No. 14-16-00961-CV

In the Fourteenth Court of Appeals
Houston, Texas

MANJU MONGA, M.D.,

Appellant,

v.

ISRAEL PEREZ and ARGELICA PEREZ,
Individually and a/n/f of XXXXX, a Minor,

Appellees.

On Appeal from the 281st District Court
Harris County, Texas

BRIEF AND APPENDIX OF APPELLEES ISRAEL PEREZ AND ARGELICA PEREZ

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STATEMENT REGARDING ORAL ARGUMENT

The Court can easily resolve this appeal without oral argument. The Appellant raises the same sorts of objections to one of Appellees' preliminary expert reports under TEX. CIV. PRAC. & REM. CODE § 74.351 that defendants typically offer in medical malpractice cases, and this Court has resolved such appeals many times. This example of genre presents no novel legal or factual issues, and argument would only prolong the Court's decision-making process without offering much benefit in return.

ISSUES PRESENTED FOR REVIEW

1. Whether a board certified maternal-fetal medicine specialist with 25 years' experience in all facets of treating pregnant women, including performing C-sections, is qualified to opine about another maternal-fetal medicine specialist's failure to recommend a C-section, though his Chapter 74 report does not specifically delve into his past use of ultrasound machines.
2. Whether a board certified maternal-fetal medicine specialist with 25 years' experience in delivering babies is qualified to opine about neurological injuries caused by complications in delivery.
3. Whether expert reports by a maternal-fetal medicine specialist and a pediatric neurologist together satisfy Chapter 74's expert report requirement as to causation when the reports, read in concert, discuss the same conduct and how it gave rise to the injuries in question.
4. Whether a maternal-fetal medicine specialist's expert report under Chapter 74 correctly describes the standard of care governing a consulting maternal-fetal medicine specialist when the standard refers to obstetricians, considering maternal-fetal medicine specialists *are* obstetricians.

5. Whether a maternal-fetal medicine specialist's expert report under Chapter 74 is impermissibly speculative because it presumes a reasonable obstetrician delivering a baby would follow the recommendation of his consulting maternal-fetal medicine specialist and perform a C-section made necessary by the baby's extremely large size.
6. Whether the Court should grant Appellants a onetime extension under TEX. CIV. PRAC. & REM. CODE § 74.351(c) to cure an expert report, if the Court finds it deficient, considering the leniency with which such extensions are routinely granted.

INTRODUCTION

Appellant Dr. Manju Monga appeals the district court's denial of her motion to dismiss Appellees Israel and Argelica Perez's health care liability claim against her under TEX. CIV. PRAC. & REM. CODE § 74.351(b). Dr. Monga is an obstetrician and maternal-fetal medicine specialist who consulted on Argelica's care with her primary obstetrician. The Perezes allege that Dr. Monga should have recognized that their baby son, referred to in this case as "XXXXX," was overly large – a condition called macrosomia – and therefore required an earlier vaginal delivery or, by the time the baby was actually born, a C-section. Argelica delivered vaginally, her baby became stuck in the birth canal, XXXXX's brain was deprived of oxygen, and he now suffers from major neurological impairments.

Dr. Monga argues that one of the Perezes' preliminary expert reports is so deficient as to reflect bad faith, requiring dismissal. First, she claims the expert who opines that she breached the standard of care, Dr. Van Bohman, is unqualified because his report does not discuss his experience using ultrasound machines. The trial court did not abuse its discretion in rejecting this claim, however, because Dr. Bohman is a board certified obstetrician and maternal-fetal medicine specialist who has treated women prenatally, delivered their babies, and performed C-sections in many settings

for 25 years. He was not required to specifically elaborate on his experience using ultrasound machines or other basic tools of obstetrics.

Dr. Monga's other main point is that Dr. Bohman is improperly speculating because he can't guarantee that the Perezes' obstetrician actually would have performed a C-section had Dr. Monga made such a recommendation. But that is a factual contention that goes to the merits of the case and is irrelevant to the validity of Dr. Bohman's opinion at this stage. Discovery has not yet occurred and Dr. Bohman is permitted to draw the basic inference that a reasonable obstetrician would have accepted the advice of the maternal-fetal medicine specialist he asked to consult on the case. In similar cases, courts including this one have rejected arguments identical to Dr. Monga's.

Finally, Dr. Monga argues that Dr. Bohman's report is so egregiously lacking that the Perezes cannot take advantage of the statute's onetime opportunity to cure deficient reports. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(i). The Texas Supreme Court has made clear that requests to rectify deficiencies under this provision must be liberally granted, however, since cases should be decided on their merits whenever possible. If the Court finds Dr. Bohman's report to be deficient, it should remand with an order that the Perezes be given 30 days to cure any omissions.

STATEMENT OF FACTS

I. Dr. Monga's Care Of Argelica Perez

Argelica Perez became pregnant with XXXXX, her third child, in 2013. CR 214 (Appellees' Appendix, Tab 1 (Bohman Report)). She suffered from gestational diabetes during her prior two pregnancies and received the same diagnosis this time. CR 214-15. Gestational diabetes causes the mother to develop extra glucose that crosses the placenta and makes the fetus produce extra insulin, which acts as a growth hormone. CR 214. Overly large, or macrosomic, fetuses – those over 8 lbs. and 13 oz. (4,000 grams) – are likely to become stuck during vaginal delivery, resulting in neurological injuries to the baby. *Id*. Delivery via C-section is therefore the standard of care for macrosomic babies. *Id.*

Initial biometric measurements of Argelica's baby boy indicated that he was approximately 18 weeks and 2 days old, and had an estimated due date of March 16, 2014. CR 215. Dr. David Galvan, the obstetrician who was going to deliver the baby, sought a consultation from Texas Children's Hospital Maternal Fetal Medicine. *Id*. A doctor there examined Argelica and informed Dr. Galvan that Argelica was suffering from "inadequate glycemic control," that she would need ultrasounds every four weeks, and that she must deliver "by 38+ or sooner." *Id.* In December 2013, Argelica

began taking insulin for her diabetes. *Id*. After an ultrasound, Dr. Galvan recalculated her due date as March 31, 2014, and XXXXX's estimated gestational age was correspondingly reduced to 24 weeks and 0 days. *Id*.

