IN THE SUPREME COURT OF TEXAS

NO. 08-0667

EBERHARD SAMLOWSKI, M.D., PETITIONER,

v.

CAROL WOOTEN, RESPONDENT

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

Argued November 18, 2009

JUSTICE GUZMAN, joined by JUSTICE LEHRMANN, and by JUSTICE WAINWRIGHT as to Parts I and II-B, concurring.

I agree with the Court that the proper disposition is to remand this case to the trial court for further proceedings; accordingly, I join the Court's judgment. However, I do not join Justice Medina's opinion because I disagree with the new procedure Justice Medina sets out to challenge a trial court's failure to grant a thirty-day extension to cure. Additionally, I disagree with Justice Medina's conclusion that the trial court did not abuse its discretion.

I. Procedural Issues

At issue in this case is whether the trial court abused its discretion by denying Carol Wooten a thirty-day extension to cure her inadequate expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). Justice Medina holds the trial court did not abuse its discretion, but then proceeds into

new territory to address the manner in which a claimant must challenge a trial court's denial of a motion to cure. Justice Medina concludes that when a trial court finds an expert report inadequate and denies a motion to cure, the claimant "*must* move the court to reconsider and promptly fix any problems." __ S.W.3d at __ (emphasis added). Justice Medina states that a subsequently filed compliant report will demonstrate the trial court abused its discretion by failing to grant the extension. *Id.* Justice Medina's approach thus establishes a new procedure for challenging the denial of a motion to cure.

But rules already exist governing the manner in which a person may challenge the trial court's denial of a motion to cure, *see, e.g.*, TEX. CIV. PRAC. & REM. CODE § 74.351(c); TEX. R. CIV. P. 329b (establishing timeline for filing certain motions); TEX. R. APP. P. 26.1 (establishing timeline for perfecting appeal), and it is unclear how these rules intersect with the procedure created in Justice Medina's opinion. For example, what if a plaintiff believes the initially-served report is not deficient and seeks to challenge the trial court's finding on that issue as well as the failure to grant an extension, as Carol Wooten did in this case? Is that plaintiff also required to submit a new report and, if so, would that action waive the plaintiff's complaint that the initial report was not deficient? Additionally, when a claimant files a new report after the trial court has denied a motion for extension, what happens if a trial court declines to timely set a motion for reconsideration for hearing? Is a claimant then required to challenge the trial court's failure to set the motion for a hearing, further delaying resolution of the question of whether the trial court erroneously denied the extension in the first place? Or must the court of appeals consider whether the amended report is sufficient to establish the trial court abused its discretion in denying an extension? Justice Medina

also does not address when the appellate deadlines begin to run—whether from the time the trial court signs the order of dismissal or, because a claimant must move the court to reconsider, from the denial of a motion to reconsider. Nor does Justice Medina consider whether this deadline is different if a claimant chooses not to file an amended report, but to stand on the initial report filed.

Aside from the procedural questions raised, Justice Medina erroneously concludes that an amended report filed *after* the trial court has denied a motion for extension will "typically establish the trial court's abuse of discretion." __ S.W.3d at __. It is well-established that a reviewing court is to determine whether a trial court abused its discretion based on the record before the trial court at the time the decision was made. *Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961); *see Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 52 n.7 (Tex. 1998). I believe, based on this principle and the purposes of the expert report requirement and the thirty-day extension to cure, that rather than considering an amended report submitted after the trial court has denied an extension, a reviewing court should analyze whether a trial court abused its discretion based on the expert report initially submitted.

II. Abuse of Discretion

A. Discretion in Reviewing Expert Reports

If a trial court finds an expert report deficient, it "may" grant one thirty-day extension to cure the report. TEX. CIV. PRAC. & REM. CODE § 74.351(c). This statutory authority is couched in permissive terms, but it is not unfettered. *See In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 676 (Tex. 2007) (orig. proceeding). While "may" gives a trial court discretion, discretionary decisions must not be arbitrary or unreasonable and must be made with reference to guiding principles. *Id.* (citing

Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997)); *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956) (orig. proceeding) (noting that use of the permissive word "may" does not vest a court with unlimited discretion, but requires a trial court to exercise that discretion within "limits created by the circumstances of the particular case"). The principles that are to guide a trial court's discretionary decision are determined by the purposes of the rule at issue. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 207 (Tex. 2004) (orig. proceeding); *Womack*, 291 S.W.2d at 683. Justice Medina acknowledges this and looks to the "broader purposes" of the Texas Medical Liability Act (TMLA) to determine the principles that should guide a trial court's determination of whether to grant an extension. __ S.W.3d at __. But the purpose of the actual rule permitting a trial court to grant an extension must also be considered. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c).

