Jepson also argues that the expert's opinion as to causation is impermissibly conclusory. We reverse the trial court's order denying her motion to dismiss and remand this case for further proceedings in accordance with this opinion.

I. BACKGROUND

A. WYRICK UNDERGOES A NEPHRECTOMY

On May 30, 2017, Wyrick filed healthcare liability claims against several health care providers, including Jepson, who was a nurse practitioner working in Baylor All Saints Medical Center's emergency department at the time relevant to this case. Wyrick alleges that she presented to the emergency department on Saturday, March 14, 2015, complaining of nausea and right-sided abdominal pain. Jepson took Wyrick's medical history, but according to Wyrick, Jepson did not identify herself as a nurse practitioner, so Wyrick assumed Jepson was a physician. Jepson performed a physical examination of Wyrick's abdomen, told Wyrick that her abdominal pain was kidney related, and ordered a CT scan of Wyrick's abdomen.

According to Wyrick, after performing the CT scan, the radiologist reported that there was a poorly defined area of low attenuation measuring 2.5 x 1.8 x 2.7 cm in the middle pole of Wyrick's right kidney peripherally and that the margination was irregular and not indicative of a simple cyst. Wyrick asserts that the radiologist's impressions included the following:

> Peripheral low attenuated right renal lesion. Finding does not represent a simple cyst. This could represent an infarct. Pyelonephritis is a consideration although there is no perinephric inflammation and the remainder of the right kidney has normal enhancement. Neoplasm also a consideration. Additional correlation with MR may be of benefit.

Wyrick alleges that after the CT scan, the radiologist told Jepson that Wyrick may have a renal mass and would probably need to follow up with a urologist. According to Wyrick, Jepson also noted a physician consultation with a urologist, who had stated that he needed to evaluate Wyrick as soon as possible and that Wyrick should visit his office the first thing Monday morning. According to Wyrick, when Jepson returned to the room where Wyrick was waiting, Jepson told Wyrick that "[i]t look[ed] like [she had] a little bit of kidney cancer"; that the radiologist had consulted with a urologist, and the urologist wanted to see her the first thing Monday morning; and that she would be in good hands because the urologist was a very good doctor and was on the hospital's board. Wyrick also alleges that Jepson said, "Don't worry, you're young and you can fight this," as she walked out of the room. According to Wyrick, another nurse then gave her discharge instructions to undergo a renal biopsy at the urologist's office the following Monday.

Wyrick, along with her husband, went to the urologist's office as instructed. According to Wyrick, the urologist showed them the scans of her abdomen, which showed a sizable mass. The urologist explained the Bosniak scale to them and said that he would rate the mass in her abdomen as a three on that scale. The urologist further told them that the mass displayed in the images was consistent with malignancy and that it appeared to have made its way to the blood supply. According to Wyrick, the urologist told them that this likely meant the entire kidney would need to be removed.

Wyrick asserts that she and her husband asked the urologist about a biopsy, since that was the reason she had been referred. The urologist told them that biopsies sometimes resulted in false positives and that removing cells for a biopsy had the potential of introducing cancer into her abdominal cavity. The urologist further said that laparoscopic surgery would enable him to evaluate whether he had clear margins to remove the kidney mass. If not, the urologist stated that Wyrick's kidney could not be saved. The urologist further stated that if the mass had reached the fatty tissue that surrounded the kidney, then the kidney could not be saved. Wyrick alleges that she and her husband then asked the urologist what all that he had told them meant and what the next steps were. The urologist stated that he could monitor her kidney but that "if [she] was [his] sister, [he] would have had this thing out like yesterday."

Wyrick alleges that her husband asked the urologist about the possibility that Wyrick's kidney could be saved. The urologist responded that he hoped to perform a

partial nephrectomy but that if he could not remove the entire mass or if the remaining portion of the kidney would not be functional, then he would remove the entire kidney. The urologist told Wyrick that kidney cancer usually spread to other places in the abdominal cavity, lungs, or brain but that her scans did not show that anything had spread beyond her kidney. Wyrick told the urologist that if he thought the mass was cancerous, then she preferred that he remove the entire kidney. According to Wyrick, the urologist then asked her if she wanted her entire kidney removed, and she replied that she did.

Wyrick presented for surgery the following week, and her right kidney was removed. Wyrick alleges that during the surgery, the urologist discovered that the mass in her kidney was solid. She further asserts that the urologist told her husband that it was a good decision to remove the entire kidney. According to Wyrick, a subsequent pathological examination of the removed kidney revealed an infarct and an incidental small benign renomedullary interstitial cell tumor with a background normal kidney. In other words, the kidney was noncancerous. Wyrick alleges that her remaining kidney is not functioning as it should, that she has been diagnosed with chronic kidney disease, and that she has to see a nephrologist every three months.

