IN THE SUPREME COURT OF TEXAS

NO. 05-0801

S. MURTHY BADIGA, M.D., PETITIONER,

v.

MARICRUZ LOPEZ, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued September 9, 2008

JUSTICE BRISTER filed a dissenting opinion, in which JUSTICE MEDINA joined.

We held one year ago that an interlocutory appeal cannot be taken from an order granting an extension to cure a *deficient* expert report.[1] Today the Court holds that an interlocutory appeal can be taken from an order granting an extension to cure a *missing* expert report. But the interlocutory-appeal statute makes no such distinction; it simply says that "an appeal may not be taken from an order granting an extension."[2] In the plainest of terms, this statute applies to all extensions — right or wrong, deficient report or no report. As the Court reads into this jurisdictional statute a distinction that is not there, I respectfully dissent.

[1] *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007).

[2] TEX. CIV. PRAC. & REM. CODE § 51.014(9).

The plaintiff here did not serve an expert report within 120 days of filing. She sent medical records to the defendant's insurer, but a defendant is entitled to those even before suit is filed.[3] If medical records alone satisfied the expert report requirement, expert reports would never be required.

The defendant moved to dismiss due to the missing report. The trial court responded by granting an extension, during which the plaintiff served a report in which a physician retyped the hospital discharge summary and signed it. The defendant filed a second motion to dismiss, incorporating the arguments from her first motion and adding that the new report was inadequate. The trial court denied the motion without specifying the grounds. The defendant then filed this interlocutory appeal, abandoning any complaint about inadequacy of the report served during the extension,[4] and complaining only that no report was served during the first 120 days. The court of appeals dismissed the appeal for lack of jurisdiction.[5]

This Court generally cannot review interlocutory appeals.[6] But we can review whether jurisdiction of one was correctly declined by a court of appeals.[7] Those courts have jurisdiction to review interlocutory orders that deny a motion to dismiss, but not those that grant an extension:

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[3] *See id.* § 74.051.

[4] Dr. Badiga challenged the adequacy of the purported report in the trial court, but made clear in her Reply Brief in the court of appeals that she was "not challenging the adequacy of Plaintiff's expert report through this appeal."

[5] ___ S.W.3d ___.

[6] *See* TEX. GOV'T CODE § 22.225(b) ("Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and a petition for review is not allowed to the supreme court, in . . . interlocutory appeals that are allowed by law").

[7] *Lewis v. Funderburk*, 253 S.W.3d 204, 206 (Tex. 2008); *Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007).

> A person may appeal from an interlocutory order of a district court, county court at law, or county court that ... denies all or part of the relief sought by a motion under Section 74.351(b) [providing for dismissal with prejudice and cost awards], except that an appeal may not be taken from an order granting an extension under Section 74.351.[8]

The statutory language is plain enough: interlocutory appeals may be taken from orders *denying dismissal*, but not orders *granting extension*s. Yet this provision has created considerable confusion about when interlocutory review is available. The confusion arises because every order that grants an extension also denies dismissal, at least by implication.

There are two reasons why these orders are inseparable. First, extensions occur only in response to a motion to dismiss; absent such a motion, the case proceeds to trial with no report at all. Second, extensions necessarily imply that the motion to dismiss is denied (at least temporarily), because no case can be extended and dismissed at the same time. Accordingly, the statute creates an apparent conflict because an order that is *not* appealable (granting an extension) also does something that *is* appealable (denying dismissal).

We resolved this conflict in *Ogletree v. Matthews*, holding that an order granting an extension cannot be severed from the accompanying order (explicit or implicit) denying dismissal, as doing so would render the statute meaningless.[9] Treating every extension as a denial of dismissal would make all extension orders immediately appealable — even though the statute expressly says they are not. To give effect to both parts of the statute (as we must),[10] an order granting an extension

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[8] TEX. CIV. PRAC. & REM. CODE § 51.014.

[9] 262 S.W.3d at 321.

