Opinion issued June 18, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00948-CV

KELSEY-SEYBOLD MEDICAL GROUP, PLLC D/B/A KELSEY-SEYBOLD CLINIC AND AHMED I. SEWIELAM, M.D., Appellants

V.

EDDIE LYNN CHEEKS, Appellee

On Appeal from the 215th District Court
Harris County, Texas
Trial Court Case No. 2017-53858

MEMORANDUM OPINION

Appellee, Eddie Lynn Cheeks, sued appellants, Kelsey-Seybold Medical Group, PLLC, d/b/a Kelsey-Seybold Clinic, and Ahmed I. Sewielam, M.D., asserting healthcare liability claims governed by the Texas Medical Liability Act (TMLA), Civil Practice and Remedies Code Chapter 74. In a July 23, 2019

opinion, this Court reversed the trial court's order overruling the objections of Kelsey-Seybold Clinic and Dr. Sewielam to Cheeks's expert report, and we concluded that the report failed to satisfy the requirements of section 74.351.[1] We remanded the case to the trial court to consider Cheeks's request for a thirty-day extension to cure the deficient report.

On remand, the trial court granted the extension, and Cheeks filed a supplemental report from the same expert, Harry F. Hull, M.D. Kelsey-Seybold Clinic and Dr. Sewielam again objected to the sufficiency of the report and moved to dismiss Cheeks's claims. The trial court overruled the objections to Dr. Hull's supplemental report and denied the motion to dismiss. Kelsey-Seybold Clinic and Dr. Sewielam now appeal that ruling, arguing in their sole issue that the trial court abused its discretion in finding that the supplemental expert report satisfied the requirements of TMLA section 74.351 and denying their motion to dismiss. Because we conclude that the expert report as supplemented adequately addresses a pleaded theory of liability and, thus, satisfies the statutory requirements, we affirm.

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[1] *See Kelsey-Seybold Medical Group, PLLC v. Cheeks*, No. 01-18-00212-CV, 2019 WL 3293689, at * 1, 6–7 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (mem. op.).

Background

The underlying facts of Cheeks's treatment and the facts underlying her case are materially the same as those already set out in our July 23, 2019 opinion. *See Kelsey-Seybold Medical Group, PLLC v. Cheeks*, No. 01-18-00212-CV, 2019 WL 3293689, at * 1–2 (Tex. App.—Houston [1st Dist.] July 23, 2019, no pet.) (mem. op.) (hereinafter *Cheeks I*). Cheeks received a series of three steroid injections at Kelsey-Seybold Clinic to treat her chronic low back pain. *Id.* at *1. Five days after her last injection, she was admitted to the hospital where she alleges that she was diagnosed with a spinal abscess, sepsis, and spinal meningitis. *Id.*

Cheeks filed a petition alleging that her infection and related conditions were caused by negligence in the care provided by Kelsey-Seybold Clinic and Dr. Sewielam. In connection with her petition, Cheeks provided an expert report from Dr. Hull. *See id.* at *1–2 (summarizing content of Dr. Hull's original expert report). Kelsey-Seybold Clinic and Dr. Sewielam objected to the sufficiency of Dr. Hull's report, asserting that he failed to demonstrate that he was qualified to opine on the standard of care applicable to the care they provided Cheeks and that he failed to articulate the standard of care or alleged breach causing Cheeks's injuries. The trial court found Dr. Hull's original report adequate, and Kelsey-Seybold Clinic and Dr. Sewielam filed an interlocutory appeal of that order to this Court. *See id.* at *2–3.

A panel of this Court concluded that Dr. Hull's expert report and CV did "not establish that he is qualified to provide standard-of-care opinions as to the Kelsey-Seybold Clinic and Dr. Sewielam." *Id.* at *6. The Court further concluded that the trial court abused its discretion in finding that Dr. Hull's opinions on the standards of care and breach satisfied the requirements of section 74.354. *Id.* at *6–8. We remanded the case to the trial court to rule on Cheeks's request for an extension to cure the deficient report. *Id.* at *8.