B. WYRICK'S CLAIMS AGAINST JEPSON

Wyrick brought healthcare liability claims against several health care providers, physicians, and at least one health care institution that were allegedly connected with the removal of her kidney, including Baylor All Saints Medical Center, the radiologist

who performed her CT scan, Jepson, and the urologist who performed the surgery. This appeal only involves Wyrick's claims against Jepson.

In her petition, Wyrick broadly pleaded negligence claims against Jepson, alleging that Jepson "failed to provide timely, proper, and/or adequate medical care and treatment to and for Ms. Wyrick's above-described illness(es), injury(ies), and/or condition(s)"; that Jepson "engaged in other wrongful or improper acts or omissions in the course of her care, and treatment of Ms. Wyrick's above-described illness(es), injury(ies), and/or condition(s)"; and that Jepson's negligence "proximately caused the occurrence(s) or injuries and harm to" Wyrick and resulted in injuries, harm, and damages to her.

Wyrick timely served the chapter 74 expert report of Eric D. Johnson, MD.[1] *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). On November 2, 2017, Jepson filed objections to Dr. Johnson's report and moved to dismiss Wyrick's claims against her. *See id.* § 74.351(a)–(b). Jepson raised two objections. First, she asserted that Dr. Johnson's report did not satisfy chapter 74's requirements because it did not adequately explain the causal relationship between her alleged negligence and the removal of Wyrick's kidney. *See id.* § 74.351(r)(6). Second, Jepson asserted that Dr.

[1]Wyrick also served a chapter 74 expert report of Guarionex Joel DeCastro, MD, MPH. Dr. DeCastro's report does not discuss the care Jepson provided to Wyrick and is not at issue in this appeal.

Johnson was not qualified to opine as to how a nurse practitioner such as Jepson should communicate diagnoses to patients. *See id.* § 74.351(r)(5).

C. DR. JOHNSON'S REPORT

Dr. Johnson's report spans nine pages. The first three pages outline his expert credentials. The bulk of the fourth and fifth pages set forth Dr. Johnson's understanding of the factual background of Wyrick's care at Baylor All Saints Medical Center.

In relevant part, Dr. Johnson's recitation of the facts is largely consistent with the factual allegations set forth in Wyrick's pleadings, which we summarized above. But relevant to this appeal, the pertinent facts recited in the report include the following. After the CT scan, Jepson noted that the radiologist told her that Wyrick "may have a renal mass" and "[would] probably need [a] urology follow up." Jepson consulted with the urologist, who stated that he needed to evaluate Wyrick as soon as possible and told Jepson to have Wyrick go see him first thing Monday morning.

The report also notes that Jepson told Wyrick, "It looks like you have a little bit of kidney cancer"; that the radiologist had consulted with the urologist on call; that the urologist wanted to see Wyrick "first thing on Monday morning"; and that Wyrick needed to have a renal biopsy. Dr. Johnson's report also notes that Jepson told Wyrick, "Don't worry, you're young and you can fight this," as Jepson walked out of the hospital room. The report states that according to Wyrick, when she left the emergency room March 14, 2015, she believed that she had kidney cancer.

The next relevant portion of Dr. Johnson's recitation of the facts states that on March 24, 2015, Wyrick returned to Baylor All Saints Medical Center and underwent a radical nephrectomy of her right kidney that was performed by the urologist. Dr. Johnson's outline of the facts did not discuss anything that occurred between the time Wyrick left the emergency room on March 14, 2015, to the time she presented to the hospital to have her kidney removed on March 24, 2015.

The bottom portion of page five through the middle portion of page eight of the report contains Dr. Johnson's discussion of the standard-of-care, breach, and causation elements required under chapter 74. *See id.* § 74.351(r)(6). The report states that the standard of care applicable to Jepson's treatment of Wyrick was to "communicate and report [the radiologist's] interpretations and diagnostic impressions [of the CT scan] in a proper and accurate manner," which in the circumstances of this case required Jepson "to avoid communicating and reporting a cancer diagnosis until a proper cancer diagnosis [had been] made." Dr. Johnson's report says that in the circumstances of this case, the standard of care not only required Jepson to specifically tell Wyrick that the radiologist's impressions of the CT scan "were that there was a right renal lesion, that the lesion did not represent a simple cyst, that the lesion could have represented an infarct, and that pyelonephritis and a neoplasm (tumor) were also considerations," but also required her to avoid telling Wyrick "that she had kidney cancer or any degree of kidney cancer." Dr. Johnson also opined that Jepson breached the standard of care by failing to tell

Wyrick the radiologist's specific interpretations and diagnostic impressions and by telling her that she had kidney cancer and that she needed to have a renal biopsy.