[10] TEX. GOV'T CODE § 311.021(2).

that expressly or impliedly denies dismissal cannot be severed into separate parts; the whole must be treated as an order granting an extension. Accordingly, we held in *Ogletree* that a defendant cannot appeal when the trial court grants an extension, but must instead wait 30 days and then appeal if the amended report is inadequate.[11]

We did not decide in *Ogletree* whether this same analysis applies when a plaintiff serves no report rather than a deficient report,[12] but there is no way to avoid it. If no report is filed but the trial judge grants an extension, the jurisdictional statute plainly says that an interlocutory appeal "may not be taken from an order granting an extension."[13] There is nothing unclear about this statute, and it must be strictly construed.[14] Thus, it does not matter whether an extension is granted because there was no report or a deficient report; it is still an extension and extensions are not immediately appealable.

The Court says the limit on interlocutory review "does not apply when no expert report has been served,"[15] but that conclusion has no support in the statute. The statute bars review of all extensions — right or wrong. The Court distinguishes *Ogletree* based on a policy against appellate review of a report at the same time it is being cured in the trial court, a policy that does not apply

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[11] 262 S.W.3d at 321.

[12] *Id*. at 320 n.2.

[13] TEX. CIV. PRAC. & REM. CODE § 51.014(9).

[14] *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 841 (Tex. 2007); *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001).

[15] ___ S.W.3d at ___.

when there is no report to review or cure.[16] But appellate courts cannot decide whether an appeal involves no report or a deficient report without reviewing them all. This takes time. Denying review in deficient-report cases has several advantages,[17] all of which are lost if every appeal must be reviewed anyway to decide into which category it belongs.

Moreover, there is no clear line between no-report and deficient-report cases, because the Legislature drew none. To the contrary, the statute treats deficient reports as one type of missing report: "If an expert report *has not been served* within the period specified by Subsection (a) *because elements of the report are found deficient*, the court may grant one 30-day extension to the claimant in order to cure the deficiency."[18] By using the plural word "elements," this statute appears to allow a party to cure a report missing several elements, perhaps even all. So trying to draw a line between deficient and missing reports is like trying to draw a line between "boys" and "people": the words mean different things, but they cannot be treated differently because one is part of the other.

The defendant claims she is not appealing the order of extension but only the order denying her motion to dismiss. But for the reasons noted above the two are "inseparable," as we stated in *Ogletree*.[19] It is true that both orders in *Ogletree* were in the same instrument, while the denial of dismissal here was signed almost three months after the extension. But if two orders are *inseparable*, signing them separately cannot change that result.

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[16] *Id.* at ___.

[17] *See Ogletree,* 262 S.W.3d at 321 (noting that extensions mean delay of only 30 days, and that reviewing a report's deficiencies at the same time they were being cured was "an illogical and wasteful result").

[18] TEX. CIV. PRAC. & REM. CODE § 74.351(c) (emphasis added).

[19] 262 S.W.3d at 321.

And in any event, the plaintiff here served a report during the extension, and the defendant has abandoned any complaint that this report was inadequate. An unchallenged report prevents dismissal,[20] so this case can be dismissed only if this report should be disregarded because extension was improper. No matter how the defendant characterizes her appeal, she is challenging the extension because she must.

The Court is undoubtedly right that denying review here allows the plaintiff and trial court to ignore a procedural requirement the Legislature took great pains to construct. The statute provides that if a report "has not been served" within 120 days, the court "shall" sign an order that "dismisses the claim."[21] Surely most trial judges in Texas would not have granted an extension here, although this case is proof that some would. But if the Legislature wants Texas appellate courts to rein in those few, it must grant them the jurisdiction to do so — rather than expressly denying it as it has done here.

When a trial court grants an extension, it does not matter whether a deficient report or no report was served; an interlocutory appeal cannot be taken in either case. As the court of appeals did only what the statute says, I would affirm; because the Court holds otherwise, I respectfully dissent.

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Scott Brister
Justice

OPINION DELIVERED: January 9, 2009

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[20] *See id.* at 322 (holding order denying dismissal was correct when hospital did not object to adequacy of report).

[21] TEX. CIV. PRAC. & REM. CODE § 74.351(b).