On remand, the trial court granted an extension, and Cheeks filed a supplemental report from Dr. Hull. In this supplemental report, Dr. Hull addressed concerns regarding his qualifications. He stated that his background in epidemiology and study of the spread of infections qualified him to opine on the standard of care applicable to Cheeks's claim:

> I have not opined on the standard of care for pain management. I have not raised any questions about the diagnosis made by the physician, the procedure performed, the technique of the physician, the location of the injection or the choice of medications used for the injection. My opinions related solely to a standard of care that applies not just to pain medicine, but to every specialty in medicine, specifically aseptic technique. Aseptic technique is the steps necessary to prevent infections. Failure to observe aseptic technique is an important cause of iatrogenic infections—those occurring as a result of medical interventions—as was the case with Ms. Cheeks. In this matter, my background in infectious disease makes me qualified to opine on the standard of care.

Dr. Hull repeated his qualifications as including experience in "infectious disease epidemiology." He also related his experience "detecting the occurrence of

infectious diseases," including "investigat[ing] an outbreak of sepsis in patients undergoing cardiac surgery at a large hospital" and working with "physicians, hospital, and nursing homes on preventing iatrogenic infections and establishing general standards for infection control."

In the supplemental report, Dr. Hull also addressed the standard of care and alleged breach by Kelsey-Seybold Clinic and Dr. Sewielam, or, as he put it, "how such an infection might have occurred." He stated:

> Breaches in aseptic technique permit introduction of pathogenic microorganisms into the human body whereby they may cause human disease. There are myriad ways in which aseptic technique can be breached. They can occur as a result of lack of knowledge or training as well as unnoticed or unreported events. They include touching sterile equipment with either inadvertently contaminated glove or bare hand, exhalation of respiratory secretions into the air contaminating sterile equipment or wounds, reuse of needles, sharing vials of injectable medications even when labeled for single use and aerosols generated by faucets with running water. Unfortunately, breaches in technique sufficient to cause infections are typically not noted in the medical records. Reasons why a breach in technique would not be recorded include medical personnel not having knowledge about [a] potential breach in technique, the breach not being observed, staff observing a breach but not reporting it and simple callousness by medical staff.

Dr. Hull went on to describe "reports in the medical literature about infections caused by breaches of sterile technique," and he cited "a number that are relevant to the question of how Ms. Cheeks' infection might have occurred." He stated that "it is most likely that Ms. Cheeks was infected during her February 23, 2016 procedure." Dr. Hull compared a report by the Centers for Disease Control

and Prevention (CDC) identifying similar infections to the one Cheeks experienced, stating that the report "found the following breaches of aseptic technique: masks were not consistently worn, patient skin preparation was below standard, and syringes used to administer epidural medications were used to access multidose medication vials." Dr. Hull highlighted several other similar reports identifying causes of infections in patients undergoing epidural injections or epidural anesthesia. He stated, "The breaches in aseptic technique that were most commonly identified were using medication vials for multiple patients, mishandling medication vials and failure to properly wear surgical masks during injections. Improper sterilization of the surgical field was also identified as a potential cause of infections."

Dr. Hull then identified some "potential breaches in aseptic technique" based on his review of Cheeks's medical records of her February 23, 2016 procedure. He stated:

> 1. Ms. Cheeks was injected with 2 cc of preservative-free Naroprin 0.2%. The smallest vial of Naroprin available is IOCC.(8) Although the10-cc vial is labeled for single dose use, it would contain 5 2-ccdoses. Using a10-cc vial for more than 1 patient would permit contamination of the vial. Use of a single dose vial for multiple patients clearly falls below the standard of care. . . . If Ms. Cheeks received an injection for Naroprin taken from a vial that was previously used for another patient(s), the injection could have been contaminated with bacteria that caused her infection. . . .
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> 2. Normal saline was injected into Ms. Cheeks' epidural space in the loss-of-resistance injection technique. . . . Failure to discard vial or

> bags of normal saline between patients would be a breach of aseptic technique and could have led to contamination of the normal saline that caused Ms. Cheeks infections.
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> . . . .
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> 5. The medical records from February 23, 2016 do not contain any note as to whether all personnel in the operating room wore masks and if they were worn properly so that significant amount exhaled breath did not escape from the sides of the mask. If staff did not wear or did not properly use surgical masks, then equipment or the injection site could have been contaminated with respiratory droplets containing the bacteria that caused Ms. Cheeks infection. In the affidavit attached, Ms. Cheeks clearly identifies 2 nurses present for her procedure who were not wearing masks at the time her procedure commenced.

