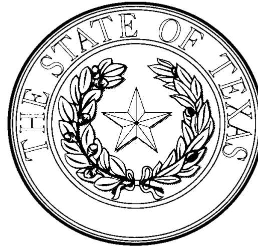
**Opinion issued July 7, 2020**




**In The**

# Court of Appeals

**For The**

# First District of Texas

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**NO. 01-18-00979-CV**

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**PINNACLE HEALTH FACILITIES XV, LP D/B/A BROOKHOLLOW HEIGHTS TRANSITIONAL CARE CENTER, LLC, Appellant**

**V.**

**DEADRA CHASE, JUSTIN BOWE, AND JOSEPH MURRAY, JR., INDIVIDUALLY AND AS HEIRS AND REPRESENTATIVES OF THE ESTATE OF JOSEPH MURRAY, SR., DECEASED, Appellees**

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**On Appeal from the 61st District Court**
**Harris County, Texas**
**Trial Court Case No. 2017-62385**

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## MEMORANDUM OPINION

In this interlocutory appeal,[1] appellant, Pinnacle Health Facilities XV, LP, doing business as Brookhollow Heights Transitional Care Center, LLC ("Pinnacle"), challenges the trial court's order denying its motion to dismiss the health care liability claim[2] brought against it by appellees, Deadra Chase, Justin Bowe, and Joseph Murray, Jr., individually and as heirs and representatives of the Estate of Joseph Murray, Sr., deceased. In two issues, Pinnacle contends that the trial court erred in denying its motion to dismiss appellees' claim because they failed to timely serve Pinnacle with an adequate expert report.[3]

We affirm.

## Background

Based on the petition and expert report filed in this case, on November 15, 2016, the decedent, Murray, was admitted to Pinnacle for skilled nursing and rehabilitation services for certain health concerns, including, as pertinent here, cerebral atherosclerosis, congestive heart failure, kidney disease, and kidney stones. On November 24, 2016, Murray fell while attempting to go to the restroom and was found on the restroom floor. He was not injured, and Pinnacle counseled him to use

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

[2] *See id.* § 74.001(a)(13).

[3] *See id.* § 74.351(a) (governing medical expert reports).

his bedside call button rather than attempting to walk on his own. Pinnacle performed a fall-risk assessment and determined that Murray presented a "high risk."

On November 28, 2016, Murray was again found on the floor, having fallen while attempting to fold clothes. Pinnacle again counseled him to use the call button for assistance. In its subsequent review, Pinnacle determined that Murray's bedside call button was malfunctioning, and Pinnacle called for repair. At some point, it ordered bed rails and fall mats.

On January 2, 2017, Pinnacle again performed a fall-risk assessment and determined that Murray demonstrated a "high risk." It noted that he had a history of falling and that his medications included diuretics and antihypertensives. Pinnacle described Murray's medical status as "alert states/forgets limitations" and his ambulatory status as "ambulatory aid: 9/bedrest/nurse assist."

On January 6, 2017, Murray was again found on the floor. He had a laceration on his head, and he was transferred to Memorial Hermann Greater Heights Hospital. At the hospital, a computerized tomography scan revealed bleeding in both sides of his brain. He became unable to breathe unassisted and remained unconscious. Murray died on January 24, 2017. The certified cause of death was subdural hemorrhage due to blunt-impact head trauma.

On September 20, 2017, appellees, who are Murray's children, brought claims against Pinnacle for negligence, gross negligence, and wrongful death. Appellees

asserted that Pinnacle owed a duty to exercise ordinary care in providing care and treatment of Murray and that it breached its duties by:

- Failing to properly train and supervise its staff to prevent and protect Murray from falls and injuries;
- Failing to properly monitor Murray;
- Failing to take necessary precautions to prevent Murray's fall and to treat Murray after his fall; and,
- Failing to ensure adequate policies and procedures.

Appellees asserted that Pinnacle's breaches of the standard of care proximately caused Murray's untimely death. And, Pinnacle was grossly negligent because it willfully and wantonly failed to monitor and safeguard Murray from injury due to falling. Appellees sought damages for past medical care; past and future pain, suffering, and mental anguish; past and future loss of consortium; and exemplary damages.

On October 30, 2017, Preferred Care Partners Management Group, L.P., A Texas Limited Partnership ("Preferred"), filed a "Defendant's Original Answer" in the suit, asserting that it was "incorrectly named Pinnacle Health Facilities XV LP d/b/a Brookhollow Heights Transitional Care Center, LLC." Preferred generally denied the allegations in the petition.

On January 24, 2018, Pinnacle filed a "Defendant's First Amended Answer," generally denying the allegations in the petition.

On March 23, 2018, Pinnacle filed a motion to dismiss appellees' claim on the ground that they had not timely served Pinnacle with an expert report, as required by Texas Civil Practice and Remedies Code section 74.351.[4] Pinnacle asserted that it filed its original answer on October 30, 2017, and thus appellees' deadline to file their expert report expired on February 27, 2018.[5] Pinnacle asserted that, because no expert report had been filed by that date, the trial court was statutorily required to dismiss the suit.[6]

Appellees responded that the October 30, 2017 filing by Preferred did not constitute an answer by Pinnacle. Rather, as reflected in the filing, it was submitted on behalf of Preferred. Appellees presented records from the Texas Secretary of State, reflecting that Preferred and Pinnacle were existing, wholly separate and distinct legal entities. Appellees asserted that, because Preferred was neither named nor served, it was not a "party" to the suit, and thus its answer could not commence the running of the 120-day statutory deadline as to defendant Pinnacle. Instead, the statutory period began when Pinnacle filed its answer on January 24, 2018. And, thus, appellees' deadline to file their expert report did not expire until May 24, 2018.

