# IN THE SUPREME COURT OF TEXAS

NO. 06-0653

IN RE MARY LOUISE WATKINS, M.D., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE JOHNSON, concurring.

I withdraw my concurring opinion delivered January 23, 2009, and substitute the following in its place.

In regard to a health care liability claim,

> "Expert report" means a written report by an expert that provides a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6). The definition requires that for a document to qualify as a statutory expert report, it must demonstrate three things: (1) someone with relevant expertise ("'[e]xpert report' means a written report by an *expert*"), (2) has an opinion ("that provides a fair summary of the *expert's opinions*"), and (3) that the defendant was at fault for failing to meet applicable standards of care and thereby harmed the plaintiff ("regarding *applicable standards of care*, the manner in which the care rendered by the physician or health care provider *failed to meet the standards*, and the *causal relationship* between that failure and the injury, harm, or damages."). *Id.* (emphasis added); *see Rivenes v. Holden*, 257 S.W.3d 332, 334, 337 n.4, 339 (Tex.

App.—Houston [14th Dist.] 2008, pet. denied) (holding that a report not mentioning the appellant, appellant's failure to meet the applicable standard of care, or how this failure caused the plaintiff's injuries was not an expert report as to the appellant making it unnecessary to address the question of whether the report was a good faith effort to comply with section 74.351).

In *Ogletree v. Matthews*, 262 S.W.3d 316, 321 (Tex. 2007), the Court held that if a *deficient* report was served, an extension order—even when combined with a motion to dismiss—was not subject to interlocutory appeal. In *Ogletree*, the trial court determined that the report was deficient, denied defendant's motion to dismiss, and granted an extension to cure the report. *Id.* at 318. The report was not accompanied by a curriculum vitae and was allegedly deficient because its author was a radiologist and not qualified to render legally valid opinions about the standard of care applicable to the urologist defendant. *Id.* But there, the report demonstrated a physician, albeit one with different medical specialization from the defendant, held and expressed opinions that the defendant violated standards of care and caused damage to the plaintiff. The Court referred to the report as deficient. *Id.* at 321.

The document referred to in this case as an expert report is not a *deficient* statutory expert report; it is not a statutory expert report *at all*. While the document is authored by a physician, it does not show that as of the date of the report the author held any opinion as to (1) applicable standards of care for the treatment in question, (2) the manner in which care rendered by the defendant physician failed to meet the standards, or (3) the causal relationship between that failure and the harm claimed.

The report before us does not purport to have any relationship to a health care liability or malpractice case. As the trial judge noted, the document is no more than a status report. In it, the author gives the history taken from the plaintiff that acetic acid "intended for a facial lesion splashed into his right eye," sets out physical findings from examinations, reports the plaintiff's condition as stable, and gives recommendations for future treatment and a prognosis.

The Court said in *Ogletree* that "[i]f *no* report is served within the 120 day deadline provided by 74.351(a), the Legislature denied trial courts the discretion to deny motions to dismiss or grant extensions, and a trial court's refusal to dismiss may be immediately appealed." 262 S.W.3d at 319-20 (emphasis added); *see* TEX. CIV. PRAC. & REM. CODE § 74.351(b) (stating that a trial court "shall" dismiss a claim when expert reports are not served within 120 days); *id.* § 51.014(a)(9) (authorizing interlocutory appeal of the denial of a motion to dismiss filed under section 74.351(b)). The Court has followed through on our statement in *Ogletree* by holding that when no report is served, but a trial court denies a motion to dismiss and grants an extension to cure, an interlocutory appeal is available to challenge the denial of the motion to dismiss. *Badiga v. Lopez*, ___ S.W.3d ___, ___ (Tex. 2009).

The Court is not faced with a *deficient* report as was the case in *Ogletree*; the Court is faced with *no* statutory-compliant expert report as we were in *Badiga*. When no statutory-compliant expert report is filed, there is an adequate remedy by appeal. *Id.* at ___; *Ogletree*, 262 S.W.3d at 321. Because there was an adequate remedy by appeal, I join the Court's judgment in denying mandamus relief.

Phil Johnson
Justice

**OPINION DELIVERED:** May 1, 2009