Dr. Hull concluded that his "initial conclusions regarding the illnesses that affected [Cheeks] remain unchanged." He again concluded, "It is more likely than not that the cause of Ms. Cheeks' epidural abscess was bacterial contamination introduced into her spinal area during epidural injections of steroids for pain relief at the Kelsey-Seybold Clinic. Such contamination could only have occurred if the staff of the Kelsey-Seybold Clinic fell below the standard of care for maintaining sterile procedure in the operating room." He added an "additional opinion regarding Ms. Cheeks' infections": "It is more likely than not that the source of Ms. Cheeks' infections was medical staff who did not wear surgical masks during the entirety of her injection procedure." And he concluded: "All the opinions I have expressed are made to a reasonable degree of medical and epidemiologic certainty and I am willing to testify to the same under oath."

In addition to this supplemental report, Cheeks provided her own affidavit stating that there were two nurses in the room when she was injected and that neither nurse wore a mask while prepping her for the procedure. She averred that Dr. Sewielam put his mask on after entering the room, and "[t]he next thing [she] recall[ed] [was] the anesthesiologist injecting [her]." A few seconds later, she "lost consciousness." She stated, "When I was injected, neither of the two nurses had put on a mask."

Kelsey-Seybold Clinic and Dr. Sewielam objected to this supplemental report and moved to dismiss Cheeks's claims against them. The trial court denied the motion to dismiss, and this appeal followed.

Chapter 74 Expert Report

In their sole issue on appeal, Kelsey-Seybold Clinic and Dr. Sewielam argue that Cheeks's supplemental report from Dr. Hull "suffers from the same fatal flaws the Court identified in his original report" because it does not demonstrate that Dr. Hull is qualified to opine on the care they provided to Cheeks, it "still does not detail the standards of care applicable to Dr. Sewielam, any other Kelsey-Seybold employees, or Kelsey-Seybold itself," it "does not describe how any of them allegedly breached the standards of care," and it "does not explain the causal relationship between the care and Cheeks's alleged injuries." Thus, Kelsey-

Seybold and Dr. Sewielam argue that the trial court erred in holding that Dr. Hull's expert report satisfies the requirements of TMLA section 74.351.

A. Relevant Law

TMLA section 74.351 provides that no medical negligence cause of action may proceed until the plaintiff has made a good-faith effort to demonstrate that a qualified medical expert believes that a defendant's conduct breached the applicable standard of care and caused the claimed injury. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(l), (r)(6); *Cheeks I*, 2019 WL 3293689, at *2.

"[T]he purpose of the expert report requirement is to weed out frivolous malpractice claims in the early stages of litigation, not to dispose of potentially meritorious claims." *Abshire v. Christus Health Se. Tex.*, 563 S.W.3d 219, 223 (Tex. 2018) (per curiam). An expert report is sufficient under the Act if it "provides a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered . . . failed to meet the standards, and the causal relationship between the failure and the injury." TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *Abshire*, 563 S.W.3d at 223. "Importantly, the trial court need only find that the report constitutes a 'good faith effort' to comply with the statutory requirements." *Abshire*, 563 S.W.3d at 223 (citing TEX. CIV. PRAC. & REM. CODE § 74.351(*l*)); *see also Am. Transitional Care Cntrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) (holding that courts look to

report itself to determine whether it "represents a good-faith effort to comply with the statutory definition of an expert report"). An expert report demonstrates a "good faith effort" when it "(1) inform[s] the defendant of the specific conduct called into question and (2) provid[es] a basis for the trial court to conclude the claims have merit." *Abshire*, 563 S.W.3d at 223 (citing *Baty v. Futrell*, 543 S.W.3d 689, 693–94 (Tex. 2018)). A report "need not marshal all the claimant's proof," but "a report that merely states the expert's conclusions about the standard of care, breach, and causation" is insufficient. *Id.* (quoting *Palacios*, 46 S.W.3d at 878–79).

We review a trial court's decision to grant or deny a motion to dismiss based on the adequacy of an expert report for an abuse of discretion. *Abshire*, 563 S.W.3d at 223; *Cheeks I*, 2019 WL 3293689, at *3. "A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles." *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002); *Cheeks I*, 2019 WL 3293689, at *3. In analyzing a report's sufficiency under this standard, we consider only the information contained within the four corners of the report. *Wright*, 79 S.W.3d at 52.