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4 *See id.* ("[A] claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party . . . one or more expert reports, with a curriculum vitae of each expert listed in the report for each . . . health care provider against whom a liability claim is asserted. . . .").

5 *See id.*

6 *See id.* § 74.351(b).

On May 8, 2018, appellees filed and served upon Pinnacle an expert report authored by Dr. Lige B. Rushing, Jr., M.D., M.S., P.A. Pinnacle objected that the report was not timely served and that it failed to adequately address the statutorily required elements of the standard of care, breach, and causation.

On July 3, 2018, the trial court denied Pinnacle's motion to dismiss the suit and granted appellees 30 days to file an amended report to "cure deficiencies." On July 10, 2018, the trial court signed an "Agreed Amended Order Granting [Appellees'] Motion for 30-day Extension."

On July 20, 2018, appellees filed and served upon Pinnacle an amended expert report authored by Dr. Rushing. In his amended expert report and CV, Rushing states that he is a graduate of Baylor University College of Medicine. He is board certified in internal medicine, rheumatology, and geriatrics. At the time of Murray's injuries and Rushing's report, Rushing was actively engaged in private practice in Dallas, Texas, specializing in internal medicine, rheumatology, and geriatrics, and he was on the affiliate staff of Presbyterian Hospital of Dallas.

Dr. Rushing states in his report that his opinions are based on his review of Murray's pertinent medical records, which included the records of Pinnacle, Memorial Hermann Greater Heights Hospital, St. Joseph Medical Center, and Houston Hospice. Further, Rushing's opinions are based on his education, training, and experience as a practicing board certified internist, geriatrician, and

rheumatologist, and his knowledge of the accepted medical and nursing standards of care for the diagnoses, care, and treatment of the illnesses, injuries, and conditions involved in this claim.

In his report, Dr. Rushing states that he is familiar with the accepted standards of care applicable to physician, nurses, and care facilities such as Pinnacle, for the care of residents such as Murray. In the regular course of his medical practice, Rushing diagnoses and treats patients with conditions similar or identical to those of Murray. During the course of his career, Rushing has provided medical care to more than 10,000 patients in hospitals, nursing homes, assisted living facilities, group homes, and other facilities that provide extended resident/patient care. He has provided care to patients who, like Murray, were suffering from multiple illnesses, including congestive heart failure, chronic kidney disease, cerebrovascular disease, pneumonia and pleural effusions, and patients considered a high risk for falling. Rushing has written orders for the care and treatment of these patients, including orders for treatment of the diseases involved in this case and for the prevention of falls. And, Rushing has supervised the execution of such orders by nurses and staff.

Dr. Rushing opines that the standard of care applicable to a facility that provides extended patient care, such as Pinnacle, requires that it provide the "necessary care, treatment, supervision, and equipment to promote safety and to prevent accidents." And, "[w]hile all falls cannot be prevented there is a basic level

of fall prevention that is owed to the patient by the facility in which they reside." These include "utiliz[ing] fall protection strategies and interventions" with respect to patients who present a high risk of falling. Rushing opines that, according to the medical records, Pinnacle staff knew as early as November 15, 2016 that Murray was a patient with a high risk of falling because he had an abnormal gait and mobility, he had difficulty walking, and he was on medication that rendered him unstable and precipitated falls. Thus, after Murray fell twice in four days, the standard of care required a "more developed fall prevention plan" than oral instruction to Murray, who also had a history of non-compliance. The standard of care applicable to a facility such as Pinnacle, caring for a patient such as Murray, requires that it have raised bedside rails when the patient is in bed and ensure that the patient's bedside call button is functioning properly. In addition, it requires the facility to implement fall-safety protection measures, including the provision of a bedside toileting device, a bed-pressure alarm to alert nursing staff if the patient attempts to get out of bed, and video monitoring of the room.

Dr. Rushing opines that the applicable standard of care also requires that the facility "maintain clinical records on each resident in accordance with the accepted professional standards and practices that are complete, accurately documented, readily accessible, and systematically organized." The standard requires that every fall be described in detail in order to determine a fall prevention plan.

Further, the "standard of care requires that where the fall prevention measures implemented by a facility such as [Pinnacle] do not meet the special needs of the patient, that facility must not retain that patient." Rather, the facility should notify the attending physician and family, and the patient should be transferred to another facility for a higher or different level of care to prevent falls.