Over the following weeks, Argelica's baby grew at a rate faster than normal. On January 7, 2014, his estimated fetal weight was 2 lbs. and 14 oz., putting him in the 70th percentile for growth. *Id.* On February 3, his estimated fetal weight was 5 lbs. and 2 oz. (2,332 grams), in the 93rd percentile. *Id.* The baby's abdominal circumference exceeded the 95th percentile. *Id*. Later that month, his gestational age was found to be 36 weeks and 1 day, which was consistent with Argelica's original due date of March 16, 2014, not March 31. *Id.*

Dr. Monga first saw Argelica for a consultation on March 3, 2014. *Id.* By then, the baby's estimated fetal weight was 8 lbs. and 7 oz. (3,819 grams) – an increase of 3 lbs. and 5 oz. since Argelica's previous scan. *Id.* XXXXX's weight and abdominal circumference exceeded the 95th percentile, though his head circumference was only at the 31st percentile. CR 215-216. Based on Argelica's original due date (March 16), his gestational age was estimated at 38 weeks and 1 day; based on the revised date (March 31), it was 36 weeks and 0 days. *Id.*

Dr. Monga next saw Argelica on March 10. CR 216. She did not order that fetal growth measurements be taken. *Id*. Based on the original due date (March 16), the baby's gestational age was now 39 weeks and 1 day; based on the later due date (March 31), it was 37 weeks and 0 days. *Id.* Dr. Monga discussed Argelica's case with Dr. Galvan and they agreed to plan on delivering the baby the following week, when XXXXX would be essentially 40 weeks old, or full term. *Id.*

Dr. Monga saw Argelica again three days later, on March 13. *Id.* An ultrasound was taken but Dr. Monga again failed to order fetal growth measurements. *Id.* Predicted gestational age was 39 weeks and 4 days using the original due date; 37 weeks and 3 days according to the later one. *Id*. At this visit, Dr. Monga recommended that Dr. Galvan induce labor in light of Argelica's diabetes and preeclampsia. CR 221.

II. Argelica's Delivery And The Injury To Her Baby

Following Dr. Monga's recommendation, Dr. Galvan admitted Argelica to Houston Methodist Sugarland Hospital for induction of labor. *Id.* Her admitting diagnoses included a notation that XXXXX was large for his gestational age. CR 216. Once delivery began, the baby's head emerged from the birth canal but his shoulders became stuck there – a condition called shoulder dystocia. *Id.* Dr. Galvan called for assistance and another

obstetrician arrived to help, but the dystocia lasted 29 minutes. CR 216-17. During that time, the baby's umbilical cord was compressed, which prevented oxygen from flowing to his brain. *Id*.

When XXXXX was finally delivered, he weighed 10 lbs. and 13.5 oz. (4,920 grams), exceeding the 97th percentile. CR 217. He displayed signs of birth-related trauma such as extensive facial bruising, no heartbeat, and initial APGAR scores indicative of death. *Id.* He was then transferred to Memorial Herman Children's Hospital, where diagnoses included severe hypoxic-ischemic encephalopathy, enlarged size, required nutritional support, and respiratory failure caused by sepsis. *Id.* He has permanent developmental delays and cognitive deficits caused by the brain damage at birth, as well as brachial plexus palsy resulting in right arm abnormalities. CR 149 (Appellees' Appendix, Tab 2 (Burris Report)).

III. Procedural History Of This Lawsuit

The Perezes sued Dr. Monga, Dr. Galvan, and others. CR 154. Following a transfer to the court below, the Perezes complied with § 74.351 by filing expert reports from two physicians, Van Bohman and Garrett Burris, and a nurse, Gayle Huelsmann. CR 128. After Monga objected to the reports, the Perezes filed a supplemental report by Dr. Bohman. CR 211.

In his supplemental report, discussed at greater length below, Dr. Bohman, a board certified maternal-fetal medicine specialist, opines that Dr. Monga breached the applicable standard of care by failing to recommend induction of vaginal delivery on March 3, 2014, or a C-section thereafter, and that the resulting shoulder dystocia is the cause of XXXXX's current injuries. CR 221-22.

Dr. Burris, a board certified pediatric neurology specialist, opines that gestational diabetes is well known to cause macrosomia, which can lead to dystocia. CR 149. *Id.* He opines that XXXXX's hypoxic ischemic injury likely occurred during the 29 minutes of dystocia, resulting in oxygen deprivation and severe brain damage. CR 150. Had this not occurred, XXXXX would be neurologically normal. *Id*.

After the Perezes filed Dr. Bohman's supplemental report, Dr. Monga renewed her objection and moved for dismissal under § 74.351(b). CR 238. The court conducted a hearing and denied the motion. CR 297.

SUMMARY OF ARGUMENT

Dr. Monga argues first that Dr. Bohman is not qualified to render her opinions on the standard of care because he did not detail his experience using the ultrasound machine. This level of detail was not required. Dr. Bohman is board certified in obstetrics and maternal-fetal medicine and has

practiced for 25 years. Most importantly, he has ample experience performing C-sections in various settings – and whether Dr. Monga should have recommended a C-section is the crux of the Perezes' claim against her. The district court did not abuse its discretion in concluding that Dr. Bohman is qualified to give his preliminary opinions. *See* Point II, *infra*.

Contrary to Dr. Monga's claim, Dr. Bohman is also qualified to opine on the cause of XXXXX's injuries. Several courts have held that OB/GYNs can opine on the cause of neurological injuries resulting from complications in delivery, and Dr. Bohman is not merely an obstetrician but a board certified maternal-fetal medicine specialist. Moreover, even if he lacks the necessary qualifications, the Perezes have also offered the causation opinion of Dr. Burris, which is adequately linked to Dr. Bohman's opinions and therefore satisfies the statutory requirement. *See* Points II(D) and (E), *infra*.

Dr. Monga next claims Dr. Bohman used the wrong standard of care – one for obstetricians rather than maternal-fetal medicine specialists. What she ignores is that maternal-fetal specialists *are* obstetricians, and so are bound by the standard of care Dr. Bohman articulates. *See* Point III, *infra*.

Dr. Monga also attacks Dr. Bohman's opinion as speculative because he cannot definitively show that Dr. Galvan would have taken Dr. Monga's recommendation and performed a C-section. This is an argument that goes

to the merits of the case and does not undermine Dr. Bohman's opinion. Dr. Bohman may properly infer that a reasonable obstetrician would have accepted Dr. Monga's recommendation. After all, Dr. Galvan arranged for her to consult on the case and followed her recommendations in other respects. Speculativeness arguments essentially identical to Dr. Monga's here have been repeatedly rejected. *See* Point IV, *infra.*

Finally, Dr. Monga argues that the Perezes' claim against her should be dismissed due to the supposed problems with Dr. Bohman's report. If the Court finds any deficiencies, however, it should order that the Perezes have an opportunity to cure them, as prescribed by § 74.351(i) of the statute. The Supreme Court has confirmed that expert reports need only meet a "minimal standard" to be eligible for this safe harbor, and courts must be lenient in granting the relief. *See* Point V, *infra*.