B. Dr. Hull's Qualification

As we held in *Cheeks I*, "whether an expert witness is qualified to offer an expert opinion under the relevant statutes and rules lies within the trial court's discretion." 2019 WL 3293689, at *3 (citing *Puppala v. Perry*, 564 S.W.3d 190,

202 (Tex. App.—Houston [1st Dist.] 2018, no pet.)); *see also Palacios*, 46 S.W.3d at 878 (determining that courts review adequacy of expert report under TMLA for abuse of discretion). "The expert's qualifications must appear in the four corners of the expert report or in the expert's accompanying curriculum vitae." *Cheeks I*, 2019 WL 3293689, at *3. "The expert must do more than show that he is a physician, but he 'need not be a specialist in the particular area of the profession for which testimony is offered.'" *Id.* at *4 (quoting *Owens v. Handyside*, 478 S.W.3d 172, 185 (Tex. App.—Houston [1st Dist.] 2015, pet. denied)). "The critical inquiry is 'whether the expert's expertise goes to the very matter on which he or she is to give an opinion.'" *Id.* (citing *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996) and *Mangin v. Wendt*, 480 S.W.3d 701, 707 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).

In *Cheeks I*, we held that "[n]othing in his report or CV establishes that Dr. Hull is an expert in the care relevant to Cheeks's claims against the Kelsey-Seybold Clinic and Dr. Sewielam." 2019 WL 3293689, at *6. We observed that Dr. Hull reported no training or experience with the type of treatment Cheeks received, and he did not state that "he has ever worked with or supervised the specific types of health care providers (nurses, housekeeping staff, and the staff of the infection-control department) that he implicates in his report." *See id.* We further observed that, although "Cheeks argue[d] that prevention of infection is

based on knowledge found throughout medicine," "nothing in Dr. Hull's report supports this argument." *Id.* We concluded, "because Dr. Hull's report and CV do not establish that he is qualified to provide standard-of-care opinions as to the Kelsey-Seybold Clinic and Dr. Sewielam, the trial court abused its discretion in finding that he was qualified to provide a section 74.351 expert report in this case." *Id.*

Dr. Hull has now supplemented his original report, providing essentially identical experience and qualifications. *See Cheeks I*, 2019 WL 3293689, at *4–5 (summarizing Dr. Hull's experience as Epidemic Intelligence Service Officer for CDC and as state epidemiologist in New Mexico and Minnesota, among other experience). Dr. Hull's supplemental report explains, however, that his "opinions related solely to a standard of care that applies not just to pain medicine, but to every specialty in medicine, specifically aseptic technique." He defined aseptic technique as "the steps necessary to prevent infections," and stated that "[f]ailure to observe aseptic technique is an important cause of iatrogenic infections—those occurring as a result of medical interventions—as was the case with Ms. Cheeks." Dr. Hull stated that his "background in infectious disease makes [him] qualified to opine on the standard of care" relevant to aseptic technique, or the steps necessary to prevent infections.

Based on this explanation of his opinion—that his opinions relate to giving injections with appropriate aseptic technique and that the steps necessary to prevent infections is common to "every specialty in medicine"—we conclude that the trial court did not abuse its discretion in concluding that Dr. Hull's background in epidemiology and experience in tracking and preventing the spread of infections "goes to the very matter on which [he] is to give an opinion." *See id.* at *3 (citing *Broders*, 924 S.W.2d at 153 and *Mangin*, 480 S.W.3d at 707). Dr. Hull "need not be a specialist in the particular area of the profession for which testimony is offered" when, as here, he has provided information regarding his education, training, and experience to satisfy the TMLA's requirements. *See Owens*, 478 S.W.3d at 185.