Dr. Rushing opines that Pinnacle breached the applicable standard of care by failing to utilize fall-protection strategies and interventions in its care of Murray. Despite the facility knowing that Murray presented a high risk of falling, the record shows that "no fall safety measures were taken" and "[n]o fall prevention plan was in place to meet" his needs. Specifically, Pinnacle "should have raised side rails whenever [Murray] was in bed" and "should have used a bed pressure alarm." Pinnacle also failed to implement additional fall-safety measures, including the provision of a bedside toileting device and video monitoring. Instead, Pinnacle relied on oral admonishments to Murray to use his bedside call button, despite his history of non-compliance and documented medical status as "forgets limitations." In addition, Pinnacle failed to ensure that Murray's bedside call button was functioning properly, despite his having fallen twice. Further, Pinnacle's medical records failed to document each of Murray's falls, such that a plan to prevent future falls could have been formulated, and failed to provide any details regarding the precise steps to be put in place after his multiple falls occurred.

With respect to causation, Dr. Rushing opines that, when Murray fell and struck his head on January 6, 2017, the blunt force injury forced his brain away from the cranial wall. The blood vessels from the surface of the brain to the cranial wall were stretched and ruptured, resulting in bleeding into the subdural space, known as a subdural hematoma. The bleeding caused the brain to shift its position, further compressing the brain tissue and impairing the circulation, and causing further brain damage. This damage resulted in impaired brain function, a loss of consciousness, unresponsiveness, and death. Rushing opines that, although Murray did have many comorbidities at the time of his fall, none were immediately life-threatening. Thus, based on a reasonable medical probability, but for his fall, Murray would not have died.

Pinnacle moved to dismiss appellees' claim, again arguing that Dr. Rushing's expert report was not timely served and that it was substantively inadequate. Pinnacle argued that Rushing's report, in which he opined that the standard of care required an "adequate fall prevention program," a "safe environment," and "appropriate clinical records," was conclusory and that he failed to "explain factually how the fall occurred." Pinnacle asserted that, "[w]ithout any explanation for how the fall occurred, causation based upon any alleged breach falls apart."

On October 11, 2018, the trial court denied Pinnacle's motion to dismiss appellees' claim.

## Expert Report

In its first and second issues, Pinnacle argues that the trial court erred in denying its motion to dismiss appellees' claim because (1) appellees failed to timely serve their expert report and (2) the amended expert report is substantively inadequate as to the elements of the standard of care, breach, and causation.

### A. Standard of Review and Overarching Legal Principles

We review a trial court's decision on a motion to dismiss a health care liability claim for an abuse of discretion. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001); *Gray v. CHCA Bayshore L.P.*, 189 S.W.3d 855, 858 (Tex. App.—Houston [1st Dist.] 2006, no pet.). When reviewing matters committed to a trial court's discretion, we may not substitute our own judgment for that of the trial court. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). A trial court does not abuse its discretion merely because it decides a discretionary matter differently than an appellate court would in a similar circumstance. *Harris Cty. Hosp. Dist. v. Garrett*, 232 S.W.3d 170, 176 (Tex. App.—Houston [1st Dist.] 2007, no pet.). However, a trial court has no discretion in determining what the law is or in applying the law to the facts. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *Jelinek v. Casas*, 328 S.W.3d 526, 539 (Tex. 2010).

A health-care-liability claimant must timely provide each defendant health care provider with an expert report. TEX. CIV. PRAC. & REM. CODE § 74.351. That is, a claimant "shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party . . . one or more expert reports, with a curriculum vitae of each expert listed in the report for each . . . health care provider against whom a liability claim is asserted." *Id.* § 74.351(a). If, as to a health care provider, an expert report has not been timely served, the trial court, on the motion of the affected health care provider, shall enter an order that dismisses the claim and awards it attorney's fees and costs. *Id.* § 74.351(b). If an expert report has not been timely served because elements of the report are found to be deficient, the trial court may grant the claimant one 30-day extension to cure the deficiency. *Id.* § 74.351(c).

An expert report is 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 . . . 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). In setting out the expert's opinions, the report must: (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. *Scoresby v. Santillan*, 346 S.W.3d 546, 556 (Tex. 2011). A report that merely states the expert's conclusions as to the standard of care, breach,

or causation does not fulfill these purposes. *See id*. Rather, the expert must explain the basis of his statements and link his conclusions to the facts. *Wright*, 79 S.W.3d at 52.

If a defendant files a motion to dismiss, challenging the adequacy of a claimant's expert report, a trial court must grant the motion if it appears, after a hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report or that it is not sufficiently specific to provide a basis for the trial court to conclude that the claims have merit. TEX. CIV. PRAC. & REM. CODE § 74.351(*l*). The trial court, in assessing the sufficiency of the report, may not draw inferences, but must rely exclusively on the information contained within the four corners of the expert report or its accompanying curriculum vitae. *See In re McAllen Med. Ctr., Inc*., 275 S.W.3d 458, 463 & n.14 (Tex. 2008).

**B. Timeliness of the Report**

In its first issue, Pinnacle argues that the trial court erred in "refusing to dismiss this action as required by Chapter 74 of the Texas Civil Practice and Remedies Code after Appellees failed to serve an expert report within the statutory deadline." Pinnacle asserts that it filed its original answer on October 30, 2017. Thus, appellees' were required to file an expert report within 120 days, or no later than February 27, 2018. And, because appellees did not file an expert report by that date, the trial court was statutorily required to dismiss their claim.