ARGUMENT

I. The Court Must Affirm Unless The District Court Abused Its Discretion In Denying Dr. Monga's Motion

This Court reviews the denial of Dr. Monga's motion for abuse of discretion. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios,* 46 S.W.3d 873, 877 (Tex. 2001); *Methodist Hosp. v. Shepherd-Sherman*, 296 S.W.3d 193, 197 (Tex. App. – Houston [14th Dist.] 2009). An abuse of discretion entails more than "a mere error in judgment." *Keo v. Vu*, 76

S.W.3d 725, 730 (Tex. App. – Houston [1st Dist.] 2002, rev. denied). The trial court must rule "in an arbitrary or unreasonable manner or without reference to any guiding rules or principles." *Shepherd-Sherman*, 296 S.W.3d at 197. This Court "may not substitute its own judgment for the trial court's judgment." *Bowie Mem. Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). As the Supreme Court observed in a related context, "[c]lose calls must go to the trial court." *Larson v. Downing*, 197 S.W.3d 303, 304 (Tex. 2006).

II. Dr. Bohman Is Qualified To Render The Opinions Contained In His Report

A. Standards Governing Expert Qualifications Under Chapter 74

An expert is qualified to opine on whether a physician breached accepted standards of medical care if the expert:

1. is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;

2. 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

3. is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

TEX. CIV. PRAC. & REM. CODE § 74.401(a). In deciding whether the expert is qualified by virtue of her training or experience, the court must consider

whether she is "(1) board certified or has other substantial training or experience in an area of medical practice relevant to the claim; and (2) is actively practicing medicine in rendering medical care services relevant to the claim." *Id.* § 74.401(c). An expert may opine on causation if he "is a physician and is otherwise qualified to render opinions on [the] causal relationship under the Texas Rules of Evidence." *Id*. § 74.403(a).

In deciding whether an expert is qualified under Chapter 74, what matters chiefly is his expertise "regarding the specific issue before the court." *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996); *see also Anderson v. Gonzalez*, 315 S.W.3d 582, 585 (Tex. App. – Eastland 2010) (key is expert's "familiarity with the issues involved in the claim before the court"). An expert is qualified if he "has practical knowledge of what is usually and customarily done by a practitioner under circumstances similar to those confronting the defendant." *Christus Spohn Health Sys. v. Castro*, 2013 WL 6576041 at * 4 (Tex. App. – Corpus Christi 2013). Although an expert need not practice in the same specialty as the defendant, *Broders*, 924 S.W.2d at 153, Drs. Bohman and Monga are both maternal-fetal medicine specialists. CR 213-14; Monga Brf. ix.

Finally, the Supreme Court has cautioned that "expert qualifications should not be too narrowly drawn." *Larson*, 196 S.W. at 305; *see also*

Adeyemi v. Guerrero, 329 S.W. 3d 241, 247 (Tex. App. – Dallas 2010) ("we must be careful not to draw expert qualifications too narrowly"). Under § 74.401(c)(1), an expert's background need only be "*relevant to the claim*" – language that "is broad not narrow." *Benson v. Hall*, 2010 WL 376947 at * 3 (Tex. App. – Waco 2010) (emphasis added).

B. Dr. Bohman's Qualifications And Opinions

Dr. Bohman is board certified in both general OB/GYN care and maternal-fetal medicine. CR 235. Since completing a residency in obstetrics and gynecology at Baylor College of Medicine in Houston and a fellowship in maternal-fetal medicine at The University of Texas Southwestern in Dallas, he has practiced as an obstetrician and maternal-fetal medicine specialist for over 25 years in Nevada and Texas. CR 213, 232-33. He is familiar with the standards of care applicable to this case promulgated by the American College of Obstetricians & Gynecologists (ACOG). CR 214. As he states in his report: "In my years of practice, I have gained extensive experience in labor and delivery and performing cesareans, in various settings." CR 213-214. Thus, his opinions are founded on his "knowledge, training and experience acquired in the over 25 years of clinical experience related to the continuum of care provided to women, their pregnancies, and deliveries." CR 214.

Dr. Bohman's report sets forth the standard breached by Dr. Monga:

> The standard of care for physicians providing Maternal Fetal Medicine services is to monitor and assess the mother and the fetus and to make a determination as to whether the mother and the fetus have a higher chance of a positive outcome through vaginal or cesarean delivery. When presented with a fetus too large for a safe, vaginal delivery, the standard of care requires the obstetrician to recommend a delivery by cesarean section. The standard of care requires obstetricians to take a patient's full medical history and prenatal care into account determining the safest method of delivery. Regardless of whether the obstetrician is the "primary" or "consulting" physician, the duties do not change regarding recommendations for the patient. It [is] reasonable to appreciate that a primary obstetrician will follow the advice of a consulting maternal fetal medicine specialist.

CR 220.

Dr. Bohman explains that Dr. Monga breached this standard by failing to take into account information that would have indicated that XXXXX was too large for a vaginal delivery at term. CR 220. That information included the March 3 ultrasound measurements, the fact that the baby's abdominal circumference exceeded the 95th percentile, the fact that fetal weight gain increases as the pregnancy proceeds, and the complication of Argelica's gestational diabetes and the role of insulin in promoting fetal growth. *See id*. Dr. Monga should have recognized that XXXXX would exceed 4,000 grams within less than a week of the March 3 visit, that induction of vaginal delivery or performance of a C-section was therefore

necessary then, and that this would likely have prevented the baby's dystocia and long-term injury. CR 220-21.

Dr. Monga also breached the standard of care during Argelica's March 10 consultation. She failed to order fetal growth measurements. CR 221. Although Argelica needed an immediate C-section, Dr. Monga agreed to delivery following week, at term. *Id.* She made this decision though delivery at 38 weeks or earlier had been recommended, Argelica's expected due date was modified late in the pregnancy, and the baby was gaining a pound per week. *Id.*

These breaches were then repeated during the March 13 appointment. *Id.* As Dr. Bohman concludes:

> When presented with a baby of this size, growing at an above-average rate, and with an abdominal circumference substantially larger than the head circumference, and with the mother's history of diabetes and her small stature, Dr. Monga should have anticipated that fetal macrosomia and shoulder dystocia [were] likely to occur if Mrs. Perez delivered vaginally. The standard of care required Dr. Monga to recommend a cesarean section. Had she done so, the dystocia that went unresolved for 29 minutes during delivery and the subsequent injuries to XXXXX would have been avoided.

CR 221-22.