As for causation, Dr. Johnson stated that Jepson's specific breaches of the standard of care he had outlined

> probably caused or probably contributed to cause [Wyrick] to consent to the radical nephrectomy surgery and to sustain the permanent loss of her healthy right kidney and probably caused [Wyrick] to sustain her claimed injuries and damages consisting of her past and probable future physical pain and mental anguish, her past and probable future loss of earning capacity or earnings, her past and probable future physical impairment, her past and probable future medical and health care expenses to care for her and treat her injuries, and that it was reasonably foreseeable to a[n] . . . emergency nurse practitioner that [Wyrick] would sustain these injuries and damages.

Dr. Johnson further stated that "[b]ut for" Jepson's breaching conduct, "in reasonable medical probability or certainty, [Wyrick] would not have consented to and undergone any surgery on her right kidney whatsoever." Dr. Johnson also said that when Jepson treated Wyrick, it was "foreseeable to a reasonably prudent . . . emergency nurse practitioner that improper and inaccurate reporting of a radiologist's interpretations and diagnostic impressions of CT images of a radiologic diagnosis of kidney cancer could influence a reasonable person to consent to surgical removal of a healthy kidney." The report continued, stating that as a result of Jepson's breaching conduct,

> Wyrick has suffered loss of her right kidney, and [she] has suffered and experienced and continues to suffer and experience significant physical and emotional injury, harm, and damages, and disfigurement, physical impairment, loss of enjoyment of life, loss of earning capacity, ongoing medical diagnosis, care, and treatment for her remaining kidney conditions and functions and related health care issues and problems

> adversely impacting her life on a daily basis, including living with the possible prospect of experiencing failure of her left kidney function and potential kidney transplantation and/or a lifetime of future dialysis care and treatment, and, in reasonable probability, [Wyrick] will suffer the same or similar injuries, harm, and damages in the future for the remainder of her life.

Dr. Johnson's report stated that the basis of his causation opinion was that, for the reasons he asserted in the standard-of-care and breach portions of the report, the radiologist should have accurately reported to the urologist and to Jepson his interpretations and diagnostic impressions of the CT images and that Jepson then should have accurately reported those interpretations and diagnostic impressions to Wyrick and should not have told Wyrick that she had kidney cancer and that she needed a renal biopsy. In other words, Dr. Johnson stated that the basis of his causation opinion was that Jepson should have adhered to the standard of care.

In the remaining portion of his report, Dr. Johnson discusses and criticizes the care Wyrick received from other providers and does not contain anything relevant when it comes to whether Jepson's alleged breach of the standard of care caused Wyrick to choose to have her kidney removed.

D. THE TRIAL COURT'S RULING

The trial court held a hearing on Jepson's objections to Dr. Johnson's expert report and her motion to dismiss. After the hearing, the trial court overruled Jepson's objections and denied her motion to dismiss. Jepson brought this interlocutory appeal, complaining in a single issue that the trial court abused its discretion by

overruling her objections to Dr. Johnson's report and denying her motion to dismiss. *See id.* § 51.014(a)(9).

II. LAW GOVERNING MEDICAL-EXPERT REPORTS AND STANDARD OF REVIEW

In the healthcare-liability context, the legislature has erected a pretrial hurdle over which healthcare liability claims must jump—the expert-report requirement—in order to ensure only claims that have "potential merit" proceed. *Samlowski v. Wooten*, 332 S.W.3d 404, 410–11 (Tex. 2011); *see also id.* at 416 (Wainwright, J., dissenting & concurring). Within 120 days of filing suit, a claimant must serve each healthcare-provider defendant with an expert report, accompanied by the expert's curriculum vitae. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a). Such a report must provide "a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered by the . . . health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *Id.* § 74.351(r)(6). A compliant report need not marshal the proof necessary at the summary-judgment or trial stage, and no particular words are required to address these elements, but bare conclusions or inferences will not satisfy the report requirement. *Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878–79 (Tex. 2001). In deciding whether this standard has been met, the trial court is to examine only the four corners of the expert's report and may not draw inferences or otherwise supply

links in the causal chain. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002); *Palacios*, 46 S.W.3d at 878. But the expert may make inferences based on medical history. *See Granbury Minor Emergency Clinic v. Thiel*, 296 S.W.3d 261, 265 (Tex. App.—Fort Worth 2009, no pet.).