Appellees argue that the purported answer filed on October 30, 2017 by Preferred does not constitute an answer by Pinnacle. Rather, Pinnacle filed its answer on January 24, 2018. Thus, appellees' expert report was due by May 24, 2018. And, because appellees timely served Pinnacle with an expert report on May 8, 2018, the trial court did not abuse its discretion in refusing to dismiss their claim.

**1. *Jurisdiction***

As a threshold matter, appellees argue that this Court lacks jurisdiction to consider Pinnacle's timeliness issue. Appellees assert that Pinnacle raised this issue in its first motion to dismiss the case, which the trial court denied on July 3, 2018. However, they note that, on July 10, 2018, the trial court signed an agreed amended order granting appellees' 30 days to cure deficiencies in the report. Appellees assert that, because Pinnacle did not file a notice of interlocutory appeal within 20 days of the July 2018 decision, this Court now lacks jurisdiction to consider this issue.

Generally, appellate courts have jurisdiction to hear immediate appeals of interlocutory orders only when a statute explicitly provides for such jurisdiction. *Stary v. DeBord*, 967 S.W.2d 352, 352–53 (Tex. 1998). An interlocutory appeal may be taken from an order that "denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351." TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9); *see also id*. § 74.351(b), (c).

Thus, no immediate interlocutory appeal may be taken from an order denying a motion to dismiss if the trial court also grants an extension to cure deficiencies. *See Scoresby*, 346 S.W.3d at 555 (noting no immediate interlocutory appeal from order denying motion to dismiss that also grants 30-day extension to cure deficiencies because appellate court's addressing sufficiency of report while its deficiencies were "presumably being cured at the trial court level" constitutes an "illogical and wasteful result"); *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007) ("[T]he actions denying the motion to dismiss and granting an extension are inseparable. . . . The statute plainly prohibits interlocutory appeals of orders granting extensions. . . ."); *Bogar v. Esparza*, 257 S.W.3d 354, 361 (Tex. App.—Austin 2008, no pet.) (holding that court of appeals could not reach merits of motion to dismiss because trial court also granted extension). If, after an extension has been granted, the defendant again moves to dismiss, then the denial of the motion is appealable. *Scoresby*, 346 S.W.3d at 555.

Here, in July 2018, after appellees had served a report implicating Pinnacle's conduct, the trial court not only denied Pinnacle's motion to dismiss appellees' claim, but it also signed an agreed amended order granting appellees a 30-day extension to cure deficiencies in the report. Thus, an immediate interlocutory appeal from the July 2018 order was not authorized. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9); *Scoresby*, 346 S.W.3d at 555. However, Pinnacle again raised its

timeliness issue in its subsequent motion to dismiss, filed in August 2018, which the trial court denied on October 11, 2018. And, it is from this order that Pinnacle now appeals. Thus, we now have jurisdiction to consider this issue. *See Scoresby*, 346 S.W.3d at 555.

**2. *Timeliness***

Whether appellees timely filed their expert report raises an issue of statutory construction. The primary goal when interpreting a statute is to effectuate "the Legislature's intent as expressed by the plain and common meaning of the statute's words." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007); *Stroud v. Grubb*, 328 S.W.3d 561, 563 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). "Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012). We presume that the legislature intends for the entire statute to be effective and that its application yield a just and reasonable result. TEX. GOV'T CODE § 311.021(2)-(3); *Univ. of Tex. Health Sci. Ctr. v. Gutierrez*, 237 S.W.3d 869, 873 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). We do not examine any term or provision in isolation; rather, we read the statute as a whole. *Gutierrez*, 237 S.W.3d at 873. We may also consider the objective that the legislature sought to attain, the circumstances under which the legislature enacted the statute, the legislative history,

former statutory provisions, and the consequences of a particular construction. TEX. GOV'T CODE § 311.023(1)-(5) (allowing consideration of statutory construction aids "whether or not the statute is considered ambiguous on its face"); *see also id.* § 312.005 ("In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.").

Civil Practice and Remedies Code section 74.351(a) provides:

> In a health care liability claim, *a claimant shall, not later than the 120th day after the date each defendant's original answer is filed, serve on that party or the party's attorney one or more expert reports,* with a curriculum vitae of each expert listed in the report *for each . . . health care provider against whom a liability claim is asserted*. The date for serving the report may be extended by written agreement of the affected parties Each defendant . . . health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed, failing which all objections are waived.

TEX. CIV. PRAC. & REM. CODE § 74.351(a) (emphasis added). If an expert report has not been timely served "as to a defendant . . . health care provider," the trial court, "on the motion of the affected . . . health care provider," shall enter an order that dismisses the claim with respect to that health care provider and awards it attorney's fees and costs. *Id.* at § 74.351(b).

Thus, based on the plain language of the statute, a claimant must, within 120 days after the date "each defendant's" original answer is filed, serve on "that party"

one or more expert reports for "each health care provider" against whom a liability claim is asserted. *See id.* § 74.351(a). A "party," for purposes of Chapter 74, means "one named in the lawsuit." *See Zanchi v. Lane*, 408 S.W.3d 373, 379 (Tex. 2013). "Strict compliance with [section 74.351(a)] is mandatory." *Id.* at 376. Accordingly, it is the filing of a specific defendant's answer that commences the 120-day period during which an expert report must be served on that defendant. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a); *see also Univ. of Tex. Health Sci. Ctr. at Hous. v. Joplin*, 525 S.W.3d 772, 778 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (holding expert-report deadline was "tied to the date" that subject health care provider filed its answer); *Gutierrez*, 237 S.W.3d at 874 (holding that, in suit involving multiple defendants, timely serving expert report on one defendant does not satisfy requirement to timely serve expert report on another defendant).

