IN THE SUPREME COURT OF TEXAS

NO. 06-0518

RORY LEWIS, M.D., PETITIONER,

v.

DEWAYNE FUNDERBURK, AS NEXT FRIEND OF WHITNEY FUNDERBURK, RESPONDENT

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

Argued November 15, 2007

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON and JUSTICE WILLETT joined.

JUSTICE O'NEILL filed a concurring opinion.

JUSTICE WILLETT filed a concurring opinion.

In an effort to stem frivolous suits against health care providers, the Legislature has made a number of changes in the rules of civil litigation. Among them has been a requirement since 1995 for early expert reports,[1] and a provision since 2003 for interlocutory review of those reports.[2] Since

[1] Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, 1995 Tex. Gen. Laws 985, 986 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 74.351(a)).

[2] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 1.03, 2003 Tex. Gen. Laws 847, 849 (codified as an amendment of TEX. GOV'T CODE § 51.014(a)).

adoption of the latter provision, 12 of the 14 courts of appeals in Texas have routinely conducted interlocutory review of allegedly inadequate reports.[3] But two courts have not — the Second and (in this case) the Tenth courts of appeals have held they have no jurisdiction of such appeals.[4]

---

[3]

1st: *CHCA Mainland L.P. v. Burkhalter*, 227 S.W.3d 221, 226 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *McKowen v. Ragston*, No. 01-06-00665-CV, 2007 WL 79330, at *1 n.1 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, no pet.).

3rd: *Austin Heart, P.A. v. Webb*, 228 S.W.3d 276, 284–85 (Tex. App.—Austin 2007, no pet.); *see also Acad. of Oriental Med., L.L.C. v. Andra*, 173 S.W.3d 184, 185 (Tex. App.—Austin 2005, no pet.).

4th: *Fox v. Hinderliter*, 222 S.W.3d 154, 156 (Tex. App.—San Antonio 2006, no pet.); *Emeritus Corp. v. Highsmith*, 211 S.W.3d 321, 326 (Tex. App.—San Antonio 2006, pet. denied).

5th: *Romero v. Lieberman*, 232 S.W.3d 385, 388 (Tex. App.—Dallas 2007, no pet.); *Cayton v. Moore*, 224 S.W.3d 440, 443–44 (Tex. App.-Dallas 2007, no pet.); *HealthSouth Corp. v. Searcy*, 228 S.W.3d 907, 908 (Tex. App.—Dallas 2007, no pet.).

6th: *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 851 n.2 (Tex. App.—Texarkana 2006, no pet.); *Longino v. Crosswhite*, 183 S.W.3d 913, 916–18 (Tex. App.-Texarkana 2006, no pet. h.).

7th: *Wells v. Ashmore*, 202 S.W.3d 465, 467 (Tex. App.—Amarillo 2006, no pet. h.).

8th: *Palafox v. Silvey*, No. 08-06-00313-CV, 2007 WL 3225512, at *1 (Tex. App.—El Paso Nov. 1, 2007, no pet. h.); *Sides v. Guevara*, No. 08-06-00213-CV, 2007 WL 2456882, at *2–3 (Tex. App.—El Paso Aug. 30, 2007, no pet.); *Grindstaff v. Michie*, 242 S.W.3d 536, 539 (Tex. App.—El Paso Aug. 30, 2007, no pet. h.).

9th: *Alexander v. Terrell*, No. 09-07-198-CV, 2007 WL 2683536, at *1 (Tex. App.—Beaumont Sept. 13, 2007, no pet.); *Hiner v. Gaspard*, No. 09-07-240-CV, 2007 WL 2493471, at *3 (Tex. App.—Beaumont Sept. 6, 2007, no pet.).

11th: *Foster v. Zavala*, 214 S.W.3d 106, 117 (Tex. App.—Eastland 2006, pet. filed); *Patel v. Harmon*, 213 S.W.3d 449, 450 (Tex. App.—Eastland 2006, no pet.).

12th: *Spitzer v. Berry*, No. 12–07–00276–CV, 2008 WL 482299, at *1–2 (Tex. App.—Tyler, Feb. 22, 2008, no pet. h.).

13th: *Haddad v. Marroquin*, Nos. 13-07-014-CV, 13-07-109-CV, 2007 WL 2429183, at *1 (Tex. App.—Corpus Christi Aug. 29, 2007, pet. filed); *Valley Baptist Med. Ctr. v. Gonzales*, No. 13-06-371-CV, 2007 WL 416536, at *1 (Tex. App.—Corpus Christi Feb. 8, 2007, no pet. h.).

14th: *Mem'l Hermann Healthcare Sys. v. Burrell*, 230 S.W.3d 755, 757 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

[4]

2nd: *Metwest, Inc. v. Rodriguez*, No. 2-07-047-CV, 2007 WL 1018640, at *1 (Tex. App.—Fort Worth Apr. 5, 2007, pet. filed); *Jain v. Stafford*, 214 S.W.3d 94, 97 (Tex. App.—Fort Worth 2006, pet. dism'd).

10th: *Hill Reg'l Hosp. v. Runnels*, No. 10-06-00372-CV, 2007 WL 765291, at *1 (Tex. App.—Waco March 14, 2007, pet. filed); *Lewis v. Funderburk*, 191 S.W.3d 756, 761.