A trial court may grant a motion to dismiss only if it appears to the court that the report is not an objective good-faith effort to comply with the statutory requirements for such a report. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(*l*). An objective good-faith effort is one that (1) informs the defendant of the specific conduct the plaintiff called into question and (2) provides a basis for the trial court to conclude that the claims have potential merit. *Scoresby*, 346 S.W.3d at 556; *Samlowski*, 332 S.W.3d at 409–10. "A report meets the minimum qualifications for an expert report under the statute 'if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated.'" *Loaisiga v. Cerda*, 379 S.W.3d 248, 260 (Tex. 2012) (quoting *Scoresby*, 346 S.W.3d at 557). In short, "the purpose of an expert report is to give the trial court sufficient information within the four corners of the report to determine if the plaintiff's claim has [potential] merit." *Id.* at 261; *Samlowski*, 332 S.W.3d at 410. However, the expert must explain the basis of his statements and link his conclusions to the facts. *See Wright*, 79 S.W.3d at 52 (citing *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999)). If the expert does so on at least one liability theory, the entire case may proceed. *See Certified EMS, Inc. v. Potts*,

392 S.W.3d 625, 630–32 (Tex. 2013); *SCC Partners, Inc. v. Ince*, 496 S.W.3d 111, 114–15 (Tex. App.—Fort Worth 2016, pet. dism'd by agr.).

We review a trial court's ruling on a motion to dismiss under section 74.351 for an abuse of discretion. *See Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 142 (Tex. 2015); *Palacios*, 46 S.W.3d at 877–78. Under this standard, we defer to the trial court's factual determinations if supported by the evidence but review its legal determinations de novo. *See Van Ness*, 461 S.W.3d at 142. An abuse occurs if the trial court rules without reference to guiding rules or principles or renders a decision lacking support in the facts or circumstances of the case. *See Samlowski*, 332 S.W.3d at 410. But an abuse does not occur if a trial court decides the matter differently than an appellate court would under similar circumstances. *See Baylor Univ. Med. Ctr. v. Rosa*, 240 S.W.3d 565, 569 (Tex. App.–Dallas 2007, pet. denied).

III. EXPERT QUALIFICATIONS

In the first part of her sole issue, Jepson renews her trial-court contention that Dr. Johnson, who is a physician, did not establish he was qualified to provide an expert opinion regarding the standard of care applicable to Jepson, a nurse practitioner.

A. STANDARD FOR ESTABLISHING EXPERT QUALIFICATIONS REGARDING HEALTH CARE PROVIDERS IN CHAPTER 74 REPORTS

As a nurse practitioner, Jepson is a "health care provider" under chapter 74. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(12); *Children's Med. Ctr. of Dallas v.*

Durham, 402 S.W.3d 391, 398 (Tex. App.—Dallas 2013, no pet.). Chapter 74 makes it clear that different standards of care apply to physicians and health care providers. *See Baylor Med. Ctr. at Waxahachie v. Wallace*, 278 S.W.3d 552, 558 (Tex. App.—Dallas 2009, no pet.). In a suit involving a healthcare liability claim against a health care provider, a person may qualify as an expert witness on the issue of whether the health care provider departed from accepted standards of care only if the person:

> (1) is practicing health care in a field of practice that involves the same type of care or treatment as that delivered by the defendant health care provider, if the defendant health care provider is an individual, at the time the testimony is given or was practicing that type of health care at the time the claim arose;
>
> (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). For purposes of section 74.402(b), "practicing health care" includes training health care providers in the same field as the defendant health care provider at an accredited educational institution or serving as a consulting health care provider and being licensed, certified, or registered in the same field as the defendant health care provider. *Id.* § 74.402(a); *see Protzman v. Gurrola*, 510 S.W.3d 640, 647 (Tex. App.—El Paso 2016, no pet.).

We recently explained how, in a chapter-74 expert report context, a physician establishes his qualifications to provide expert opinions regarding healthcare liability

claims against a non-physician health care provider. *See Cook Children's Med. Ctr. v. C.R.*, No. 02-18-00248-CV, 2019 WL 1185602, at *7–8 (Tex. App.—Fort Worth Mar. 14, 2019, no pet. h.) (mem. op.) (citing *Wallace*, 278 S.W.3d at 558). When a physician expert fails to state in his expert report that he has knowledge of the standard of care applicable to the specific category of non-physician health care providers involved in the claim, or that he has ever worked with or supervised those specific categories of non-physician health care providers, the physician is not qualified on the issue of whether the non-physician health care provider departed from the accepted standards of care for that category of non-physician health care provider. *Id.* at *7.