Here, appellees' petition reflects that they sued "Pinnacle Health Facilities XV LP, DBA Brookhollow Heights Transitional Care Center," regarding the care that Murray received at Brookhollow. It is undisputed that Pinnacle, as named, is the proper party to the suit.

On October 30, 2017, "Preferred Care Partners Management Group, L.P., A Texas Limited Partnership," filed a "Defendant's Original Answer" in the suit, asserting that it was "incorrectly named Pinnacle Health Facilities XV LP d/b/a Brookhollow Heights Transitional Care Center, LLC." It is undisputed that

Preferred is neither a defendant nor a party to the suit and that appellees asserted no health care liability claims against it.

On January 24, 2018, defendant "Pinnacle Health Facilities XV LP, DBA Brookhollow Heights Transitional Care Center" filed a "Defendant's First Amended Answer," generally denying the allegations in appellees' petition. In its answer, Pinnacle did not mention Preferred.

In the trial court, appellees presented evidence from the Texas Secretary of State that "Pinnacle Health Facilities XV LP, DBA Brookhollow Heights Transitional Care Center," and "Preferred Care Partners Management Group, L.P., A Texas Limited Partnership," are existing, separate, and distinct legal entities.

Pinnacle argues that the purported answer filed by Preferred, although it reflects that it was filed on behalf of Preferred, and not on behalf of Pinnacle, should be deemed an answer by Pinnacle, such that it commenced the statutory period for appellees to serve Pinnacle with an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

As discussed above, however, section 74.351(a) is clear that it is the filing of an answer by "each defendant," i.e., that specific defendant, that commences the period during which the plaintiff must serve on "that party" an expert report for "each health care provider against whom a liability claim is asserted." *See id.* Again, "[s]trict compliance with [section 74.351(a)] is mandatory." *See Zanchi*, 408

S.W.3d at 376. It is undisputed that Preferred is not a "defendant," a "party," or a "health care provider against whom a liability claim is asserted." It is undisputed that Pinnacle is the defendant and the proper party against whom appellees asserted their health care liability claim. Thus, the statutory period during which appellees were required to serve an expert report on Pinnacle, or risk dismissal of their claim, commenced upon the filing of an answer by Pinnacle. Because Pinnacle filed its answer on January 24, 2018, appellees were required to serve their expert report on Pinnacle no later than May 24, 2018. And, the record shows that appellees timely served their expert report on Pinnacle on May 8, 2018.

Pinnacle argues that because its answer is titled, "Amended Answer," it necessarily relates back to Preferred's "Original Answer." "The title of the pleading is not dispositive." *Hayes v. Carroll*, 314 S.W.3d 494, 501 (Tex. App.—Austin 2010, no pet.) (applying predecessor section 74.351(a)). Rather, it is "the substance of the [pleading] with respect to the health care providers who are named . . . [that] is dispositive." *Id.* Thus, notwithstanding that Pinnacle's answer is titled "Amended Answer," it is, substantively, the first answer filed by Pinnacle.

Pinnacle further argues that whether the filing by Preferred constitutes an answer by Pinnacle "ultimately boils down to whether this is a case of" misidentification or misnomer. Ordinarily, misidentification occurs when "two separate legal entities exist and a plaintiff mistakenly sues an entity with a similar

name to that of the correct entity." *In re Greater Hous. Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009) (discussing in context of non-suit). That is, "misidentification occurs when a party named in the pleading is not the party with an interest in the suit." *Maher v. Herrman*, 69 S.W.3d 332, 338 (Tex. App.—Fort Worth 2002, pet. denied). If the plaintiff is mistaken as to which of two defendants is the correct one and there is actually an existing entity with the name of the erroneously named defendant, then the plaintiff has sued the wrong party, limitations is not tolled, and an amended petition will not relate back to the original. *Enserch Corp. v. Parker*, 794 S.W.2d 2, 4–5 (Tex. 1990). "To be entitled to equitable tolling, the plaintiff must show that the correct defendant had notice of the suit, was cognizant of the facts, and was not misled or disadvantaged by the mistake." *Diamond v. Eighth Ave. 92, L.C.*, 105 S.W.3d 691, 695 (Tex. App.—Fort Worth 2003, no pet.) (citing *Chilkewitz v. Hyson*, 22 S.W.3d 825, 830 (Tex. 1999)); *see also In re Greater Hous.*, 295 S.W.3d at 325 n.1.