C. Dr. Bohman Is Qualified To Opine On The Standard Of Care Governing Dr. Monga

Dr. Bohman's qualifications satisfy the requirements of Chapter 74. He is qualified to render the opinions in his report both because of his applicable board certifications and his 25 years of practice caring for expecting mothers, delivering babies, and performing C-sections in various settings. CR 213-14. Under § 74.401(a), an expert's qualification can flow from *either* board certification *or* "substantial training or experience in an area of medical practice relevant to the claim." Dr. Bohman has both. Above all, he has significant experience in deciding when and whether to deliver via C-section in various settings – and then performing the procedure. CR 214. This qualifies him to opine that Dr. Monga breached the standard of care by failing to realize a C-section was necessary in this case and to timely recommend one. This case is a straightforward example of an expert who possesses special training and long experience "regarding the specific issue before the court" – the necessity of a C-section. *Broders*, 924 S.W.2d at 153; *see also*, *e.g.*, *Owens v. Handyside*, 478 S.W.3d 172, 186-87 (Tex. App. – Houston [1st Dist.] 2015, rev. denied) (expert qualified because report showed "he has experience in treating and diagnosing patients with the conditions suffered" by plaintiff); *Baylor College of Med. v. Pokluda*, 283 S.W.3d 110, 120 (Tex. App. – Houston [14th Dist.] 2009)

(expert's education and "experience in treating patients similarly situated to [plaintiff] and performing surgeries similar" to plaintiff's procedure qualified him to opine on standard of care).

Dr. Monga objects that Dr. Bohman does not describe his knowledge of ultrasound and how physicians use the machine to treat pregnant women. Monga Brf. 12. It is enough, however, that Dr. Bohman provide his qualifications as an OB/GYN and maternal-fetal medicine specialist with substantial experience in C-sections, and that he give the basis for his key opinion as to why Dr. Monga should have recommended the procedure. Elaborating on his familiarity with every medical tool or machine used along the way would be superfluous. In Dr. Monga's view, a surgeon could not opine about surgery without discussing his past use of a scalpel, a radiologist would have to explain x-rays, and a pathologist must specifically say he uses a microscope and describe how it works. Then, presumably, all would have to expound on their use of computers and the internet. The statute does not demand this level of detail in order to determine that an expert's background is "relevant to the claim." TEX. CIV. PRAC. & REM. CODE § 74.401(c)(1).

Rather, this case is similar to *Benavides v. Garcia*, 278 S.W.3d 794 (Tex. App. – San Antonio 2009, rev. denied). In *Benavides*, the plaintiff alleged that the defendant obstetrician misdiagnosed his wife with

gestational hypertension, though she actually suffered from preeclampsia, leading to cardiac arrest and death. *Id.* at 796. In his report, the plaintiff's expert explained that he was a board certified OB/GYN who practiced for 28 years, and that he had been "trained to manage 'high risk' pregnancies that, at times, require the consultation of a perinatologist (maternal-fetal medicine specialist)." *Id.* at 797. The court found that the expert's "knowledge of accepted standards of care for the diagnosis, cure or treatment of the illness or condition involved in the underlying claim," and his stated "opportunity to manage 'high risk' pregnancies" such as plaintiff's was, without more, a sufficient description of his qualifications. *Id.* Here too, Dr. Bohman has noted his relevant board certifications and explained the source of his familiarity with the particular procedure at hand: the C-section.

Moreover, specialists are presumed to be qualified to opine about topics incidental to their fields. Hence, in one case, an expert experienced in head and neck surgery was found to be qualified to testify about the plaintiff's post-surgical disability because "[i]t is axiomatic that a physician trained to perform surgery is also trained to manage surgical complications." *Sloman v. Chavez*, 2007 WL 595134 at * 4 (Tex. App. – San Antonio 2007, rev. denied) ("Accordingly, Dr. Alford's expertise as a head and neck surgeon also qualifies him to opine on the cause in fact of postoperative

complications that flow from that surgery"); *see also Keo*, 76 S.W.3d at 733 (same). As a board certified maternal-fetal medicine specialist with "extensive experience in labor and delivery and performing cesareans, in various settings," as well as "over 25 years of clinical experience related to the continuum of care provided to women, their pregnancies, and deliveries," CR 214, it is similarly axiomatic that Dr. Bohman is presumed to be qualified to opine on Argelica's need for a C-section without having to specify how often he uses one of the most fundamental tools of obstetrics.

The decisions Dr. Monga cites here are inapt. Monga Brf. 13-14. In *Cortez v. Tomas*, the procedure involved was "complex and beyond the experience and training of most physicians practicing obstetrics and gynecology." 2012 WL 407382 at * 5 (Tex. App. – Ft. Worth 2012). Consequently, merely having the same specialty as the defendant was not enough. By contrast, Dr. Bohman does not rely simply on his status as a maternal-fetal medicine specialist; he has diagnosed the need for and performed the same procedure at issue, and there no reason to believe using ultrasound machines is "complex and beyond the experience and training of most" maternal-fetal medicine specialists. The reverse is true.

In *In re Windisch*, the expert simply noted that he was a radiologist, leaving the court to guess whether he had ever performed or had any

familiarity with the procedure the plaintiff experienced. *S*ee 138 S.W.3d 507, 513-14 (Tex. App. – Amarillo 2004). Dr. Bohman's report contains what the *Windisch* plaintiff's lacked: a description of his experience with C-sections and the basis for his familiarity with Argelica's condition. The same is true as regards *CHCA Mainland, L.P. v. Dickie*, 2008 WL 3931870 (Tex. App. – Houston [14th Dist.] 2008); while the report there said nothing about the expert's experience with decubitus ulcers, Dr. Bohman's report specifically notes his work performing C-sections.

Dr. Monga maintains that ultrasound "is not 100% accurate 100% of the time," and she goes outside the record to refer to an ACOG practice bulletin and assert that Dr. Monga's report contains a factual error about macrosomia. Monga Brf. 14-15. The bulletin also supposedly states that ultrasound-derived fetal weight estimates can be erroneous and are of limited use. These are attacks on the merits or substance of Dr. Bohman's opinion and, as such, do not address the adequacy of his qualifications under Chapter 74. "Whether the expert's conclusions are correct is an issue for either trial or summary judgment." *Beaumont Spine Pain & Sports Med. Clinic, Inc. v. Swan*, 2011 WL 379168 at * 6 (Tex. App. – Beaumont 2011, rev. denied). Fulfilling the statute's expert report requirement does not

entail litigation of the merits. *See Palacios*, 46 S.W.3d at 879; *Wissa v. Voosen*, 243 S.W.3d 165, 169 (Tex. App. – San Antonio 2007).