However, if the physician states he is familiar with the standard of care for both the applicable category of non-physician health care provider and physicians, and for the prevention and treatment of the illness, injury, or condition involved in the claim, then the physician is qualified on the issue of whether the non-physician health care provider departed from the accepted standards of care for that category of non-physician health care provider. *See id.* at *8. Additionally, if the physician states he is familiar with the standard of care and responsibilities and requirements for the pertinent category of non-physician health care provider, and he has worked with, interacted with, and supervised that category of non-physician health care provider, then the physician is qualified to opine on the issue of whether the health care

provider departed from the accepted standards of care for that category of health care providers. *See id.*

B. DR. JOHNSON'S ASSERTED QUALIFICATIONS

Dr. Johnson stated in his report that he received his undergraduate degree in biochemistry in 1984 and obtained his medical degree in 1988. He then completed a one-year internship in internal medicine before serving as medical director at the United States Navy's ambulatory care clinic at the Pensacola Naval Hospital in Pensacola, Florida. He went through flight surgeon training at the Naval Aerospace Medical Institute in Pensacola for a year and then served as a flight surgeon at the naval air station in Norfolk, Virginia from 1991 to 1993. Dr. Johnson then completed his four-year residency in diagnostic radiology at the University of Texas, M.D. Anderson Cancer Center in 1997. According to his curriculum vitae, Dr. Johnson is presently licensed to practice medicine in Kentucky and Florida.

The report further states that Dr. Johnson has been actively engaged in practicing medicine since 1989, became board certified in radiology in 1997, has been practicing as a diagnostic radiologist since 1997, and was practicing in that capacity at the time Jepson provided care to Wyrick at Baylor All Saints Medical Center. According to his curriculum vitae, Dr. Johnson served as a staff radiologist at two hospitals from 1997 to 2000. He then served as medical director of the department of radiology at three hospitals from 2000 to 2009, and as a staff radiologist at two additional hospitals from 2009 to 2014. He has worked at the Institute of Diagnostic

Imaging in Fort Walton Beach, Florida since 2014. In addition, according to his curriculum vitae, Dr. Johnson has been the owner of Advanced Imaging Open MRI in Monticello, Kentucky and Berea, Kentucky since 2005.

Dr. Johnson stated that he had substantial experience evaluating and interpreting radiological images like the ones the radiologist obtained from Wyrick at the emergency room and that he had substantial experience rendering radiological diagnoses like the ones given by the radiologist who evaluated Wyrick's CT scan. According to Dr. Johnson, he had performed more than 100,000 CT scans of the abdomen and pelvis, which included CT scans of the kidneys.

Dr. Johnson stated that he had made a radiologic diagnosis of all or almost all types of renal lesions and masses on approximately 5,000 occasions. He further said that he had communicated his diagnosis to other physicians, to nurses, and to patients approximately 250 times and that this included such communication in an emergency-room setting. Dr. Johnson stated that he was familiar with the standards of care relating not only to a radiologist's communication of radiologic imaging to other physicians and to nurses, but also to a nurse's communication of radiologic imaging to a patient. Dr. Johnson also stated that he was familiar with the standards of care for a nurse's communication of radiologic imaging to a patient in circumstances like or similar to those involving Wyrick and the specific claims she has raised.

Dr. Johnson stated that his familiarity with standards of care applicable to a physician's or nurse's communication of radiologic imaging to a patient was based on the following:

> (1) [his] above-described education, training, and experience as a diagnostic radiologist;
>
> (2) [his] familiarity with the medical and diagnostic radiology knowledge and experience necessary for radiologic diagnosis and interpretation of radiologic imaging of patients;
>
> (3) [his] familiarity with the medical and nursing knowledge and experience necessary for the communications and reporting of radiologic imaging of patients by a radiologist to other physicians and to nurses and for the communications and reporting of radiologic imaging by a physician or nurse to the patient; and
>
> (4) [his] familiarity with the circumstances to which the above-mentioned standards of medical and nursing care for the communications and reporting of radiologic imaging of patients by a radiologist to other physicians and to nurses and for the communications and reporting of radiologic imaging by a physician or nurse to the patient apply.