Conversely, a "misnomer occurs when a party misnames itself or another party, but the correct parties are involved." *In re Greater Hous.*, 295 S.W.3d at 325; *see, e.g.*, *Barth v. Bank of Am., N.A.*, 351 S.W.3d 875, 876–77 (Tex. 2011) (holding suit against "Bank of America Corporation," rather than "Bank of America, N.A.," constituted misnomer). When a misnomer occurs, limitations is tolled, and an amended petition will relate back to the date of the original petition. *In re Greater*

*Hous.*, 295 S.W.3d at 325. Courts generally allow parties to correct a misnomer if an "application of the doctrine of misnomer would not mislead or disadvantage anyone." *Wendt v. Sheth*, 556 S.W.3d 444, 449 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

Misidentification and misnomer of parties are common-law doctrines. *Chilkewitz*, 22 S.W.3d at 828; *Wendt*, 556 S.W.3d at 448 (discussing misnomer). Thus, here, Pinnacle seeks to engraft a judicial exception onto an unambiguous statute. Pinnacle provides no authority for the application of these common-law doctrines to the commencement of the statutory deadline for serving an expert report under section 74.351. *See Lone Star HMA, L.P. v. Wheeler*, 292 S.W.3d 812, 817 (Tex. App.—Dallas 2009, no pet.).

Further, Pinnacle, as the proponent of misnomer doctrine, was required to show in the trial court that, not only was there a mistake in the name it used in its own answer, but also that the correct parties were already involved in the suit and that an application of the doctrine would not mislead or disadvantage anyone. *Wendt*, 556 S.W.3d at 449. Notably, however, Pinnacle seeks to use the doctrine to end the instant suit.

We conclude that Pinnacle has not shown that the trial court acted in an arbitrary or unreasonable manner in concluding that the statutory period for appellees to serve an expert report on Pinnacle commenced on the filing of an answer

by Pinnacle, and did not relate back to the filing by Preferred. We hold that the trial court did not abuse its discretion in denying Pinnacle's motion to dismiss appellees' claim on the ground that appellees failed to timely serve Pinnacle with an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a); *Palacios*, 46 S.W.3d at 875.

We overrule Pinnacle's first issue.

## C. Adequacy of the Report

In its second issue, Pinnacle argues that appellees' amended expert report fails to adequately address the elements of the standard of care, breach, and causation. Pinnacle asserts that Dr. Rushing "failed to provide any specific factual information as to how [Pinnacle] breached its standards of care" and failed to explain "how and why [Pinnacle's] alleged breaches were a substantial factor in [Murray's] death."

### 1. *Standard of Care*

The standard of care is defined by what an ordinarily prudent health care provider would have done under the same or similar circumstances. *Palacios*, 46 S.W.3d at 880; *Strom v. Mem'l Hermann Hosp. Sys.*, 110 S.W.3d 216, 222 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). Identifying the standard of care in a health care liability claim is critical: "Whether a defendant breached his or her duty to a patient cannot be determined absent specific information about what the defendant should have done differently." *Palacios*, 46 S.W.3d at 880. Again, an expert report must provide a "fair summary" of the expert's opinion regarding the

applicable standard of care and the manner in which the care rendered by the health care provider failed to meet the standard. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). "While a 'fair summary' is something less than a full statement of the applicable standard of care and how it was breached," it "must set out what care was expected, but not given." *Palacios*, 46 S.W.3d at 880.

In his report, Dr. Rushing opines that the standard of care applicable to a facility that provides extended patient care, such as Pinnacle, requires that it provide the "necessary care, treatment, supervision, and equipment to promote safety and to prevent accidents." And, "[w]hile all falls cannot be prevented there is a basic level of fall prevention that is owed to the patient by the facility in which they reside." These include "utiliz[ing] fall protection strategies and interventions" with respect to patients who present a high risk of falling. Rushing opines that, according to the medical records, Pinnacle staff knew as early as November 15, 2016 that Murray was a patient with a high risk of falling because he had an abnormal gait and mobility, he had difficulty walking, and he was on medication that rendered him unstable and that precipitated falls. Thus, after Murray fell twice in four days, the standard of care required a "more developed fall prevention plan" than oral instruction to Murray, who also had a history of non-compliance. The standard of care applicable to a facility such as Pinnacle, caring for a patient such as Murray, requires that it have raised bedside rails when the patient is in bed and ensure that

the patient's bedside call button is functioning properly. Further, it requires the facility to implement fall-safety protection measures, including the provision of a bedside toileting device, a bed-pressure alarm to alert nursing staff if the patient attempts to get out of bed, and video monitoring of the room.

In addition, Dr. Rushing opines that the applicable standard of care requires that the facility "maintain clinical records on each resident in accordance with the accepted professional standards and practices that are complete, accurately documented, readily accessible, and systematically organized." This includes that every fall be described in detail in order to determine a fall prevention plan.

Dr. Rushing further opines that the "standard of care requires that where the fall prevention measures implemented by a facility such as [Pinnacle] do not meet the special needs of the patient, that facility must not retain that patient." Rather, the facility should notify the attending physician and family, and the patient should be transferred to another facility for a higher or different level of care to prevent falls.

Thus, Dr. Rushing clearly identifies the pertinent standard of care applicable to a care facility, such as Pinnacle, that is providing care to a patient who presents a high risk of falling, such as Murray. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *Palacios*, 46 S.W.3d at 880.

