IN THE SUPREME COURT OF TEXAS

NO. 07-0240

MIGUEL HERNANDEZ, M.D., PETITIONER,

v.

JULIOUS EBROM AND RICHARD HUNNICUTT, RESPONDENTS

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

Argued October 15, 2008

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

CHIEF JUSTICE JEFFERSON filed a dissenting opinion, in which JUSTICE O'NEILL and JUSTICE MEDINA joined.

A defendant in a health care liability claim may appeal from the interlocutory order denying its objection to the plaintiff's expert report. The statutes authorizing the defendant's objection and appeal do not impose consequences if an interlocutory appeal is not pursued. In this case, we consider whether a defendant health care provider's failure to challenge the adequacy of an expert report by interlocutory appeal precludes a challenge of the report by appeal from a final judgment when the plaintiff later nonsuits before trial. The court of appeals held it does; we hold it does not. We reverse and remand to the court of appeals.

I. Background

Dr. Miguel Hernandez, a member of McAllen Bone and Joint Clinic, performed surgery on Julious Ebrom's knee. Ebrom experienced complications, filed a health care liability suit against Dr. Hernandez and the clinic, and timely provided the required expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a).

Dr. Hernandez and the clinic filed a motion to dismiss, asserting that the report was deficient because no curriculum vitae for the expert making the report was submitted, the report was conclusory, and it did not mention either defendant. Both defendants sought recovery of their attorney's fees and costs. *See id.* § 74.351(b)(1). The trial court granted the motion as to the clinic but denied it as to Dr. Hernandez. Six months later, and before trial, Ebrom filed notice of nonsuit. The trial court dismissed the case with prejudice. Following entry of the final judgment of dismissal, Dr. Hernandez appealed the trial court's denial of his earlier motion to dismiss. He re-urged his contention that Ebrom's expert report was deficient and sought his attorney's fees.

The court of appeals dismissed the appeal for lack of jurisdiction. ___ S.W.3d ___. It held that the order denying the motion to dismiss was rendered moot by the subsequent nonsuit and order of dismissal. *Id.* at ___. The appeals court relied on two cases we have since reversed: *Villafani v. Trejo*, No. 13-04-449-CV, 2005 WL 2461821 (Tex. App.—Corpus Christi Oct. 6, 2005), *rev'd*, 251 S.W.3d 466 (Tex. 2008), and *Barrera v. Rico*, No. 13-04-480-CV, 2005 WL 1693698 (Tex. App.—Corpus Christi July 21, 2005), *rev'd per curiam*, 251 S.W.3d 519 (Tex. 2008). We held in those cases that a health care provider may appeal the trial court's denial of a motion for sanctions

and dismissal despite a nonsuit, as "the purpose of the sanctions . . . survive[s] [the plaintiff's] nonsuit." *Villafani*, 251 S.W.3d at 471; *see also Barrera*, 251 S.W.3d at 520. Under *Villafani*, Ebrom's assertion that the nonsuit rendered Dr. Hernandez's subsequent appeal moot is invalid.

However, Ebrom also asserts that because Dr. Hernandez failed to pursue an interlocutory appeal, his complaints have been waived. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.014(a)(9), 74.351.[1] Dr. Hernandez argues that because the plain language of the statute says an interlocutory appeal "may" be taken from an order denying a challenge to an expert report, an interlocutory appeal is permitted but not mandated. *See id.* § 51.014(a).

We agree with Dr. Hernandez. His failure to pursue an interlocutory appeal did not waive the right to challenge the order after Ebrom nonsuited and final judgment was entered.

II. Discussion

Under the Medical Liability Insurance Improvement Act (MLIIA) as it applies to this case, a health care liability claimant must serve an expert report on the defendant provider within 120 days of filing suit. *Id.* § 74.351(a). Each health care defendant whose conduct is implicated in the report may object to the report's sufficiency. *Id.* However, the objection must be made "not later than the 21st day after the date it was served, failing which all objections are waived." *Id.* If a timely and sufficient report is not served, the trial court must award the provider its attorney's fees and costs and dismiss the case with prejudice. *Id.* § 74.351(b).

[1] *Villafani* also involved an appeal from a final judgment after a nonsuit. However, *Villifani* was filed prior to enactment of section 51.014(a)(9) allowing interlocutory appeal of such orders. *See Villafani*, 251 S.W.3d at 468 ("Such an interlocutory appeal was not available under the version of the MLIIA applicable to this case.").

Generally, appeals may only be taken from final judgments, *Ogletree v. Matthews*, 262 S.W.3d 316, 319 n.1 (Tex. 2007), and an order denying a health care defendant's objection to an expert report is not a final judgment. However, section 51.014(a)(9) of the Texas Civil Practice and Remedies Code provides that a person "may" appeal from an interlocutory order that "denies all or part of the relief sought by a motion under Section 74.351(b)."