C. DISCUSSION

We begin by noting that Dr. Johnson's report does not share in the defects that the reports in cases such as *Simonson v. Keppard*, where our sister court concluded the proffered expert neurosurgeon failed to establish his qualifications to provide an opinion as to the standard of care applicable to a nurse practitioner's emergency room care because the neurosurgeon expert failed to state that he had familiarity with the standard of care for a nurse practitioner. *See* 225 S.W.3d 868, 874 (Tex. App.—Dallas 2007, no pet.); *see also McCoy v. Sandoval*, No. 13-16-00520-CV, 2017 WL 2570822, at

*3 (Tex. App.—Corpus Christi–Edinburg Mar. 30, 2017, no pet.) (mem. op.) (holding that proffered physician expert failed to establish qualifications to opine as to the standard of care applicable to nurse practitioner because the physician expert failed to state that he was familiar with the standard of care for nurse practitioners). Here, Dr. Johnson's report states that he has knowledge not only of the standard of care applicable to a radiologist's communication of his diagnostic impressions and findings to other physicians and to nurses, but also of the standard of care applicable to a nurse's communication of those findings to a patient "under circumstances like or similar to those of [Wyrick] involved in the claim made the basis of this case."

But neither is Dr. Johnson's report similar to the reports at issue in cases like *Wallace* or *Durham*. *See Durham*, 402 S.W.3d at 399–400; *Wallace*, 278 S.W.3d at 558. In *Wallace*, our sister court, in distinguishing its earlier decision in *Simonson*, concluded that the proffered expert neurologist satisfactorily established he was qualified to opine regarding the standard of care applicable to other health care providers, including nurse practitioners, because his report, in contrast to the report in *Simonson*, specifically stated both that he had worked with those categories of health care providers and that he was familiar with the standards of care applicable to each of those categories of health care providers in situations similar to the one giving rise to the plaintiff's claims. *See Wallace*, 278 S.W.3d at 558. And in *Durham*, the same court concluded that the report of the proffered expert pediatrician established he was qualified to opine as to the standard of care applicable to nurse practitioners where he

stated that he had worked with nurse practitioners, was familiar with the standards of care that applied to nurse practitioners in situations similar to those giving rise to the plaintiff's claims, and had trained and supervised nurse practitioners. *See* 402 S.W.3d at 399–400. Here, unlike the expert's report in *Wallace*, Dr. Johnson's report does not state that his work experience included working with nurse practitioners in situations similar to the one giving rise to Wyrick's claims. And in contrast to the report in *Durham*, Dr. Johnson's report does not indicate that he has trained or supervised nurse practitioners.

In short, Dr. Johnson's report states that he is familiar with the standard of care applicable to Jepson but does not explain the basis for his familiarity. This is similar to the expert reports in cases such as *Methodist Hosp. Levelland v. Kimbrell*, No. 07-09-0104, 2009 WL 3101315, at *1–2 (Tex. App.—Amarillo 2009, no pet.) (mem. op.). There, after a successful surgery removing the plaintiff's gallbladder, a nurse was allegedly negligent in administering the post-operative pain medication the physician had ordered, allegedly causing the plaintiff to suffer respiratory arrest. *Id.* at *1. The plaintiff served the report of its proffered expert, a board-certified surgeon. *Id.* The report indicated the expert had been an assistant professor of clinical surgery, had maintained a private practice comprised of 60% general surgery and 40% colon and rectal surgery. *Id.* The report further stated that the expert had performed 500-600 surgeries a year, 25 to 35 percent of which encompassed the removal of gallbladders. *Id.*

The expert's report provided an opinion concerning the nurse's negligence. *Id.* But the report did not say anything about how the proffered expert "came to know the standards of care applicable to nurses, as opposed to physicians, in like circumstances." *Id.* at *2. Distinguishing cases such as *Wallace*, the Amarillo court of appeals noted that the report did not show that the expert was familiar with the standards of nursing care as they related to the circumstances giving rise to the plaintiff's claims, that the expert supervised or worked with nurses in those circumstances, or that the expert taught classes to nurses on the subject. *Id.* Thus, the Amarillo court of appeals held that the report did not establish the expert was qualified to provide an opinion concerning the standard of care applicable to nurses in the relevant circumstances. *Id.*

The same problem exists here. Dr. Johnson's report states that he is familiar with the standard of nursing care applicable to Jepson's treatment of Wyrick, but that statement is conclusory in the absence of some explanation as to how Dr. Johnson became familiar with that standard. For that reason, we conclude Dr. Johnson failed to establish his qualifications to opine as to the standard of care applicable to Jepson. Accordingly, the trial court abused its discretion by denying Jepson's motion to dismiss. We sustain this part of Jepson's sole issue.

IV. CAUSATION

As she did in the trial court, Jepson also contends that Dr. Johnson's causation opinion with respect to her alleged negligence is inadequate because he failed to

establish a causal relationship between her alleged negligence and the removal of Wyrick's kidney. Jepson asserts that Dr. Johnson's causation opinion is conclusory.