Pinnacle argues that Dr. Rushing's expert report is inadequate with respect to the standard of care because he merely opines that the standard requires an "adequate

fall prevention program," a "safe environment," and "appropriate clinical records." Pinnacle asserts that Rushing's statements are too conclusory to give a fair summary of the care that was expected and what it should have done differently. Specifically, Rushing "fails to identify what an 'adequate fall prevention program' consists of, other tha[n] claiming that 'some type of fall safety measures should have been taken" and that Murray required a "more developed fall prevention plan."

An expert's statement is conclusory if the witness simply "asserts a conclusion with no basis or explanation." *Windrum v. Kareh*, 581 S.W.3d 761, 768 (Tex. 2019); *see Palacios*, 46 S.W.3d at 879. As discussed above, Dr. Rushing specifically explains that the standard of care required Pinnacle to "have raised side rails whenever [Murray] was in bed" and to implement fall safety and protection measures that included a properly operating bedside call button, the provision of a bedside toileting device, a bed-pressure alarm, and video monitoring of his room. Further, opines Rushing, the applicable standard of care required that Pinnacle maintain clinical records on each resident that accurately documented patient falls and described in detail the fall-protection measures taken. Thus, Rushing explains the basis of his conclusions with respect to what an ordinarily prudent health care provider would do under the same or similar circumstances. *See Palacios*, 46 S.W.3d at 880.

### 2. *Breach*

With respect to breach, Dr. Rushing opines in his report that Pinnacle breached the applicable standard of care by failing to utilize fall-protection strategies and interventions. He opines, based on his review of Murray's medical records, that Pinnacle staff knew as early as November 15, 2016 that Murray demonstrated a high risk of falling. He had an abnormal gait and mobility, he had difficulty walking, and he was on medication that rendered him unstable. Rushing opines that, despite Pinnacle knowing that Murray presented a high risk of falling, "[n]o fall prevention plan was in place to meet" his needs. Specifically, Pinnacle "should have raised side rails whenever [Murray] was in bed" and "should have used a bed pressure alarm." Pinnacle also failed to implement additional fall-safety measures, including the provision of a bedside toileting device and video monitoring. Instead, Pinnacle relied on oral admonishments to Murray to use his bedside call button, despite his history of non-compliance and documented medical status as "forgets limitations." In addition, Pinnacle failed to ensure that Murray's bedside call button was functioning properly, despite his having fallen twice. Further, Pinnacle's medical records failed to document each of Murray's falls, such that a plan to prevent future falls could have been formulated, and did not provide any details regarding the precise steps put in place after his multiple falls occurred.

Thus, Dr. Rushing explains the basis of his conclusions with respect to Pinnacle's breaches of the standards articulated and explains what Pinnacle should have done differently. *See id.*; *see, e.g.*, *SSC Pleasanton S. Operating Co. LP v. Pennington*, No. 04-12-00551-CV, 2012 WL 6195576, at *4 (Tex. App.—San Antonio Dec. 12, 2012, no pet.) (mem. op.) (holding expert's report, opining that nursing staff failed to follow fall preventions measures by ensuring patient wore proper footwear and by monitoring "tab alarm," adequate as to element of breach of standard of care).

Pinnacle argues that Dr. Rushing's expert report is inadequate with respect to the breach element because he failed to "discuss factually how the fall occurred." Pinnacle asserts that Rushing's "only attempt at explaining [Pinnacle's] alleged breach is [its] alleged failure to utilize side rails." And, "without explaining the circumstances of the fall, whether side rails are even relevant cannot be determined." In support of its argument, Pinnacle asserts that the Fourteenth Court of Appeals "addressed a virtually identical scenario" in *Pinnacle Health Facilities XV, LP v. Robles*, No. 14-15-00924-CV, 2017 WL 2698498 (Tex. App.—Houston [14th Dist.] June 22, 2017, no pet.) (mem. op.).

In *Robles*, a fall occurred while facility staff was transferring a patient in a lift chair. *Id.* at *2. The court concluded that the expert's report, which concluded that the standard of care was breached merely by reason of the fact that the patient fell

and contained "no facts implicating the staff members' conduct," was insufficient. *Id.* at *3. Notably, there was no specific information about what the facility should have done differently. *Id.* Here, unlike in *Robles*, it is undisputed that Murray, who is deceased, was alone when he took his final fall on January 6, 2017. And, Dr. Rushing, as discussed above, explains the basis of his conclusions with respect to Pinnacle's breaches of the standards he articulated, and he specifically explains what should have been done differently. *See Palacios*, 46 S.W.3d at 880; *cf. Robles*, 2017 WL 2698498, at *2–3.