In construing statutes, "our primary objective is to ascertain and give effect to the Legislature's intent." *City of Marshall v. City of Uncertain*, 206 S.W.3d 97, 105 (Tex. 2006). If the Legislature provides definitions for words it uses in statutes, then we use those definitions in our task. *See* TEX. GOV'T CODE § 311.011(b). We give effect to legislative intent as it is expressed by the statute's language and the words used, unless the context necessarily requires a different construction or a different construction is expressly provided by statute. *See id.* § 311.016; *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). Unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results. *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

According to the Code Construction Act, "'[m]ay' creates discretionary authority or grants permission or a power." TEX. GOV'T CODE § 311.016(1). In this case, Ebrom does not contend that some context or express language in section 51.014 makes it necessary to read "may" differently than how it is defined. Nor do we see in the statute either express language or a context that necessitates construing "may" as imposing a duty as opposed to creating authority or granting permission or a power.

In other cases where this Court has construed "may," we considered the plain language of the statutes. For example, in *Dallas County Community College District v. Bolton*, 185 S.W.3d 868, 873 (Tex. 2005), the issue was whether a statute prohibited the collection of technology fees if they were not used for bond repayment when the statute provided such fees collected by public junior colleges "may be pledged to the payment of [revenue] bonds." The Court recognized "[w]e cannot disregard the Legislature's choice of language in providing that the authorized fees '*may* be pledged to the payment' of revenue bonds rather than requiring that they *must* or *shall* be so pledged." *Id.* We concluded that "'may' and 'shall' mean different things, and there is no clear indication from the Legislature that it intended otherwise." *Id.* at 874; *see also Mid-Century Ins. Co. of Tex. v. Ademaj*, 243 S.W.3d 618, 623 (Tex. 2007) (statute providing the insurance commissioner "may" give consideration to certain expenses was permissive and did not compel him to do so).

The Legislature *authorized* health care providers to pursue interlocutory appeals from trial court denials of challenges to plaintiffs' expert reports, but we see no indication that the Legislature effectively *mandated* interlocutory appeals by providing that if no appeal was taken, then the health care provider waived the right to challenge the report under all circumstances. Neither section 51.014(a)(9) nor section 74.351 indicates there are consequences if an appeal from the interlocutory order is not pursued. *Cf. Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001) ("To determine whether a timing provision is mandatory, we first look to whether the statute contains a noncompliance penalty."). The statute providing for interlocutory appeals states only that "[a] person may appeal from" certain specified interlocutory orders. TEX. CIV. PRAC. & REM. CODE § 51.014. And section 74.351, which requires expert reports and allows health care providers to

challenge them, does not reference the question of appeal, interlocutory or otherwise, from such a challenge or the ruling on it.

Ebrom relies on *Bayoud v. Bayoud*, 797 S.W.2d 304 (Tex. App.—Dallas 1990, writ denied), to support his argument that failure to pursue an interlocutory appeal waives the issue. In *Bayoud*, the appellant challenged the trial court's grant of a temporary injunction enjoining a receiver from selling a company's assets on the ground that the trial court failed to require the appellant, who had requested the injunction, to file a bond. *Id.* at 308. The court held that the appellants "lost their right to complain of the validity of the bond or the injunction order as they should have appealed within proper time limits after the grant of the injunction." *Id.* at 312 (citing TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4)). But *Bayoud* was not addressing the type of interlocutory appeal at issue here.

Appeals of some interlocutory orders become moot because the orders have been rendered moot by subsequent orders. *See, e.g.*, *Richards v. Mena*, 820 S.W.2d 372, 372 (Tex. 1991) (the appeal of a temporary injunction was rendered moot by the rendering of a permanent injunction); *Lincoln Prop. Co. v. Kondos*, 110 S.W.3d 712, 715 (Tex. App.—Dallas 2003, no pet.) (recognizing that the issue of whether the trial court properly granted class certification was rendered moot by the trial court's grant of the defendant's motion for summary judgment). But as to the statute involved here, we recently held that a motion to dismiss and for sanctions is not rendered moot by a nonsuit. *Villafani*, 251 S.W.3d at 471.

Appellate review in this case would allow Dr. Hernandez to pursue a right given to him by the Legislature—the statutory right to potential reimbursement for certain of his attorney's fees and costs. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b)(1). Precluding defendants from asserting that

statutory right would dilute the deterrent value of the statute. *See Villafani*, 251 S.W.3d at 470 ("Allowing defendants to seek sanctions under the MLIIA for attorney's fees and dismissal with prejudice deters claimants from filing meritless suits."); *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001) ("The Legislature has determined that failing to timely file an expert report, or filing a report that does not evidence a good-faith effort to comply with the definition of an expert report, means that the claim is either frivolous, or at best has been brought prematurely. This is exactly the type of conduct for which sanctions are appropriate." (citations omitted)).