A. STANDARD FOR CAUSATION OPINIONS IN CHAPTER 74 EXPERT REPORTS

To be considered a good-faith effort to comply with the expert-report requirement, Dr. Johnson's report not only had to address the standard of care and the manner in which the standard of care was breached but also had to explain the causal relationship between the breach and the injury, harm, or damages claimed. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(r)(6); *Wright*, 79 S.W.3d at 52; *Palacios*, 46 S.W.3d at 875. A causal relationship is shown by proof that the alleged negligent act or omission was a substantial factor in bringing about the harm and that the harm would not have occurred absent that act or omission. *See Cornejo v. Hilgers*, 446 S.W.3d 113, 123 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). An expert may not simply say that one event "in medical probability" caused another; he "must go further and explain, to a reasonable degree, how and why the breach caused the injury based on the facts presented." *Jelinek v. Casas*, 328 S.W.3d 526, 539–40 (Tex. 2010). The report should "provide an articulable, complete, and plausible path toward a cause of action against" the healthcare provider. *Mendez–Martinez v. Carmona*, 510 S.W.3d 600, 610 (Tex. App.—El Paso 2016, no pet.).

An expert report that speaks only of possibilities will not meet the statutory standard for causation. *Wright*, 79 S.W.3d at 53; *Hutchinson v. Montemayor*, 144 S.W.3d 614, 617 (Tex. App.—San Antonio 2004, no pet.). And a causation opinion that

contains an obvious gap in the chain of causation also will not qualify as a good-faith expert report. *Wright*, 79 S.W.3d at 53; *Tenet Hosps., Ltd. v. Love*, 347 S.W.3d 743, 755 (Tex. App.—El Paso 2011, no pet.); *Estorque v. Schafer*, 302 S.W.3d 19, 28 (Tex. App.—Fort Worth 2009, no pet.). But a statement on causation will be sufficient if the expert establishes a logical, complete chain that begins with a negligent act and ends in injury to the plaintiff. *See Mendez–Martinez*, 510 S.W.3d at 607; *McKellar v. Cervantes*, 367 S.W.3d 478, 485 (Tex. App.—Texarkana 2012, no pet.).

In sum, "[a] bare expert opinion that the breach caused the injury will not suffice." *Van Ness*, 461 S.W.3d at 142. The expert must provide some basis that the health care provider's act or omission proximately caused the injury, explain the basis of his statements, and plausibly link his conclusions to the facts. *See Wright*, 79 S.W.3d at 52; *Cornejo*, 446 S.W.3d at 123.

B. DISCUSSION

As Wyrick observes in her brief, and as we have outlined above, Dr. Johnson's report includes several statements to the effect that Jepson's telling Wyrick that she had kidney cancer and needed a renal biopsy rather than accurately conveying the radiologist's specific interpretations and diagnostic impressions caused Wyrick to elect to have her noncancerous kidney removed. The report states that the specific breaches of the standard of care Dr. Johnson had concluded Jepson committed "probably caused or probably contributed to cause [Wyrick] to consent to the radical nephrectomy surgery and to sustain the permanent loss of her healthy right kidney."

It states that "[b]ut for . . . Jepson['s] . . . improper and inaccurate reporting of [the radiologist's] interpretations and diagnostic impressions of the CT images of [Wyrick], in reasonable medical probability or certainty, [Wyrick] would not have consented to and undergone any surgery on her right kidney whatsoever." And it states that "[a]s a result of . . . Jepson['s] . . . improper and inaccurate reporting of [the radiologist's] interpretations and diagnostic impressions of the CT images of [Wyrick] . . . , Wyrick has suffered loss of her right kidney."

Certainly, these opinions fairly convey Dr. Johnson's opinion that Jepson's negligence, in reasonable medical probability or certainty, caused Wyrick to choose to have her kidney removed. But standing alone, they are nothing more than a bare assertion that Jepson's breach of the standard of care caused Wyrick to choose to have her kidney removed. To satisfy chapter 74, an expert is required to do more than opine that one event "in medical probability" caused another. *See Jelinek*, 328 S.W.3d at 539–40 (holding that expert's opinion that health care provider's breach of the appropriate standard of care in "reasonable medical probability, resulted in a prolonged hospital course and increased pain and suffering being experienced by" the plaintiff, without more, was conclusory on causation). Dr. Johnson's report had to explain, to a reasonable degree, how and why Jepson's negligence causally resulted in the removal of Wyrick's kidney. *See id.*

We are mindful that appellate courts are not to analyze an expert's chapter 74 report based on isolated portions or sections of the report. *See Baty v. Futrell*,

543 S.W.3d 689, 694 (Tex. 2018). Rather, they are to view the report in its entirety to determine whether it meets chapter 74's good-faith requirement. *Id.* However, reviewing Dr. Johnson's report as a whole, we can find nothing within the four corners of the report that explains his conclusion that Jepson's negligence caused Wyrick to decide to have her kidney removed. The report leaves us to speculate.

