

# IN THE SUPREME COURT OF TEXAS

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No. 06-0518  
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RORY LEWIS, M.D., PETITIONER,

v.

DEWAYNE FUNDERBURK, AS NEXT FRIEND OF  
WHITNEY FUNDERBURK, RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS  
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**Argued November 15, 2007**

JUSTICE O'NEILL, concurring.

As part of House Bill 4's medical tort-reform package, the Legislature amended sections 51.014 and 74.351 of the Texas Civil Practice and Remedies Code to allow for interlocutory appeals of certain orders regarding expert reports in health care liability claims. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014, 74.351. Section 51.014(a)(9) allows immediate appeal from an order that denies dismissal under section 74.351(b) when "an expert report has not been served within [120 days of filing suit]." *Id.* § 74.351; *see id.* § 51.014(a)(9). Section 51.014(a)(10) allows appeal from an order that *grants* a challenge to an expert report's adequacy under section 74.351(l). *See id.* § 51.014(a)(10) (emphasis added). As the court of appeals interpreted these provisions, section 74.351(b) applies only when an expert report is wholly absent within the statutory period and has

no effect when an amended report is filed after an extension to cure a deficient report has been granted. 191 S.W.3d 756, 761.

I agree with the Court that whether an expert report is absent within the statutory period, or a deficient report is filed and an opportunity for cure has not yielded an adequate report, the statutory basis for a defendant's motion to dismiss is the same: the plaintiff has failed to serve an expert report as section 74.351(b) requires and, if the trial court denies the motion, the defendant is entitled to interlocutory review. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9). In my view, however, this conclusion rests on the fact that subsection (b) and subsection (c) of section 74.351 together define unserved reports to include both absent and deficient reports, not on the Court's premise that only subsection (b) provides for the relief (dismissal and fees) that Lewis sought. If an amended report is filed and the trial court denies a meritorious challenge to the report's adequacy, the statutory requirements for an "expert report" have not been met and by subsection (b)'s terms, the effect is as though no report has been served at all. *Id.* §§ 74.351(b), (c), (l), 51.014(9).

But while an absent report and a deficient one are treated the same way under section 74.351(b) for purposes of interlocutory appeal, the Legislature has precluded review of the latter when an extension to cure has been granted. *See id.* § 51.014(a)(9) ("an appeal may not be taken from an order granting an extension"). As I read the statutory scheme, when a report, however deficient, has been served, the trial court's actions in denying the dismissal motion and granting an extension are inseparable, and section 51.014(a)(9) bars review of the trial court's order. *See id.*; *Ogletree v. Matthews*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Tex. 2007) ("Thus, even when a report is deemed not served because it is deficient, the trial court retains jurisdiction to grant a thirty-day extension, and

the Legislature explicitly stated that such orders are not appealable.”). In this case, the trial court assessed the Wroton report and stated: “I think it is deficient. I think that if— if that’s intended as your expert report, it’s deficient under the rules. I’m going to grant a thirty-day extension . . . .” Because the trial court’s denial of Lewis’s first motion to dismiss based on the Wroton report was accompanied by an extension to cure, I disagree with the court of appeals’ and Justice Willett’s conclusion that Lewis could have appealed that order. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9). The Court declines to reach the question because Lewis “vigorously asserts he is not appealing” the point. \_\_\_ S.W.3d at \_\_\_. But given that we have interpreted the statute to mean that no appeal is allowed when the denial of a motion to dismiss a deficient report is accompanied by an extension to cure, and that Lewis has expressly reserved the issue, I would note the court of appeals’ error. *See Ogletree*, \_\_\_ S.W.3d at \_\_\_.

In sum, I agree with the Court that a separate expert may cure a defective report in whole or in part, and that the court of appeals had jurisdiction to consider the adequacy of Funderburk’s amended report; to this extent I join the Court’s opinion. However, I write separately to clarify what I believe to be the proper basis for jurisdiction and to note the court of appeals’ error in concluding that Lewis could have appealed the trial court’s initial ruling.

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Harriet O’Neill  
Justice

**OPINION DELIVERED:** April 11, 2008