Further, holding that failing to take an interlocutory appeal forfeits the right to statutory sanctions could induce defendants who might not otherwise take an interlocutory appeal from denials of their motions to do so in order to avoid losing any chance of recovering sanctions. Placing defendants in such a position surely would slow down the process of disposing of health care liability claims by increasing interlocutory appeals and would increase costs of resolving the claims. That would run counter to one purpose for which the MLIIA was enacted. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(2), 2003 Tex. Gen. Laws 847, 884 (stating that one purpose of the MLIIA was to decrease the cost of health care liability claims).

III. Response to the Dissent

The dissent agrees that section 51.014(a)(9) provides a defendant the right to an interlocutory appeal and queries whether the statute contemplates the appeal's immediate exercise. The question, however, is not whether the statute contemplates immediate exercise of the right to interlocutory

appeal, but whether the statute provides that a defendant loses its statutory right to seek attorney's fees and costs if an immediate interlocutory appeal is not taken.

Prior to the 2003 amendments, the statute provided no time limit for filing objections to the report, as we held in *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (per curiam). There, the defendant challenged the expert report more than 600 days after the plaintiff served it. *Id.* at 155. The trial court granted the motion to dismiss over the plaintiff's assertion that the defendant doctor had waived any challenge to the report by waiting so long. *Id.* We noted that the statute did not "impose a deadline for a health care provider to file a motion to dismiss" and held that the doctor's actions were not consistent with an intent to waive his right to challenge the report. *Id.* at 156.

Section 74.351 now imposes time limits for both filing expert reports and objecting to them. TEX. CIV. PRAC. & REM. CODE § 74.351(a). Section 74.351(a) specifies that reports must be served no later than 120 days after the original petition is filed and that objections to the sufficiency of such reports must be made within twenty-one days after the report is served. Consequences result if either of those deadlines are missed. *See id.* § 74.351(b). If the report is not timely filed, the suit must be dismissed with attorney's fees and costs awarded to the defendant. *See id.* If a defendant fails to timely object to a report, any objection is waived. *See id.* § 74.351(a).

The time limitation on filing objections was added by amendment in 2003 when the Legislature also authorized interlocutory appeals from orders denying defendants' objections to reports.[2] In contrast to the specific time limits the Legislature set in section 74.351(a) for filing

[2] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 1.03, 10.01, 2003 Tex. Gen. Laws 847, 849, 875.

reports and objecting to them when it amended the statute in 2003, it provided no limitation in section 74.351(b) for appealing from final judgments and challenging the interlocutory orders denying objections to reports. We presume the Legislature placed into the statute words it intended to be there and that it purposefully omitted words not found there. *In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). When the Legislature has prescribed certain time limits and procedures, it is not our prerogative to add further limitations to them.

Finally, the dissent queries whether the same rule that applies to this case will apply following a trial on the merits and a final judgment for the plaintiff based on the trial. The dissent suggests that because section 74.351(b) provides the trial court "shall" dismiss an action for failure to comply with the expert report requirement, dismissal for an inadequate report would be required even after a final judgment for the plaintiff. We do not believe the statute contemplates such a result for at least two reasons.

First, by requiring timely expert reports, the Legislature intended to reduce frivolous claims; it indicated no intent to preclude meritorious claims. If a full trial occurs and the plaintiff prevails after introducing evidence of the appropriate standard of care for the defendant, the defendant's breach of that standard, and a causal relationship between the breach and the plaintiff's damages, then the claim could not sensibly be classified as frivolous. Construing the statute to require post-trial dismissal of such a claim because of an earlier inadequate report would be construing the statue to yield an unjust and nonsensical result—one we presume the Legislature did not intend. *See* TEX. GOV'T CODE § 311.021(3) ("In enacting a statute, it is presumed that . . . a just and reasonable result is intended."); *City of Rockwall*, 246 S.W.3d at 626 (noting that a statute will not be construed to

yield an absurd result); *McKinney v. Blankenship*, 282 S.W.2d 691, 698 (Tex. 1955) ("Unless there is no alternative, a statute will not be interpreted so as to lead to a foolish or absurd result.").

Second, the situation referenced by the dissent is similar to the situation involving the denial of a motion for summary judgment. Texas Rule of Civil Procedure 166a(c) states that a judgment "shall" be rendered when a motion for summary judgment establishes the movant is entitled to judgment as a matter of law. As the dissent acknowledges, a party may not, after trial and an unfavorable judgment, prevail on a complaint that the party's motion for summary judgment should have been granted. Likewise, we do not see how section 74.351(b) could have been intended to require dismissal of the action because of an inadequate expert report after a full trial and introduction of evidence establishing the appropriate standard of care, breach of the standard, and a causal relationship of the breach to the plaintiff's damages. As stated above, such a result would be unjust and nonsensical—one we presume the Legislature did not intend.

IV. Conclusion

The court of appeals had jurisdiction over Dr. Hernandez's appeal and erred by dismissing it. We reverse the court of appeals' judgment and remand the case to that court for it to consider the merits of the appeal.

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Phil Johnson
Justice

OPINION DELIVERED: July 3, 2009