Dr. Hull's statements in his supplemental report regarding his qualifications, while brief, nevertheless address the significant concerns this Court identified in *Cheeks I*. He has explained that his background and experience are relevant to Cheeks's claims against Kelsey-Seybold Clinic and Dr. Sewielam because of his background in studying infectious diseases and practicing epidemiology. *See* 2019 WL 3293689, at *6 (observing that original report did not identify relevance of Dr. Hull's training or experience to type of treatment Cheeks received). And unlike the original report, which we faulted for providing no support for Cheeks's contention that "prevention of infection is based on knowledge found throughout medicine,"

Dr. Hull's supplemental report expressly states that use of aseptic technique is common to all medical specialties, and it provides numerous studies to support his opinion on that subject. *See id.*

As we observed in *Cheeks I*, to qualify as an expert for the purpose of an expert report under the TMLA, Dr. Hull needed to establish that he was "practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose," that he "has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim," and that he "is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care." 2019 WL 3293689, at *3 (quoting TEX. CIV. PRAC. & REM. CODE § 74.401(a)); *see* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(5)(A) (defining "expert" qualified to give opinion on "whether a physician departed from accepted standards of medical care" as "an expert qualified to testify under the requirements of Section 74.401"). Taking his supplemental report into consideration, Dr. Hull has established these qualifications by identifying Cheeks's claim as arising from failure to use proper aseptic technique common to all medical specialties and identifying his relevant medical training and experience to offer an opinion.

Kelsey-Seybold Clinic and Dr. Sewielam argue that Dr. Hull's supplemental report is still deficient, stating, "[N]othing in the supplemental report identifies Dr.

Hull as having *any* training or experience with epidural spinal injections," nor does it include "any indication as to whether Dr. Hull has ever worked with or supervised the specific types of health care providers involved in Cheeks's claim."

However, we observe that "[a] physician may be qualified to provide an expert report even if his specialty differs from that of the defendant if he 'has practical knowledge of what is usually and customarily done by other practitioners under circumstances similar to those confronting the malpractice defendant,' or 'if the subject matter is common to and equally recognized and developed in all fields of practice.'" *Cheeks I*, 2019 WL 3293689, at *4 (quoting *Keo v. Vu*, 76 S.W.3d 725, 732 (Tex. App.—Houston [1st Dist.] 2002, pet. denied)). The supplemental report makes clear that the nature of the alleged breach in the standard of care did not involve the type or method of treatment prescribed by Kelsey-Seybold Clinic or Dr. Sewielam; rather, it addresses the method of giving the injection and failure to use proper aseptic technique that is common to all medical specialties. "[T]he law is that if the subject matter is common to and equally recognized and developed in *all* fields of practice, any physician familiar with the subject may testify as to the standard of care." *Keo*, 76 S.W.3d at 732 (recognizing that "an expert witness need not be a specialist in the particular branch of the medical profession for which the testimony is offered").

Kelsey-Seybold Clinic and Dr. Sewielam further argue that, although Dr. Hull "suggests his lack of training or expertise with steroid spinal injections is irrelevant because he is opining only on a standard of care that applies 'to every specialty in medicine, specifically aseptic technique,'" he "provides no support for this conclusory assertion that aseptic technique is universal across practice areas." They cite our analysis in *Cheeks I* in which we observe that "prevention of infection is based on knowledge found throughout medicine" but stated that this "line of cases has been limited to the care and treatment of existing open wounds that develop infection." 2019 WL 3293689, at *6. Dr. Hull's supplemental report, however, addresses this concern (albeit briefly) by stating expressly that aseptic technique is relevant to Cheeks's claim and is common to all medical specialties. Thus, we need not rely on an impermissible inference or a line of cases recognizing that prevention of infection is common medical knowledge. *See In re McAllen Med. Cntr., Inc.*, 275 S.W.3d 458, 463 (Tex. 2008) (stating that court may not infer that physician providing expert report has some knowledge or expertise not included in record); *Wright*, 79 S.W.3d at 53 (stating that courts cannot draw inferences as to expert report's meaning and that "the report must include the required information within its four corners").

We further observe that the standard of review requires that we reverse the trial court only if its ruling is arbitrary or unreasonable, without reference to any

guiding rules or principles. *See Wright*, 79 S.W.3d at 52; *Cheeks I*, 2019 WL 3293689, at *3. The few additions in Dr. Hull's supplemental report address the deficiencies in his original report, such that we cannot say the trial court abused its discretion in determining that he was qualified. *See Cheeks I*, 2019 WL 3293689, at *3, 5–6; *see also Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985) ("The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred.").

We overrule Kelsey-Seybold Clinic and Dr. Sewielam's argument that the trial court abused its discretion in determining that Dr. Hull was qualified to provide an expert report under the TMLA.