Lastly, Dr. Monga faults Dr. Bohman for failing "to qualify himself as an expert in diabetes and in particular gestational diabetes," and for inadequately explaining what his maternal-fetal medicine specialty "qualifies him to do regarding pre-natal care or pregnancy." Monga Brf. 15. Again, Dr. Bohman states that his opinions are based, not simply on his maternal-fetal specialty or board certification, but the "knowledge, training and experience" he acquired in more than "25 years of clinical experience related to the continuum of care provided to women, their pregnancies, and deliveries." CR 214. That he does not go into his experiences with the specific ailment of gestational diabetes is unimportant. What matters in this case is that XXXXX was macrosomic and growing larger, regardless of the cause of that condition. Whatever the reason for the baby's dimensions, Dr. Bohman provides his qualifications and basis for opining on why a vaginal delivery when performed by Dr. Galvan was dangerous, and why a C-section would have avoided the dystocia and associated brain injury. Dr. Bohman's experience with C-sections in a variety of settings suffices to qualify him to opine on the standard of care that governs when maternal-fetal medicine specialists should recommend the procedure.

D. Dr. Bohman Is Also Qualified To Opine About The Cause Of XXXXX's Injuries

Dr. Monga also claims Dr. Bohman is unqualified to "make a neurologic causation opinion." Monga Brf. 23. According to Dr. Monga, Dr. Bohman "fails to reveal any training, knowledge, skill, or experience in pediatric neurology, infant hypoxic ischemic brain injury, or any of the injury physiology described by Dr. Burris." *Id*. at 26.

Because Dr. Bohman has undisputed experience with delivery in various settings, he is qualified to opine on the complications and injuries that can stem from giving birth, including the relatively basic causal relationship between compressing a baby's umbilical cord for 29 minutes and brain damage from oxygen deprivation. As he states, "[w]hen the fetus is trapped, significant injuries can occur, including lack of oxygen, nerve damage, and other birth injuries." CR 214. He also opines that adhering to the standard of care and delivering via C-section would have avoided the dystocia that caused XXXXX's injuries. CR 222.[1]

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[1] Seizing on a sentence early in Dr. Bohman's report, Dr. Monga asserts that Dr. Bohman only said he was offering opinions on the standard of care, not causation. Monga Brf. 23-24. But Dr. Bohman clearly addresses causation later in his report. CR 214, 222. Similarly, Dr. Monga claims the Perezes "concede that Dr. Bohman is not an expert on causation" because they also filed an expert report on causation from Dr. Burris, Monga Brf. 24, but Dr. Burris's report is not somehow a concession of an omission in Dr. Bohman's report. Experts' opinions often overlap in complex medical malpractice actions.

Case law makes clear that Dr. Bohman was qualified to offer his opinions on causation. In *Abilene Regional Med. Ctr. v. Allen*, an OB/GYN opined that failure by delivery room nurses to recognize fetal respiratory distress led to brain damage stemming from oxygen deprivation. 387 S.W.3d 914, 916-18 (Tex. App. – Eastland 2012, rev. denied). Regarding his qualifications, the expert stated only that he had attended hundreds of deliveries and was "familiar with the biological mechanism by which a fetus suffers brain injury when deprived of oxygen." *Id.* at 918. Although the defendant made the same claim Dr. Monga advances here – that the expert was unqualified because he was not a neurologist and provided too little information about his experience with pediatric neurological injuries – the court of appeals disagreed and found him qualified to opine on the cause of the baby's brain damage. *Id.* at 922-23.

Similarly, in *Livingston v. Montgomery*, an OB/GYN prepared an expert report on the causation of injuries suffered during birth. 279 S.W.3d 868, 873-74 (Tex. App. – Dallas 2009). As in this case, the defendant objected that the expert lacked the proper background to opine on the source of pediatric neurological injuries. *Id.* at 873. Appellees responded that the expert could make the "logical leap" that "oxygen deprivation in utero causes brain injury.'" *Id.* at 874. In his report, the expert stated that, "as an

obstetrician," he possessed knowledge and expertise on the topic. *Id.* The court agreed that the OB/GYN was qualified: "[Dr.] DiLeo is an expert in managing labor and delivery, and his expertise qualifies him to opine on the causal relationship between labor and delivery and the complications that stem from labor and delivery, including a newborn's neurological injuries." *Id.* at 877; *see also Cornejo v. Hilgers*, 446 S.W. 3d 113, 120-23 (Tex. App. – Houston [1st Dist.] 2014, rev. denied) (same).

Dr. Monga's reliance on *Tenet Hosps. v. De La Riva*, 351 S.W.3d 398 (Tex. App – El Paso 2011), is misplaced. Monga Brf. 25. In that case, the court rejected a neurological causation opinion from an obstetrician in part because he last encountered issues related to perinatology over 20 years before his report. *Id.* at 407. Here, by contrast, Dr. Bohman is board certified in the field concerned with high risk pregnancies and difficult deliveries. He has two decades of continuous practice with labor and delivery, including C-sections "in various settings." CR 214. More generally, *De La Riva* is outlier; most decisions recognize that obstetricians, let alone maternal-fetal medicine specialists, are fully qualified to offer opinions about the injuries that are caused by complications in delivery.

E. Dr. Burris's Report Also Establishes Causation

Even if Dr. Bohman is found to be unqualified to render an opinion on the cause of XXXXX's injuries, Dr. Burris's report fulfills that obligation. Dr. Monga concedes that Dr. Burris is "well qualified to express causation opinions" in this case, Monga Brf. 24, but she complains that Dr. Burris's report doesn't mention her specifically or link her treatment to XXXXX's injuries. *Id.* at 26-28.

TEX. CIV. PRAC. & REM. CODE § 74.351(i) permits plaintiffs to satisfy the expert report requirement by "serving reports of separate experts regarding… different issues… such as issues of liability and causation." "When a plaintiff relies on one report to show the standard of care and breach and a second report to show causation, we must look to both reports to see whether the breach identified in the standard-of-care report is sufficiently linked to the cause of the alleged injury in the causation report." *Columbia North Hills Hosp. Subsidiary, L.P. v. Alvarez*, 382 S.W.3d 619, 629 (Tex. App. – Ft. Worth 2012).

In this case, Dr. Bohman establishes that Dr. Monga's breaches of the applicable standard of care caused XXXXX's shoulder dystocia, while Dr. Burris explains how that same dystocia causes hypoxic ischemic injury leading to "epilepsy, cerebral palsy, and other developmental disabilities."

CR 149. As Dr. Burris states, XXXXX's "hypoxic ischemic injury occurred during the time of shoulder dystocia and fetal entrapment with umbilical cord occlusion… This infant would have been neurologically normal had the fetal entrapment at delivery been avoided." CR 150. XXXXX's current developmental delays are attributable to the brain damage he suffered during birth, and his permanent brachial plexus injury was caused by a stretching of the brachial plexus during his difficult delivery. *Id*. The breach identified in Dr. Bohman's report – failing to deliver via C-section and thereby prevent the possibility of dystocia – is plainly linked to the cause of injury described in Dr. Burris's report: neurological impairments and brachial plexus injury resulting from 29 minutes of avoidable dystocia.