We have jurisdiction to determine whether a court of appeals has properly declined jurisdiction.[5] Because we agree with the great majority that interlocutory review is proper, we reverse.

I. Background

Dewayne Funderburk, as next friend of his daughter Whitney Funderburk, filed this suit claiming Dr. Rory Lewis was negligent in treating Whitney's broken wrist. When Dr. Lewis moved to dismiss the case for failure to serve an expert report, Funderburk pointed to a thank-you-for-your-referral letter in the medical records. The letter said nothing about any standard of care, breach, or causation. Nevertheless, the trial court refused to dismiss, instead granting a 30-day extension during which Funderburk served a report by a local osteopath. Dr. Lewis again moved to dismiss, and the trial court again denied his motion. Dr. Lewis then filed an interlocutory appeal with the Tenth Court of Appeals, which dismissed for want of jurisdiction, with one justice dissenting.[6]

II. Interlocutory Review of Inadequate Reports

Section 74.351 of the Civil Practices and Remedies Code provides that within 120 days of filing a claimant must serve a curriculum vitae and one or more expert reports regarding every defendant against whom a health care claim is asserted.[7] Section 74.351 has numerous subparts, including:

---

[5] *Qwest Commc'ns Corp. v. AT & T Corp.*, 24 S.W.3d 334, 335-36 (Tex. 2000); *accord*, *Tex. Dep't of Criminal Justice v. Simons*, 140 S.W.3d 338, 343 (Tex. 2004).

[6] 191 S.W.3d at 761.

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

- subpart (b) requiring trial courts to dismiss a claim with prejudice and award fees if "an expert report has not been served" by the statutory deadline;[8]
- subpart (c) allowing a 30-day extension of the deadline if a report is found inadequate; and
- subpart (*l*) providing that a motion challenging a report's adequacy should be granted only if the report does not represent a good-faith effort to comply with the statute.[9]

Of these and other rulings a trial court might make under section 74.351, the Legislature provided for interlocutory review of just two. First, an immediate appeal can be taken if a trial court *denies* relief sought under subpart (b).[10] Second, an immediate appeal is allowed when a trial court *grants* relief under subpart (*l*).[11] The question here is whether the trial court's order falls under (b) or (*l*) — a jurisdictional question as a denial under (b) is immediately appealable but a denial under (*l*) is not.

We disagree with the Tenth Court of Appeals that Dr. Lewis's motion, which sought dismissal and attorney's fees, falls under subpart (*l*). Only subpart (b) provides for dismissal and fees. Subpart (*l*) provides for challenges to inadequate reports, but says nothing about dismissal or fees. That is because some challenges — specifically those filed within the first 120 days — *cannot* seek dismissal or fees until the 120-day window has closed. Only when that window has closed and no report has been filed can a defendant move for dismissal and fees under subpart (b).

---

[8] *Id*. § 74.351(b).

[9] *Id*. § 74.351(*l*).

[10] *Id*. § 51.014(a)(9).

[11] *Id*. § 51.014(a)(10).

Funderburk argues that because subpart (b) refers to cases in which an expert report "has not been served," it must be limited to cases in which there is no report at all. But in section 74.351(c), the Legislature made clear that when it used the words "an expert report has not been served," it meant to include cases in which an inadequate report *has* been served:

> 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....[12]

When a statute uses a term with a particular meaning, we are bound by the statutory usage.[13] As subpart (c) defines a timely but deficient report as one that "has not been served," the same meaning must be given the same phrase in subpart (b).[14]

We do not reach the question addressed in the concurring opinions here because it is not raised. As stated in his reply brief, "[Dr.] Lewis has made it abundantly clear that he is not appealing the trial court's [initial] order (no matter how vehemently he disagrees with it)," but instead is only appealing the order denying his second motion to dismiss.

Accordingly, the court of appeals had jurisdiction to consider the alleged inadequacy of Funderburk's report, and erred in concluding that it did not.

---

[12] *Id*. § 74.351(c).

[13] TEX. GOV'T CODE § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."); *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 318 (Tex. 2002).

[14] *See Ogletree v. Matthews*, ___ S.W.3d ___, ___ n.2 (Tex. 2007) (noting that this statute "uses the phrase 'has not been served' to refer both to deficient and absent reports").

III. Changing Experts to "Cure Any Deficiency"

Rather than remanding to the court of appeals to consider the merits of the osteopath's report, Dr. Lewis asks us to dismiss this case instead. He argues that the 30-day extension in section 74.351(c) allowing a claimant to "cure the deficiency" permits only amendments by the original expert rather than substitutions by a new one. But in section 74.351(i), the statute provides that "a claimant may satisfy *any requirement* of this section . . . by serving reports of separate experts."[15] Because the statute allows a claimant to cure a deficiency, and that requirement like all others may be satisfied by serving a report from a separate expert, we agree with Funderburk that the statute does not prohibit him from changing experts midstream.

* * *

Accordingly, we reverse the judgment of the court of appeals and remand the case to that court to consider the remaining arguments raised by the interlocutory appeal.

_____
Scott Brister
Justice

OPINION DELIVERED: April 11, 2008

[15] TEX. CIV. PRAC. & REM. CODE § 74.351(i) (emphasis added).