C. Standard of Care and Breach

Kelsey-Seybold Clinic and Dr. Sewielam further argue that "[e]ven if Dr. Hull were qualified, the trial court abused its discretion in finding that his supplemental report opinions on the standards of care and their breach are adequate."

To constitute a good-faith effort, an expert report must provide enough information to fulfill two purposes: (1) inform the defendant of the specific conduct that the plaintiff has called into question, and (2) provide a basis for the trial court to conclude that the claim has merit. *Abshire*, 563 S.W.3d at 223;

Cheeks I, 2019 WL 3293689, at *6 (citing *Baty*, 543 S.W.3d at 693–94 and *Palacios*, 46 S.W.3d at 878–79). An expert report must provide a "fair summary" of the expert's opinions regarding the (1) applicable standards of care, (2) manner in which the care rendered by the physician or health care provider failed to meet the standards, and (3) causal relationship between that failure and the injury, harm, or damages claimed. *Cheeks I*, 2019 WL 3293689, at *6 (citing TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6) and *Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 513 (Tex. 2017) (per curiam)). "To adequately identify the standard of care, an expert report must set forth 'specific information about what the defendant should have done differently.'" *Abshire*, 563 S.W.3d at 226 (quoting *Palacios*, 46 S.W.3d at 880); *Cheeks I*, 2019 WL 3293689, at *6.

In *Cheeks I*, we concluded that Dr. Hull's original report failed to identify the standard of care applicable to Kelsey-Seybold Clinic and Dr. Sewielam or their alleged breaches of that standard, observing that he listed "*possible* violations of the standard of care . . . without stating that any of these possibilities actually occurred during Cheeks's care." 2019 WL 3293689, at *7. His report did not identify "any particular failure to maintain sterile procedures" or "the persons responsible for the alleged failure." *Id.*

Dr. Hull's supplemental report adds a discussion of various studies on outbreaks of bacterial infections, explaining that "[t]here are many reports in the

medical literature about infections caused by breaches of sterile technique," and stating that he will "cite a number that are relevant to the question of how Ms. Cheeks' infection might have occurred, specifically focusing on bacterial infections resulting from injections as she was infected with Streptococcus pneumonia and Acinetobacter baumannii, which are both bacteria." Similar to his original report, Dr. Hull then identifies potential breaches of sterile procedure, making statements such as, "If Ms. Cheeks received an injection for Naroprin taken from a vial that was previously used for another patient(s), the injection could have been contaminated with bacteria that caused her infection" and "[u]se of either a multidose or a single dose vial of contrast media could have resulted in contamination of the vial with bacteria and caused Ms. Cheeks' infections."

Unlike his original report, however, which stated that "[t]he records do not identify a specific route by which the contamination occurred," Dr. Hull's supplemental report adds a conclusion that it "is more likely than not that the source of Ms. Cheeks' infections was medical staff who did not wear surgical masks during the entirety of her injection procedure." This opinion apparently relies on Cheeks's statement in an affidavit that two nurses were not wearing surgical masks while they prepped her for the procedure. Thus, Dr. Hull's supplemental report, unlike his original report, identifies the standard of care for giving an injection using sterile, aseptic technique and it sets forth "specific

information about what the defendant should have done differently" by stating that "[i]t is more likely than not that the source of Ms. Cheeks' infections was medical staff who did not wear surgical masks during the entirety of her injection procedure." *See Abshire*, 563 S.W.3d at 226 (quoting *Palacios*, 46 S.W.3d at 880); *Cheeks I*, 2019 WL 3293689, at *6.

Kelsey-Seybold Clinic and Dr. Sewielam argue that Dr. Hull's supplemental report is insufficient because he "never specifically states . . . the specific standards of care applicable to a multi-specialty clinic like Kelsey-Seybold, its physicians, and its staff relative to the administration of epidural spinal injections for the treatment of pain" and because he "does not state that the standard of care requires all personnel in an operating room to wear surgical masks in advance of an epidural injection." While Dr. Hull does not expressly state that the standards for aseptic technique apply specifically to Kelsey Seybold Clinic or any of the other providers involved, his supplemental report does state that aseptic technique "applies not just to pain medicine [as practiced by Kelsey-Seybold Clinic and Dr. Sewielam], but to every specialty in medicine." And he opines that the specific failure involved Kelsey-Seybold Clinic's, and specifically Dr. Sewielam's, breach of aseptic technique in providing an injection when "medical staff . . . did not wear surgical masks during the *entirety* of her injection procedure." (Emphasis added). Kelsey-Seybold Clinic and Dr. Sewielam argue that "Dr. Hull does not identify Dr.

