IN THE SUPREME COURT OF TEXAS

NO. 06-1028

JOHN LELAND, D.D.S., PETITIONER,

v.

GEORGE C. BRANDAL AND RUTH L. BRANDAL, RESPONDENTS

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

Argued November 14, 2007

JUSTICE BRISTER, dissenting.

I agree that plaintiffs have 120 days after filing suit to serve expert reports. I also agree voluntary supplementation does not bar them from obtaining a 30-day extension. But I disagree that expert reports found deficient on appeal should be remanded for an extension to start the process all over again. The Legislature mandated that health-care claims must be dismissed within the first 4 or 5 months unless supported by an expert report; today's decision extends that deadline to 4 or 5 years. As this completely frustrates the Legislature's intent, I respectfully dissent.

Section 74.351 of the Civil Practice and Remedies Code requires health-care claimants to provide supporting expert reports early in the litigation. Subsection (a) says the reports are due 120 days after filing. Subsection (b) says the trial court must dismiss the case if no report is served by

then. But subsection (b) is subject to subsection (c), which allows the trial court to grant a single 30-day extension if it finds a report deficient:

> 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.

How this was intended to work is plain from the statute's structure:

(a) the plaintiff files a report,

(b) if it the trial court finds the report deficient it must dismiss the case or

(c) grant an extension.

But the Court changes that structure (and radically extends the timetables) by inserting in this sequence a reversal on interlocutory appeal. While the statute does not expressly say which court the Legislature had in mind when addressing reports that "are found deficient," for four reasons it could not have been an appellate court after an interlocutory appeal.

First, section 74.351 says nothing about interlocutory appeals or appellate courts. As "the court" granting an extension in 74.351(c) can only be the trial court (as the Court in effect concedes by remanding to that court to decide this matter) construing the section to include the court of appeals requires us to change courts *in mid-sentence*. The only court mentioned anywhere in the subchapter on expert reports is the trial court. Interlocutory appeal is provided by section 51.014 of the Civil Practice and Remedies Code — a different statute in a different code. While section 51.014 does refer to section 74.351, so do other statutes like section 160.053 of the Occupations Code,[1] and

[1] *See* TEX. OCC. CODE § 160.053 (requiring health care insurers to forward section 74.351 reports to Texas Medical Board).

surely nobody believes extensions are available if the Texas Medical Board finds a report deficient. So when section 74.351 addresses extensions after reports "are found deficient," there is no reason to presume it refers to any court other than the only one referenced in the same sentence — the trial court.

Second, the 30-day extension in section 74.351 is usually, as we recently held, "inseparable" from a trial court's denial of a physician's motion to dismiss.[2] The statute requires neither written motion nor even oral request for an extension; it simply allows trial judges to grant extensions *sua sponte* if they find a report deficient. Thus, a trial judge confronted with a deficient report has two choices: (1) dismiss or (2) grant a short extension. Today's decision creates a third choice: (3) deny the motion altogether, and then grant an extension years later if reversed on appeal. This looks a lot like the waste and delay the Legislature intended to stop.

Third, a substantial part of the state's appellate resources are already being expended reviewing preliminary expert reports; today's decision will likely double that load. The Court remands so the trial court can consider granting an extension, but that is a foregone conclusion — any self-respecting trial judge who found the first report sufficient would feel compelled on remand to find the same report was a good faith effort. New reports will then be filed, challenged,[3] and appealed again no matter what the trial judge rules. One interlocutory appeal is enough; two on preliminary matters like this are too many.

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[2] *Ogletree v. Matthews*, ___ S.W.3d ___, ___ (Tex. 2007) ("[T]he actions denying the motion to dismiss and granting an extension are inseparable.").

[3] For example, in addition to challenging the qualifications of the Brandals' expert, Dr. Leland raised five other challenges to their expert reports.

Fourth, the Court's construction of section 74.351 effectively frustrates its purpose. There is no question what that purpose was: to cutoff prolonged litigation if no qualified expert could support the plaintiff's case.[4] The Legislature repeatedly found that traditional rules of litigation — like waiting until trial to see if a plaintiff could produce an expert — had created a crisis in the cost and availability of medical care in Texas.[5] Any ambiguity in whether 74.351 allows post-appeal extensions must be construed in favor of this intent.[6]

But the Court does the opposite. Even though three years have passed since the Brandals filed this case, the Court says they can get another 30 days to finally get their reports right. That, as just noted, will likely lead to another round of appeals. So instead of getting a sufficient report or dismissal within 4 or 5 months as the Legislature intended, health-care providers may not get what they deserve for 4 or 5 years.

If the Brandals were surprised that the court of appeals found their reports deficient, they should not have been. They claimed their dentist, Dr. Leland, caused George Brandal's stroke by advising him to discontinue anticlotting medications before extraction of multiple teeth. Dr. Leland specifically challenged their expert report on causation because their expert was an anesthesiologist who stated no qualifications regarding heart medications or strokes. Recognizing the omission, the

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[4] *In re McAllen Medical Ctr., Inc.*, ___ S.W.3d ___, ___ (Tex. 2008).

[5] *Id.* at ___.

[6] TEX. GOV'T CODE § 311.023 ("In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the: (1) object sought to be attained; . . . (5) consequences of a particular construction . . . .").

Brandals supplemented his report, but the only information added about his qualifications was the following:

> Anesthesiologists are frequently asked to care for patients similar to Mr. Brandal. In my years of practice of Anesthesiology I have taken part in the care of scores of patients like Mr. Brandal who are at risk for stroke or heart attacks and are taking these medicines. Many of them were having open heart operations with all of the problems of severe disease and bleeding. Thus I have had considerable work experience with these drugs and have great respect for their potency.

As the court of appeals correctly held, this is not enough. Everything in this paragraph could also be said about nurses, who frequently care for patients at risk for stroke and surely have great respect for the related medications, but who undoubtedly are not qualified to opine on causation. We cannot presume all physicians are qualified to testify about what caused George Brandal's stroke;[7] the plaintiffs knew this was the objection but simply failed to answer it.

I share the Court's reluctance to dismiss claims like this when reports are found deficient only on appeal.[8] But of course there are many instances in which parties do not get a second chance after an appellate court dismisses their claims or defenses. In enacting section 74.351, the Legislature intended to favor the public interest over the private interests of particular plaintiffs.[9] Grace periods and extensions were concessions the Legislature made while trying to establish firm

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[7] *In re McAllen*, ___ S.W.3d at ___ (quoting *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996)).

[8] It is not true, as the Court asserts, that courts always remand for a possible extension after finding a report deficient. *See, e.g.*, *CHCA Mainland, L.P. v. Burkhalter*, No. 01-06-00158-CV, 2007 WL 686679, *5 (Tex. App.—Houston [1st Dist.] Mar. 8, 2007, no pet.) (finding reports deficient and rendering judgment); *Methodist Healthcare Sys. of San Antonio, Ltd. v. Martinez-Partido*, 04-05-00868-CV, 2006 WL 1627844 (Tex. App.—San Antonio 2006, pet. granted) (same).

[9] TEX. GOV'T CODE § 311.021(5).

rules to stem a serious problem; continuing judicial reluctance to enforce those rules may eventually encourage the Legislature to grant no concessions at all.

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Scott Brister
Justice

OPINION DELIVERED: June 13, 2008