Dr. Monga's claim that a combined reading of Dr. Bohman's and Dr. Burris's reports fails to establish causation is off base. In *Alvarez*, for example, one doctor opined that "all defendants" failed to expedite a second surgery on a woman experiencing internal bleeding after a hysterectomy, causing her death, and a different expert stated that multiple defendants' failure to recognize the woman's deteriorating condition breached the standard of care. 382 S.W.3d at 630. The causation expert's report did not distinguish between culpable parties. *See id.* Regardless, the court deemed the two reports sufficient because the actions found by the causation expert

to have led to the woman's death were the same as those condemned by the standard-of-care expert. *See id*.

The court reached the same conclusion in *Salais v. Tex. Dept. of Aging & Disability Serv*., where one expert opined that state employees breached the standard of care by restraining a developmentally disabled patient, and another expert reported that the patient's death "was a homicide caused by the restraint and mechanical asphyxia imposed on him by the three Mexia State School employees." 323 S.W.3d 527, 535 (Tex. App. – Waco 2010, rev. denied). The court found enough of a connection between the two reports because they involved the same conduct:

> [H]ere, there is no gap, and there is no guessing, that Dr. Winston's opinion on the cause of Ruben's death – "restraint and mechanical asphyxia imposed on him by the three Mexia State School employees" – *is the same conduct* referred to in the Wohlers report as being the three Mexia State School employees' breach of the standard of care in restraining a person in respiratory distress….
>
> Read together, they provide "enough information linking the defendant's breach of the standard of care to the plaintiff's injury."

Id. at 536 (emphasis in original, citation omitted). As in *Salais*, the Bohman and Burris reports center on the same conduct – vaginal delivery of a macrosomic baby – as breaching the standard of care and causing injury. This is adequate linkage and sufficient evidence of causation at the early,

Chapter 74 stage. *See also, e.g., Rio Grande Regional Hosp., HCA v. Ayala*, 2012 WL 3637368 at ** 24-25 (Tex. App. – Corpus Christi 2012, rev. denied) (same).

Dr. Monga cites seven decisions for the proposition that plaintiffs' experts must explain how each defendant violated the standard of care, and how that breach caused harm. Monga Brf. 26-28. In all but one of these, however, the plaintiff submitted a single report purportedly covering both liability and causation. Consequently, they have nothing to do with the permissible linkage between the two kinds of reports under § 74.351(i) when the reports are prepared by different experts.[2] As the decisions discussed above make clear, multiple reports satisfy § 74.351 as long as they describe the *same conduct* as breaching the standard and causing injury. Because that connection is present here, the Court should reject Dr. Monga's argument. "[A] report does not fail to implicate a defendant's conduct solely because the defendant is not identified by name." *Troeger v. Myklebust*, 274 S.W.3d 104, 110 (Tex. App. – Houston [14th Dist.] 2008, rev. denied).

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[2] In one decision Dr. Monga cites, the plaintiff filed three letters from different providers and claimed they satisfied § 74.351. Monga Brf. 27 (citing *Haskell v. Seven Acres Jewish Senior Care Serv., Inc*., 363 S.W.3d 754, 758-59 (Tex. App. – Houston [1st Dist.] 2007)). But the plaintiff did not argue that one of the reports was intended to address liability and another causation. *See id*. In fact, none of the letters claimed any defendant committed malpractice, and none tied any action by defendants to plaintiff's injuries. *See id*.

III. Dr. Bohman Correctly Describes The Standard Of Care Applicable To Dr. Monga

Next, Dr. Monga argues that Dr. Bohman applies the wrong standard of care to the treatment she provided – that of an obstetrician rather than a maternal-fetal medicine specialist. Monga Brf. 16-17. She bases this argument on Dr. Bohman's use of the word "obstetrician" in the portion of his report where he articulates the relevant standard of care. *Id*.; *see* CR 220. This might be problematic if Dr. Bohman was holding obstetricians to the standards of maternal-fetal medicine specialists, since the latter have more training and experience with high risk pregnancies.[3] But the reverse isn't true; holding maternal-fetal medicine specialists to the lower standards of obstetricians is correct because they *are* obstetricians. Dr. Bohman is describing the standard obstetricians must follow when they provide more specialized maternal-fetal medicine or consultation services, as Dr. Monga – both an obstetrician and a maternal-fetal medicine specialist – did here.[4]

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[3] *See, e.g.,* Society for Maternal Fetal Medicine, "What is the Society" page, http://www.smfm.org/what-is-the-society, last visited January 25, 2017 ("Maternal-Fetal physicians are obstetricians with additional training in the area of high-risk, complicated pregnancies").

[4] Strangely, Dr. Monga states in her brief that she is "certainly not an obstetrician." Monga Brf. 17. Presumably she means she was practicing as a maternal fetal specialist when seeing Argelica and that Dr. Galvan was Argelica's primary obstetrician – not that she (Dr. Monga) is not actually a licensed obstetrician. In any case, Dr. Bohman opines that the standard he articulates apply whether the practitioner is the primary or secondary physician. CR 220

Tellingly, Dr. Monga doesn't quarrel with the substance of the standard itself, or claim she need not have adhered to it. Her argument is purely semantics and should be rejected by the Court.

IV. Dr. Bohman's Causation Opinion Is Not Speculative

Lastly, Dr. Monga contends that Dr. Bohman's opinion that her breach of the standard of care caused XXXXX's injuries is speculative because Dr. Bohman can't guarantee that any recommendation she made regarding Argelica's treatment would have been carried out, preventing the harm that occurred. Monga Brf. 17-23. According to Dr. Monga, the Court is forced to guess whether Dr. Galvan would have followed her recommendation, how she could have "enforced" it, whether Argelica would have agreed to a C-section, whether Dr. Galvan is competent to perform one, and how she "was supposed to control Dr. Galvan's thinking and his actions after…. delivery began." Monga Brf. 17-20.

In the first place, Dr. Bohman's report need only be "an objective good faith effort to comply" with § 74.351(a)'s requirement. *Id*. § 74.351(l). The Perezes are not obligated to "marshal [their] evidence or present sufficient evidence to avoid summary judgment." *Shepherd-Sherman*, 296 S.W.3d at 197; *Palacios*, 46 S.W.3d at 879. Their expert reports should simply "inform the defendant of the specific conduct the plaintiff has called

into question," and "provide a basis for the trial court to conclude that the claims have merit." *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex. 2013) (quotation omitted). "The Legislature's goal was to deter baseless claims, not to block earnest ones." *Id.* at 631. Or as Justice Hecht put it: "An expert report, as we have interpreted it, is a low threshold a person claiming against a health care provider must cross merely to show that his claim is not frivolous." *Losaiga v. Cerda*, 379 S.W.3d 248, 264 (Tex. 2012) (Hecht, J., concurring in part and dissenting in part).