Sewielam's actions as a breach of the standard of care," but Dr. Hull opines that "[i]t is more likely than not that the source of Ms. Cheeks' infections was medical staff who did not wear surgical masks during the entirety of her injection procedure"—a procedure carried out by Dr. Sewielam at Kelsey-Seybold Clinic.

In reaching this conclusion, we are mindful that one purpose of the TMLA's expert-report requirement is to "weed out frivolous malpractice claims in the early stages of litigation, not to dispose of potentially meritorious claims." *See Abshire*, 563 S.W.3d at 223. At this "preliminary stage," whether the expert's stated standards or breaches appear reasonable "is not relevant to the analysis of whether the expert's opinion constitutes a good-faith effort" to comply with the TMLA. *Id.* at 226 (citing *Miller*, 536 S.W.3d at 516–17); *see also id.* at 223 ("Importantly, the trial court need only find that the report constitutes a 'good faith effort' to comply with the statutory requirements."). "[A]n 'adequate' expert report 'does not have to meet the same requirements as the evidence offered in a summary-judgment proceeding or at trial.'" *Miller*, 536 S.W.3d at 517 (quoting *Scoresby v. Santillan*, 346 S.W.3d 546, 556 n.60 (Tex. 2011)). Rather, the TMLA requires only a good-faith effort to demonstrate that a qualified medical expert believes that a defendant's conduct breached the applicable standard of care and caused the claimed injury. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(l), (r)(6); *Cheeks I*, 2019 WL 3293689, at *2.

We are also mindful that the TMLA's purpose of deterring frivolous medical malpractice suits is reflected in the abuse-of-discretion standard of review. *See Palacios*, 46 S.W.3d at 877–78; *see also Abshire*, 563 S.W.3d at 223 (holding that courts review decision to grant or deny motion to dismiss based on adequacy of expert report for abuse of discretion). We cannot say that the trial court acted "in an arbitrary or unreasonable manner without reference to any guiding rules or principles" in denying the motion to dismiss based on Dr. Hull's supplemental report stating that failure of medical staff to wear a mask during the entirety of Cheeks's procedure more likely than not caused her infections. *See Wright*, 79 S.W.3d at 52. Furthermore, "an expert report that adequately addresses at least one pleaded theory of liability satisfies the statutory requirements." *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 632 (Tex. 2013). "If a health care liability claim contains at least one viable liability theory, as evidenced by an expert report meeting the statutory requirements, the claim cannot be frivolous." *Id.* at 631 (citing Legislature's goal of deterring "baseless" claims, not blocking "earnest ones" in concluding that plaintiff who demonstrated that "at least one of her alleged theories . . . had expert support" and "cleared the first hurdle" and was entitled "to have the entire case move forward").

We conclude that, because Dr. Hull's supplemental report sets forth "specific information about what [Kelsey-Seybold Clinic and Dr. Sewielam]

should have done differently"—i.e., administer Cheeks's injection in sterile conditions with medical staff wearing masks for the entirety of the procedure—the trial court did not abuse its discretion in finding that the report provides a "fair summary" of the standard of care and how it was breached. *See Abshire*, 563 S.W.3d at 226 (citing *Palacios*, 46 S.W.3d at 880). We overrule Kelsey-Seybold Clinic and Dr. Sewielam's arguments on this ground.

D. Causation

Kelsey-Seybold Clinic and Dr. Sewielam also argue that the supplemental report fails to "supply the how and why of a causal relationship."

