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 WILLETT, concurring.

My recent concurrence in *Ogletree v. Matthews* described what I hoped would be a "rare bird in Texas legal practice": a "grossly substandard filing pitched as a bona fide report" under Section 74.351.[1] Today's case presents the Court with an actual sighting of this rare bird, a species that in my view merits extinction, not conservation. Extensions forgive deficient reports, not absent ones. If a report is missed, not just amiss, courts are remiss if they do not dismiss.

I agree with the Court that (1) the court of appeals had jurisdiction to hear Dr. Lewis's appeal and (2) a plaintiff may cure a deficient report by one expert with a substituted report by another expert. I write separately only to emphasize this point: because Funderburk's initial "report" was

[1] ___ S.W.3d ___ (Tex. 2007) (Willett, J., concurring).

literally no report at all—an irrefutable fact—I believe Dr. Lewis was free to appeal immediately the trial court's first order denying his motion to dismiss, even though that order simultaneously granted a thirty-day extension.

The statutory rules for filing a health care liability claim are straightforward:

- A claimant must submit an expert report within 120 days of filing suit.[2]
- The report must summarize the expert's opinion concerning three mandatory elements: standard of care, breach of duty, and causation.[3]
- Failure to submit the expert report within the 120-day deadline warrants dismissal,[4] and a trial court's refusal to dismiss can be appealed immediately.[5]
- If a plaintiff files a timely-but-deficient report, a trial court may grant one thirty-day extension "in order to cure the deficiency,"[6] and this decision is not reviewable by interlocutory appeal.[7]

A wholly absent report is incurable and cannot be deemed a deficient report eligible for a thirty-day extension. In *Ogletree*, we observed that Chapter 74 by its terms draws a sharp distinction between deficient reports and absent ones; trial courts have discretion regarding the former (extension is permissible) and none regarding the latter (dismissal is mandatory).[8] Accordingly, we

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

[3] § 74.351(r)(6).

[4] § 74.351(b)(2).

[5] § 51.014(a)(9).

[6] § 74.351(c).

[7] § 51.014(a)(9).

[8] *Ogletree v. Matthews*, ___ S.W.3d at ___ (Tex. 2007).

held that the trial court in *Ogletree* acted within its discretion in letting the plaintiff cure a report that, although it covered the statutory elements, was deemed deficient because it was prepared by the wrong kind of medical professional.[9]

As Justice O'Neill emphasizes, we also held in *Ogletree* that the simultaneous grant of an extension to cure a timely-but-deficient report and denial of a motion to dismiss was not subject to interlocutory appeal.[10] But in that same case, we expressly reserved for another day the question of whether interlocutory appeals of joint "dismissal-no/extension-yes" orders may proceed "when there is an absence of a report, rather than a report that implicated a provider's conduct but was somehow deficient."[11] Today is not the day for resolution of this important question, but it could have been, had Dr. Lewis timely appealed the trial court's ruling on Funderburk's first expert report, which implicates no provider's conduct.[12]

Unlike the report at issue in *Ogletree*, which addressed the required elements that make a report a report, the document that Funderburk designated as his report—a February 2002 "thank-you-for-your-referral letter"[13]—bears no resemblance to Chapter 74's definition of an expert report. This

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[9] *Id.*

[10] *Id.*

[11] *Id.* at ___ n.2.

[12] I understand fully a defense counsel's reluctance to bring such an interlocutory appeal, notice of which would be due before the thirty-day extension even expires and which carries, not incidentally, the risk of annoying the trial court. Defense counsel's reluctance to appeal a nondismissal order is particularly understandable when a trial court, as here, assures defense counsel that it will reconsider the original motion to dismiss once plaintiff serves the spruced-up report, but such tensions are inherent in interlocutory appeals and their attendant deadlines.

[13] ___ S.W.3d at ___ (majority opinion). This letter is reproduced in its entirety in Chief Justice Gray's dissent below. *See* 191 S.W.3d 756, 762-63.

doctor-signed letter is no more a report than a doctor-signed prescription or Christmas card would be. The explanation for this conclusion is impossible to miss: *this letter was written more than eighteen months before Chapter 74 and its expert report requirement became effective* (and a full twenty-two months before suit was filed). When Dr. Wroten composed this letter in early 2002, he doubtless never dreamed it might one day be held up as an expert report in a not-yet-filed lawsuit governed by a not-yet-enacted law.

The letter conveys gratitude for a patient referral and briefly summarizes the patient's condition, but it covers none of the statutory elements that the Legislature mandated in Chapter 74; indeed, it never once "accuse[s] anyone of doing anything wrong."[14] As I wrote in *Ogletree*, "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."[15] When compared with the standards for expert reports set by the Legislature, this letter is "so utterly lacking that, no matter how charitably viewed, it simply cannot be deemed an 'expert report' at all, even a deficient one."[16] Essentially, the trial court judicially amended the statutory expert-report deadline, stretching it from 120 days to 312 days (when the first, and only, actual expert report was filed). This order is plainly impermissible.

Funderburk's own trial court pleadings make it abundantly clear that he himself never equated the Wroten referral letter with a bona fide expert report. On September 30, 2004—163 days

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[14] *Ogletree*, ___ S.W.3d at ___ (Willett, J., concurring).

[15] *Id.* at ___.

[16] *Id.* at ___.

after the 120-day expert report deadline expired (and 951 days after the referral letter was written)—Funderburk's Motion for 30-Day Extension acknowledged as much, indicating that he did not have the required report and stating an extension would enable him "to obtain" one. Another telling point: Funderburk *never* provided Wroten's curriculum vitae as required by Section 74.351(a)—even after the 120-day deadline had expired—yet another indication that Funderburk himself never viewed the letter as an expert report.[17]

This Court made clear in *Ogletree* that nonexistence is not a curable defect: "the Legislature denied trial courts the discretion to . . . grant extensions" when no report has been served.[18] In this case, because the Wroten letter "totally omits the required statutory elements and makes no colorable attempt to demonstrate liability," dismissal was mandatory.[19]

Nevertheless, the trial court denied Dr. Lewis's motion to dismiss and instead granted Funderburk a thirty-day extension, remarking at the hearing:

> I'm not convinced without any case law to the contrary that no report isn't considered a deficient report and so I'm not sure, even if it's no report, that she's not entitled to have an extension and I'm going to grant thirty days to file the report and then I will reconsider your motion to dismiss.

We should hasten to provide such precedent, but unfortunately the issue is not squarely presented today. While Dr. Lewis had the statutory right (at least in my view) to immediately appeal the first

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[17] Chapter 74 requires more than a timely expert report that satisfies the statutory elements; it also requires the expert's curriculum vitae. TEX. CIV. PRAC. & REM. CODE § 74.351(a). And even if disbelief is suspended and the Wroten letter is deemed a timely expert report, the record proves that the required curriculum vitae was not timely provided, or *ever* provided for that matter.

[18] *Ogletree*, ___ S.W.3d at ___ (majority opinion).

[19] *Id.* at ___ (Willett, J., concurring).

order denying his motion to dismiss, he failed to do so within the prescribed twenty days.[20] As a result, Dr. Lewis has waived his "no report" argument, thus foreclosing a merits-based challenge to the Wroten letter at this interlocutory stage.

Accordingly, I concur with the Court's judgment and look forward to the case that provides the Court a clean opportunity to resolve the question reserved in *Ogletree*.

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Don R. Willett
Justice

OPINION DELIVERED: April 11, 2008

[20] *See* TEX. R. APP. P. 26.1(b) (establishing a 20-day deadline for filing an interlocutory appeal).