Dr. Monga's speculativeness argument fails because the factual questions she raises about what would have happened after she made the required recommendation to Dr. Galvan have no relevance to whether an expert report satisfies § 74.351. Dr. Bohman opines that "it is reasonable to appreciate that a primary obstetrician will follow the advice of a consulting maternal fetal medicine specialist." CR 220. At this stage of the case, however, it is impossible for Dr. Bohman to definitively know one way or the other, since the Perezes have yet to depose Dr. Galvan. As a result, Dr. Bohman cannot be faulted for reasonably presuming facts that will be resolved later, when the parties litigate the merits. "The possibility that facts may later be discovered that prove [the expert's] opinions on causation are incorrect is not a basis for holding the report insufficient under section

74.351." *Fagadau v. Wenkstern*, 311 S.W.3d 132, 139 (Tex. App. – Dallas 2010); *accord Allen*, 387 S.W.3d at 923 ("If the facts do not support a plaintiff's claim, summary judgment procedures provide a remedy").

Indeed, the facts known now suggest Dr. Galvan *would* have followed Dr. Monga's recommendation. The whole point of engaging a maternal-fetal medicine specialist is to solicit and presumably utilize her greater level of expertise in high risk situations, and in this case, when Dr. Monga finally recommended inducing labor on March 13, 2014, Dr. Galvan did so. CR 221. Nor is there any reason to think Argelica would have refused both doctors' plan of treatment and insisted on a vaginal delivery despite their assessments that it could harm her baby. In any case, these are factual questions to be answered when the parties litigate the merits.

Several decisions make clear that Dr. Monga's speculativeness argument provides no basis to grant her § 74.351(b) motion. This Court specifically rejected an identical argument in *Shepherd-Sherman*. There, the plaintiff alleged that she asked defendants to contact her regular cardiac surgeon (Dr. Coselli) during an emergency but they refused, a different doctor operated, and she suffered additional injuries that would not have occurred if her regular surgeon had been consulted. *See* 296 S.W.3d at 196. In response, the defendant hospital made the same argument Dr. Monga

advances here: that plaintiff's causation expert's opinion was "speculative and conclusory because there is no basis for concluding what Dr. Coselli would have actually done." *Id*. at 199. This Court disagreed:

> Methodist complains that Dr. Adams's opinion is not based on evidence, such as an affidavit or deposition from Dr. Coselli, stating exactly what *he* would have done had he been called when Sherman was admitted. Methodist cites no authority that discovery from a fact witness is required to support an initial expert report under chapter 74…. Dr. Adams's well-supported conclusions about how a reasonably prudent doctor would have acted under the circumstances are sufficient to have given the trial court such assurances at this stage in the case. That discovery could later prove Dr. Adams wrong is not a basis for holding that his report is insufficient under chapter 74.

Id. at 200 (emphasis in original).

Other decisions have reached the same conclusion. In *Allen*, a case very similar to this one, plaintiffs alleged that hospital nurses failed to tell their OB/GYN that their daughter had certain fetal heart symptoms indicating distress. *See* 387 S.W.3d at 919-20. Plaintiffs' causation expert opined that, had the nurses done so, the OB/GYN would have immediately delivered by C-section. *See id*. Although the defendants argued that whether the OB/GYN "would have performed a Caesarean section earlier is pure speculation and thereby conclusory," the court upheld the report. *See id.* at 923. It was sufficient for the expert to describe what a reasonable

OB/GYN *should* have done with the withheld information, not what the actual doctor *would* have done. *See id*.

Likewise, in *Brunson v. Johnston*, the plaintiff sued doctors who failed to detect abnormalities in an MRI of his spine, which delayed surgery and caused his paralysis. *See* 2013 WL 173743 at ** 1, 5 (Tex. App. – Ft. Worth 2013, rev. denied). The defendants objected to the plaintiff's causation expert's report on the ground that he was speculating as to whether, had the abnormality been spotted, the relevant pathology would have been understood, other surgeons would have agreed to operate more quickly, and the surgery would have succeeded. *Id*. at * 6. The court decided that these inferences were permitted, not improper speculation, and that the report met the goals of § 74.351. *See id*.; *see also Martin v. Abilene Regional Med. Ctr.*, 2006 WL 241509 at *5 (Tex. App. – Eastland 2006) (causation opinion not speculative though expert could not say whether doctor would have ordered medication had nurse informed him of omitted prescription); *Eikenhorst v. Wellbrock*, 2008 WL 2339735 at ** 9-10 (Tex. App. – Houston [1st Dist.] 2008) (approving causation opinion where delay in diagnosis caused harm, though opinion depended on assumption that immediate surgery would have followed correct diagnosis).

Ultimately, Dr. Monga's argument proves too much. It would prohibit a claim against anyone who assisted with or consulted on treatment unless the plaintiff was somehow privy to an admission from a later or primary caregiver, before discovery, as to what he would have done with the information or consultation. Given that care from multiple providers at different times is the norm where serious conditions are concerned, Dr. Monga's position would immunize whole classes of people and entities who provide medical care. Even more claims would be precluded if experts must prove in their preliminary reports that patients would follow their doctors' planned course of treatment. Nothing in Chapter 74 suggests the legislature intended this result. A causation expert's report "is not insufficient simply because there may be many links in the chain of events leading to" plaintiff's injury. *Vardiman v. Ogden*, 2011 WL 4974211 at * 4 (Tex. App. – Beaumont 2011); *accord Patel v. Williams ex rel. Estate of Mitchell*, 237 S.W.3d 901, 906 (Tex. App. – Houston [14th Dist.] 2007) ("While there are many links in this chain of causation, we cannot conclude that Dr. Zeitlin's report is insufficient to fulfill the requirements of section 74.351").

Dr. Monga also argues here that Dr. Bohman's opinion is deficient because it hinges on possibilities. Monga Brf. 21-23. She cites numerous decisions faulting experts for using "expressions of possibility," such as

"likely" and "could have," and claims "[a]n expert report speaking only of possibilities will not suffice." *Id*. at 20. This boilerplate criticism has no application to Dr. Bohman's report, which states definitively: "The standard of care required Dr. Monga to recommend a cesarean section. Had she done so, the dystocia that went unresolved for 29 minutes during delivery and the subsequent injuries to XXXXX *would have been avoided*." CR 222 (emphasis added). Dr. Bohman does not equivocate or fail to explain what result was caused by Dr. Monga's alleged negligence. At this stage, Dr. Bohman's opinion need only give "an articulable, complete, and plausible explanation of how the alleged breaches led to the damages sustained. If the plaintiff gets their foot that far inside the door, they can then proceed with discovery to verify that the plausible explanation can be proven by a preponderance of the evidence." *Tenet Hosps., Ltd. v. Garcia*, 462 S.W.3d 299, 308 (Tex. App. – El Paso 2015). Dr. Bohman's report easily clears this low bar and confirms that the Perezes' claim is not frivolous.