An expert report is sufficient under the TMLA if, in addition to providing "a fair summary of the expert's opinions . . . regarding applicable standards of care [and] the manner in which the care rendered . . . failed to meet the standards," it also sets out "the causal relationship between the failure and the injury." TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *Abshire*, 563 S.W.3d at 223. "A causal relationship is established by proof that the negligent act or omission constituted a substantial factor in bringing about the harm and that, absent the act or omission, the harm would not have occurred." *Kline v. Leonard*, No. 01-19-00323-CV, 2019 WL 6904720, at *9 (Tex. App.—Houston [1st Dist.] 2019, pet. denied) (mem. op.); *Costello v. Christus Santa Rosa Health Care Corp.*, 141 S.W.3d 245, 249 (Tex. App.—San Antonio 2004, no pet.). "It is not enough for an expert simply to

opine that the defendant's negligence caused the plaintiff's injury. The expert must also, to a reasonable degree of medical probability, explain how and why the negligence caused the injury." *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010).

In *Cheeks I*, we only briefly addressed the sufficiency of Dr. Hull's original report on the issue of causation. We stated that it was "insufficient as to causation because it [did] not link Cheeks's injury to a specific breach of a standard of care." *Cheeks I*, 2019 WL 3293689, at *7 n.2. The analysis in *Cheeks I* focused on Dr. Hull's failure to articulate a specific breach of the applicable standard of care. As we discussed above, Dr. Hull has now opined, in his supplemental report, "It is more likely than not that the source of Ms. Cheeks' infections was medical staff who did not wear surgical masks during the entirety of her injection procedure."

In light of this identified breach of the standard of care, we conclude that Dr. Hull's expert report also sets out a causal link between that breach and Cheeks's subsequent injuries. Both his supplemental report and his original report cite the chain of events that led from Cheeks's infection to her subsequent injuries, including hospitalization and multiple surgeries. *See id.* at *1–2 (setting out Dr. Hull's original report's summary of Cheeks's medical records and treatment following her spinal steroid injections); *see also Abshire*, 563 S.W.3d at 223–24 (holding that multiple reports may be read together to determine whether the TMLA's requirements have been met). Specifically, Dr. Hull's supplemental

report cites numerous studies identifying the failure to wear a mask as a cause of infections. He opines that the medical staff's failure to wear a mask during the entirety of Cheeks's procedure caused her infection, that the "combined infection of Streptococcus pneumoniae and Acinetobacter baumannii caused the abscess of her spine," and that "[t]he treatment provided to cure Ms. Cheeks' sepsis, possible meningitis and epidural abscess was both medically necessary and appropriate." Thus, his report sets out "to a reasonable degree of medical probability . . . how and why" Kelsey-Seybold Clinic and Dr. Sewielam's alleged negligence in giving an injection when medical personal failed to wear masks caused Cheeks's infection, which in turn caused the remainder of her injuries. *See Jelinek*, 328 S.W.3d at 536; *Kline*, 2019 WL 6904720, at *9 (providing that causal relationship is established by proof that alleged negligence was substantial factor in bringing about the harm).

Kelsey-Seybold Clinic and Dr. Sewielam argue that these opinions are insufficient to establish a causal connection, identifying flaws in the conclusions Dr. Hull drew from the cited studies and inconsistencies between Cheeks's account of the procedure and other reported cases. However, we observe that "[a]n 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." *Kline*, 2019 WL 6904720, at *9; *see*

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 for proving that a defendant's act or omission proximately caused the injury. *Wright*, 79 S.W.3d at 53; *Scoresby*, 346 S.W.3d at 556 ("No particular words or formality are required [in the expert report], but bare conclusions will not suffice."). With respect to causation, our role "is to determine whether the expert has explained how the negligent conduct caused the injury. Whether this explanation is believable should be litigated at a later stage of the proceedings." *Abshire*, 563 S.W.3d at 226.

Because we conclude that Dr. Hull has explained how the alleged negligent conduct—failure of medical staff to wear a mask during the entirety of Cheeks's procedure—caused the infection that resulted in her injuries, we cannot conclude that the trial court abused its discretion in determining that the expert report satisfied the TMLA's requirement to provide "the causal relationship between the failure and the injury." *See* TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6); *Abshire*, 563 S.W.3d at 223. We overrule Kelsey-Seybold Clinic and Dr. Sewielam's arguments on this ground.

We overrule Kelsey-Seybold Clinic and Dr. Sewielam's sole issue.

Conclusion

We affirm the trial court's order denying Kelsey-Seybold Clinic and Dr. Sewielam's motion to dismiss for failure to file an adequate TMLA expert report.

Richard Hightower
Justice

Panel consists of Justices Lloyd, Kelly, and Hightower.