From the facts recited in Dr. Johnson's report, one can logically conclude that Wyrick believed she had kidney cancer when she left the emergency room, that is, after Jepson stated that "[i]t look[ed] like [she had] a little bit of kidney cancer"; that the radiologist had consulted with the urologist on call; that the urologist wanted to see her "first thing on Monday morning"; and that she needed to have a renal biopsy. But did Wyrick decide to have her kidney removed based on Jepson's statements? Dr. Johnson's report says that she probably did, but he does not link that conclusion to any specific facts in this case.[2] Did Wyrick follow up with the urologist after leaving the emergency room? The report does not say. If Wyrick did follow up with

[2]Dr. Johnson stated that he drew his understanding of the facts he set forth in his report from five sources: Wyrick's original petition; Wyrick's medical records from Baylor All Saints Medical Center; CT images taken on March 14, 2015, and April 1, 2015; and a telephone interview with Wyrick. But the report does not, for example, point to anything within the records from Baylor All Saints Medical Center that factually links Jepson's alleged negligence with Wyrick's decision to have her kidney removed. The report does not identify anything in the imaging records Dr. Johnson reviewed that factually links Jepson's alleged negligence and Wyrick's decision to have her kidney removed. And the report does not point to any statement or statements Wyrick made to Dr. Johnson during his telephone call with her that links Jepson's alleged negligence to Wyrick's decision to have her kidney removed.

the urologist, did that visit factor into her decision to have her kidney removed? Again, the report does not say.

In sum, it is not apparent from the four corners of Dr. Johnson's report that Jepson's alleged negligence was a substantial factor in bringing about Wyrick's decision to have her kidney removed, or that Wyrick would not have decided to have her kidney removed absent Jepson's alleged negligence. *See Cornejo*, 446 S.W.3d at 123 (noting that a causal relationship is established by proof that the alleged negligence constituted a substantial factor in bringing about the harm and that absent the alleged negligence, the harm would not have occurred). Thus, we conclude that when it comes to his causation opinion with respect to Jepson, Dr. Johnson's report in substance merely states that Jepson's negligence, in medical probability, caused Wyrick to decide to have her kidney removed and does not, to a reasonable degree, explain how and why Jepson's alleged negligence caused that outcome. *See Jelinek*, 328 S.W.3d at 539–40. It is therefore conclusory on causation. *See id.* Accordingly, the trial court abused its discretion by denying Jepson's motion to dismiss. *See id.* at 540. We sustain this portion of Jepson's sole issue.

V. DISPOSITION

In her brief, Wyrick requests that in the event we sustain Jepson's issue, then we remand this case to the trial court so that she may have the opportunity to cure any deficiencies in Dr. Johnson's report. In her response to Jepson's motion to dismiss in the trial court, Wyrick requested a thirty-day extension pursuant to civil

practice and remedies code section 74.351(c) to cure deficiencies in Dr. Johnson's report if the trial court found it deficient. Because the trial court found Dr. Johnson's report was not deficient with respect to Jepson, the trial court has yet to grant Wyrick an opportunity to cure deficiencies. Although the report fails to sufficiently show Dr. Johnson's qualifications to provide an opinion regarding Jepson and is conclusory as to causation with respect to her, those deficiencies do not render Dr. Johnson's report a non-report, and we cannot say that it is impossible for the deficiencies in the report to be cured. *See Columbia Valley Healthcare Sys., L.P. v. Zamarripa*, 526 S.W.3d 453, 461–62 (Tex. 2017). Thus, we will remand this case for the trial court to consider granting Wyrick a thirty-day extension to attempt to cure the deficiencies in the report with regard to her claims against Jepson. *See id.*; *THN Physicians Ass'n v. Tiscareno*, 495 S.W.3d 599, 617 (Tex. App.—El Paso 2016, no pet.)

VI. CONCLUSION

Having sustained Jepson's sole issue, we reverse the trial court's order denying her motion to dismiss and remand this case for further proceedings in accordance with this opinion. *See* Tex. R. App. P. 43.2(d).

/s/ Lee Gabriel

Lee Gabriel
Justice

Delivered: May 9, 2019