Pinnacle complains that Dr. Rushing improperly inferred that Murray's bedrails were not in place on the night of his fall. In assessing the sufficiency of a report, a trial court may not draw inferences; instead, it must exclusively rely upon the information contained within the four corners of the report. *In re McAllen Med. Ctr.*, 275 S.W.3d at 463 & n.14. However, section 74.351 does not prohibit experts, as opposed to courts, from making inferences from the medical records. *See Clavijo v. Fomby*, No. 01-17-00120-CV, 2018 WL 2976116, at *10 (Tex. App.—Houston [1st Dist.] June 14, 2018, pet. denied) (mem. op.). Whether an expert's factual inferences in the report are accurate is an issue for summary judgment, not a Chapter 74 motion to dismiss. *See id.*

### 3. *Causation*

With respect to causation, an expert report must provide a fair summary of the expert's opinions regarding the causal relationship between the failure of a health care provider to provide care in accord with the pertinent standard of care and the injury, harm, or damages claimed. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). A causal relationship is established by proof that the negligent act or omission constituted a substantial factor in bringing about the harm and that, but for the act or omission, the harm would not have occurred. *Costello v. Christus Santa Rosa Health Care Corp.*, 141 S.W.3d 245, 249 (Tex. App.—San Antonio 2004, no pet.). An expert report need not marshal all of the plaintiff's proof necessary to establish causation at trial, and it need not anticipate or rebut all possible defensive theories that may ultimately be presented to the trial court. *Wright*, 79 S.W.3d at 52; *Cornejo v. Hilgers*, 446 S.W.3d 113, 123 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). The expert must simply provide some basis that a defendant's act or omission proximately caused injury. *Wright*, 79 S.W.3d at 53. And, the expert must explain the basis of his statements and link his conclusions to the facts. *Id*. at 52. "No particular words or formality are required [in the expert report], but bare conclusions will not suffice." *Scoresby*, 346 S.W.3d at 556.

In his report, Dr. Rushing opines that, when Murray fell and struck his head on January 6, 2017, the blunt force injury forced his brain away from the cranial

wall. The blood vessels from the surface of the brain to the cranial wall were stretched and ruptured, resulting in bleeding into the subdural space, known as a subdural hematoma. The bleeding caused the brain to shift its position, further compressing the brain tissue and impairing the circulation, and causing further brain damage. This damage resulted in impaired brain function, a loss of consciousness, unresponsiveness, and death. Rushing opines that, although Murray did have many comorbidities at the time of his fall on January 6, 2017, none were immediately life-threatening. And, based on a reasonable medical probability, but for his fall, striking his head and developing a subdural hematoma, Murray would not have died. Rushing opines that there was no fall-prevention program in place at Pinnacle and that, "[h]ad side rails been present and raised" on Murray's bed on the night of his fall, "this would have greatly reduced the chance of his getting out of bed and falling." And, had a bed-pressure alarm been used, nursing staff would have been alerted and been given an opportunity to respond and intervene.

At this pre-discovery stage, appellees' burden is not to prove a causal link by a preponderance of the evidence to the satisfaction of a factfinder or to rule out all other possible causes of injury. *See Palacios*, 46 S.W.3d at 879; *Puppala v. Perry*, 564 S.W.3d 190, 202 (Tex. App.—Houston [1st Dist.] 2018, no pet.) ("At this expert-report stage, an expert report does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial."). We conclude

that Rushing's report provides a fair summary of the causal relationship between Pinnacle's failure to meet the applicable standard of care and Murray's injuries and death. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *see, e.g.*, *Nexion Health at Beechnut, Inc. v. Moreno*, No. 01-15-00793-CV, 2016 WL 1377899, at *3–5 (Tex. App.—Houston [1st Dist.] Mar. 29, 2016, no pet.) (mem. op.) (holding expert report adequate as to causal connection between nursing home's failure to supervise resident and death resulting from head wound from fall in hallway); *Regent Care Ctr. of Laredo, Ltd. P'ship v. Abrego*, No. 04-07-00320-CV, 2007 WL 3087211, at *6 (Tex. App.—San Antonio Oct. 24, 2007, pet. denied) (holding experts' reports, opining that had facility appropriately assessed, evaluated, and implemented fall-prevention and safety measures for patient, patient would not have sustained injuries that diminished her ability to respond to congestive heart failure, constituted good-faith effort to provide fair summary of casual relationship between facility's action and patient's death); *Estate of Birdwell v. Texarkana Mem'l Hosp., Inc.*, 122 S.W.3d 473, 479–80 (Tex. App.—Texarkana 2003, pet. denied) (holding expert's report gave fair notice to hospital that cause of patient's hemorrhages and paralysis was her fall resulting from hospital's failure to provide restraints as additional fall protection). Thus, Rushing's report presents an objective, good faith effort to comply with the statute. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(*l*); *Scoresby*, 346 S.W.3d at 555–56.

In sum, we conclude that the trial court could have reasonably concluded that Dr. Rushing's report represents an objective good faith effort to inform Pinnacle of the specific conduct called into question, the standard of care that should have been followed, and what it should have done differently. Further, Rushing's report represents an objective good faith effort to inform Pinnacle of the causal relationship between its failure to provide care in accordance with the pertinent standards of care and the injury and damages claimed. *See Palacios*, 46 S.W.3d at 879; *see also Kelly v. Rendon*, 255 S.W.3d 665, 679 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (emphasizing that expert reports "are simply a preliminary method to show a plaintiff has a viable cause of action that is not frivolous or without expert support"). Accordingly, we hold that the trial court did not abuse its discretion in denying Pinnacle's motion to dismiss appellees' health care liability claim on the ground that Rushing's expert report was inadequate with respect to the applicable standard of care, the manner in which it was breached, or the element of causation.

We overrule Pinnacle's second issue.

## Conclusion

We affirm the trial court's order.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Lloyd and Countiss.