IN THE SUPREME COURT OF TEXAS

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NO. 06-0502
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JAN N. OGLETREE, M.D. AND HEART HOSPITAL OF AUSTIN,
PETITIONERS,

v.

NANCY KAY MATTHEWS AND LUANN MATTHEWS,
RESPONDENTS

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS
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Argued April 10, 2007

JUSTICE WILLETT, concurring.

I agree with the Court's reasoning and result and write separately only to make this minor observation: the Court's classification of all purported expert reports as either absent or deficient may prove inapposite in rare cases—where the claimed "report" is actually no such thing—and inadvertently expand the availability of the thirty-day extension provided by section 74.351(c) beyond what the Legislature intended.

Section 74.351(a) requires a health care liability claimant to serve an expert report on all defendants within 120 days of filing suit.[1] To qualify as an expert report, the report must summarize the expert's opinion regarding three statutorily required elements: standard of care, breach, and

[1] TEX. CIV. PRAC. & REM. CODE § 74.351(a).

causation.[2] As the Court correctly notes, failure to timely file *any* report warrants dismissal on defendant's motion.[3] If the trial court refuses to dismiss, the defendant is entitled to an immediate appeal.[4]

The Court also correctly points out that the Legislature provided a safety outlet for plaintiffs who file a deficient expert report. In those instances, the trial court has discretion to grant the claimant one thirty-day extension "in order to cure the deficiency,"[5] and this discretionary decision is not reviewable by interlocutory appeal.[6]

The Court today correctly disposes of the arguments presented by Ogletree and the Hospital. The expert reports filed by the Matthews, consistent with the statutory requirements, contained written opinions by medical professionals discussing the standard of care, breach, and causation applicable to the facts of the lawsuit. The Matthews' alleged miscue, designating the wrong type of medical professionals to opine on standard of care, is the type of defect for which a trial court may grant a discretionary section 74.351(c) extension.

Nevertheless, in discussing the statutory framework, the Court limits the universe of possible reports to two (and only two) types: absent reports, which have not been filed at all and require dismissal of the case, and deficient reports, which have been timely filed and may receive an

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[2] § 74.351(r)(6).

[3] § 74.351(b).

[4] § 51.014(a)(9).

[5] § 74.351(c).

[6] § 51.014(a)(9).

extension. In my view, there exists a third, albeit rare, category: a document so utterly lacking that, no matter how charitably viewed, it simply cannot be deemed an "expert report" at all, even a deficient one. A document like this merits dismissal just like an absent report.

The Court recognizes that "a deficient report differs from an absent report."[7] I agree but contend that some material does not even rise to the level of a deficient report because it fails to address the statutorily mandated elements set forth in Chapter 74. Such documents constitute no expert report at all. In fact, I hesitate even to label such material a "*grossly* deficient report" because that description may well confer more credit than the "report" claims for itself. It may not purport to be a report at all, and its author may never have intended it as such. For example, it may (by its own terms) be provider correspondence or perhaps "medical or hospital records or other documents"[8] or other health-related paperwork that, while related to the patient's care and condition, neglects altogether to address the rudimentary elements of an expert report; indeed, it may never and nowhere accuse anyone of doing anything wrong. Such information certainly constitutes discoverable and highly relevant information in a lawsuit,[9] but any claimant passing off such material as an expert report, and any court treating it as such, evinces a complete disregard for Chapter 74's unambiguous statutory criteria. To be clear, I am not describing a situation where "elements of the report have been found deficient,"[10] thus making the report eligible for an opportunity to cure; rather, I am

[7] ___ S.W.3d ___, ___.

[8] § 74.351(s).

[9] *Id*.

[10] § 74.351(c).

describing a situation where elements of the report have not been found at all—where the plaintiff submits nothing but doctor- or provider-signed material that contains zero (or practically zero) discussion of what makes a report a report. Elements must be present to be labeled deficient; if they are nonexistent, so is the report.

It is indisputable, for example, that a "report" signed by a plumber is no report at all and merits swift dismissal, no matter how brilliantly he describes how the defendant's departure from accepted standards of care caused the patient's injury. Likewise, a doctor- or provider-signed record that totally omits the required statutory elements and makes no colorable attempt to demonstrate liability is no report at all and merits dismissal just as swift. A "report" of this nature falls outside the section 74.351(c) safe harbor afforded to deficient-but-curable reports. A trial court reviewing such material should conclude that a report "has not been served" for purposes of section 74.351(b) and dismiss the claim as the statute directs; failure to do so invites an interlocutory appeal and reversal under section 51.014(a)(9).

I am confident that the overwhelming majority of health care liability claimants do their best to submit expert reports that comply with Chapter 74. A grossly substandard filing pitched as a bona fide report may indeed be a rare bird in Texas legal practice, but courts should be mindful of its existence.

Don R. Willett
Justice

Opinion delivered: November 30, 2007