V. If The Court Finds Dr. Bohman's Report Deficient, It Should Order An Extension Under § 74.351(c) Or Remand To The Trial Court For It To Consider An Extension

Chapter 74 permits courts to grant one 30-day extension so that the plaintiff can cure a deficient report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). Dr. Monga argues that Drs. Bohman's and Burris's reports are

not merely deficient but were made in bad faith, depriving the Perezes of the opportunity to cure afforded by § 74.251(c). Monga Brf. 28-30.

The Texas Supreme Court addressed § 74.351(c) in *Scoresby v. Santillan*, 346 S.W.3d 546 (Tex. 2011). "It must be remembered," the Court observed, "that there are constitutional limitations upon the power of courts to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Id*. at 554 (quotation omitted). Courts should therefore "be lenient in granting thirty-day extensions and must do so if deficiencies in an expert report can be cured within the thirty-day period." *Id.* at 554. The Court set what it called a "minimal standard" for judging whether an expert report can be cured: "if the report is served by the statutory deadline, if it contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated." *Id*. at 557. Because "the *Scoresby* standard is minimal," this Court recognizes that "most purported expert reports are likely to fall into the deficient-report category and be eligible for a thirty-day extension." *Rosemond v. Al-Lahiq*, 362 S.W.3d 830, 840 (Tex. App – Houston [14th Dist.] 2012, rev. denied).

The Bohman and Burris reports, if deficient, at least meet *Scoresby's* minimal standard. As for the Bohman report, the Perezes served it within the statutory deadline, and it expressly implicates Dr. Monga's conduct. The

report also "contains the opinion of an individual with expertise that the claim has merit." *Scoresby*, 346 S.W.3d at 557. Dr. Monga's main argument is that Dr. Bohman is unqualified, but *Scoresby* requires only that the physician's background be "relevant." 346 S.W.3d at 557; *see also Nexion Health at Garland, Inc. v. Treybig*, 2014 WL 7499373 at * 7 (Tex. App. – Dallas 2014). As a double board certified maternal-fetal medicine specialist with a quarter century's experience treating women before, during, and immediately after delivery, it is not credible to claim Dr. Bohman lacks relevant expertise here. If the report is deficient regarding his experience with ultrasound, it is a technical omission easily cured. And claiming Dr. Bohman is not an "individual with expertise" in what caused XXXXX's injuries is equally weak; as noted above, courts routinely hold that OB/GYNs can opine about neurological damage from delivery. *See* pp. 21-23, *supra*.

Dr. Monga's objection to Dr. Burris's report is that it fails to mention her. Monga Brf. 29. As discussed above, that is because the report is intended to be read in conjunction with Dr. Bohman's opinions and to address how dystocia causes neurological damage. *See* pp. 23-27, *supra*. Regardless, if not mentioning Dr. Monga is deficient in this context, the shortcoming is easily remedied: Dr. Burris can amend the report to explicitly

refer to Dr. Bohman's opinion that Dr. Monga, specifically, failed to recommend a C-Section. As with her objection to Dr. Bohman's report, Dr. Monga's complaint about Dr. Burris's report is entirely technical.

Decisions since *Scoresby* confirm that dismissal of the Perezes' claim without an opportunity to cure would be unjustified. In *Mangin v. Wendt*, for example, where an expert anesthesiologist opined about cardiac care, the court nonetheless deemed his report "an objective good faith effort to comply, despite its deficiency in failing to articulate how [his] expertise qualified him to render an opinion." 480 S.W.3d 701, 710 (Tex. App. – Houston [1st Dist.] 2015). The court also noted that the trial court had found the report to be adequate. *See id*. The fact that the two courts could disagree about the adequacy of a report – also present here, if this Court finds Dr. Bohman's report deficient – obviously argues strongly against the notion that the report is so egregiously lacking as to demonstrate bad faith.

Other courts have also declined to order dismissal when curing the identified deficiency was possible. *See, e.g.*, *Savaseniorcare Admin. Serv., LLC v. Cantu*, 2014 WL 5352093 at * 5 (Tex. App. – San Antonio 2014) (report that failed to show causation "beyond mere conjecture" nevertheless could be cured and therefore eligible for extension); *Castro*, 2013 WL 6576041 at * 7 (ordering extension though reports were prepared by experts

in geriatrics and home nursing care rather than ICU and trauma care); *Salais*, 323 S.W.3d at 537 (plaintiff could cure report in case where developmentally disabled boy died after application of physical restraints, but report gave no information at all about expert's qualifications and CV indicated only that he was ER physician and general and trauma surgeon); *Rosemond*, 362 S.W.3d at 840 (trial court abused discretion denying opportunity to cure though expert did not explain how his experience as physical medicine specialist qualified him to opine on plaintiff's joint ailment, and report failed to articulate standard of care).[5]

If this Court finds the reports by Dr. Bohman or Dr. Burris deficient, it should remand the case with an order that the Perezes be afforded 30 days to cure the deficiency and refile the reports. *See, e.g.*, *Mangin*, 480 S.W.3d at 714; *Castro*, 2013 WL 6576041 at * 7. Alternately, it should remand to the district court so that court can decide whether to grant the extension. *See, e.g., Allen*, 387 S.W.3d at 924; *Salais*, 323 S.W.3d at 537.

[5] Dr. Monga cites several decisions denying opportunities to cure. Monga Brf. 28-29. However, "these cases were decided before *Scoresby*, which imposed a new, more 'lenient' standard for the section 74.351(c) extension." *Matagorda Nursing & Rehabilitation Ctr., LLC v. Brooks*, 2017 WL 127867 at * 6 (Tex. App. – Corpus Christi 2017).

PRAYER

The Court should affirm the district court's order denying Dr. Monga's motion under TEX. CIV. PRAC. & REM. CODE § 74.351. If the Court does not affirm, it should order that Appellees may cure any deficiency in any expert report under TEX. CIV. PRAC. & REM. CODE § 74.351(c). If the Court does not affirm and does not directly order that Appellees may cure any deficiency in any expert report under TEX. CIV. PRAC. & REM. CODE § 74.351(c), it should remand to the district court for it to make the determination whether Appellees should be granted an extension and an opportunity to cure under § 74.351(c).

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Brief and Appendix was served on counsel of record for Appellant on January 30, 2017 by electronic means in accordance with this Court's rules on electronic filing:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word limit of TEX. R. APP. P. 9.4(i)(2)(B) because this brief contains 8,985 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).

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Dated: January 30, 2017

APPENDIX

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