B. Scope of the Trial Court's Review

One stated purpose of section 74.351 is to "reduce excessive frequency and severity of health care liability claims." *Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (quoting Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), 2003 Tex. Gen. Laws 847, 884). The expert report requirement helps accomplish this purpose by providing a basis for the trial court to determine a claim has merit. *Id.* at 206-07. Justice Medina and the dissent both conclude that factors other than the report should be considered to determine whether the trial court abused its discretion by denying an extension. But if one purpose of the report is to inform the trial court of the merits of a claim, then the purpose of an extension is to provide a claimant the opportunity to amend a report to a point that would allow the trial court to make that determination. We have previously held that a trial court should look no further than the four corners of an expert report when considering a motion

challenging the adequacy of the report because all the information relevant to that inquiry is contained within the report. *See Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002). Section 74.351(l) does not explicitly state that a trial court may not look beyond the report to determine adequacy, but we have held this is so because the statute specifically focuses on what the report discusses. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 878 (Tex. 2001). The same is true in a trial court's consideration of a motion for extension: the extension provision focuses only on the report itself. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (providing that a trial court may grant an extension if "elements of the report are found deficient"). Further, the expert report requirement is not a substitute for a trial on the merits—just as a trial court should not consider the defendant's pleadings and other evidence when ruling on a motion to dismiss on adequacy grounds, the trial court should similarly refrain from considering these extraneous matters when considering a motion for an extension to cure. *See Palacios*, 46 S.W.3d at 878.

Even though the trial court should only consider the expert report when determining whether to grant an extension, that is not to say a claimant is only entitled to an extension when the report contains specific information or is not entitled to an extension when the report lacks certain information. The Legislature clearly contemplated that trial courts would grant extensions when reports contained varying degrees of deficiencies. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (providing that a trial court may grant one thirty-day extension when "elements" of the report are deficient). Therefore, as long as a claimant has filed a report (as defined by the statute), the specific deficiencies of a report should not determine whether the trial court should grant an extension. Rather, a trial court should be able to determine, based on the initial report, if a claim warrants an

extension—that is, whether a claim could potentially have merit if the report were cured. A report from a qualified health care professional stating a belief that a plaintiff has a claim against a defendant, even though elements of the report are deficient, should be sufficient for a trial court to determine the curability of the report.[1]

As further evidence that a trial court need not consider more than the report itself, nothing in section 74.351 requires a trial court to hold a hearing before denying an extension to cure a deficient report and dismissing a case. *Compare id.* § 74.351(b)–(c) (requiring dismissal if an extension to cure a deficient report is not granted), *with* TEX. REV. CIV. STAT. art. 4590i § 13.01(g) (requiring a court to hold a hearing before granting a single thirty-day extension for good cause under the former statute);[2] *see, e.g.*, *Johnson v. Willens*, 286 S.W.3d 560, 565-66 (Tex. App.—Beaumont 2009, pet. filed) (trial court granted order dismissing case without holding a hearing). Had the Legislature intended for a trial court to consider more than the report when determining whether to grant an extension to cure, it could have required a hearing to allow a claimant to present additional evidence.

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[1] Justice Medina contends this approach mirrors that of the court of appeals, and that it is unclear the manner in which a court will distinguish between deficient reports that are curable and those that are not. But this mischaracterizes my position—a court will be able to determine from the four corners of the report whether it is from a qualified health care professional stating a belief that the plaintiff has a claim against a defendant.

[2] Act of May 5, 1995, 74th Leg., R.S., ch. 140, § 1, sec. 13.01(g), 1995 Tex. Gen. Laws 985, 986, *amending* the Medical Liability and Insurance Improvement Act of Texas, 65th Leg., R.S., ch. 817, 1977 Tex. Gen. Laws 2039, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884. Former article 4590i section 13.01 was replaced by Texas Civil Practice and Remedies Code section 74.351, as amended.

III. Application

In this case, Wooten's expert report by R. Don Patman, M.D. was over nine single-spaced pages. The report contained Wooten's medical history, the applicable standard of care, and a numbered list of Dr. Samlowski's alleged standard-of-care breaches, including failing to perform a comprehensive diagnostic work-up and thereby failing to determine the extent of Wooten's illness. Dr. Patman concluded that Dr. Samlowski's actions constituted negligence and were the proximate causes of Wooten's developing multiple life-threatening complications. The report inferred that Dr. Samlowski performed an unnecessary surgery, delaying treating Wooten's condition. The report, however, did not contain an explanation of how Dr. Samlowski's actions caused Wooten's injuries and was, as Wooten now acknowledges, deficient. 282 S.W.3d at 90. But the report did not demonstrate, on its face, that it was incurable. To the contrary, it demonstrated that it had the potential to be cured since the report was from a qualified health care professional and explained a belief that Samlowski's actions caused Wooten's injuries. Nothing outside of this report would have aided in the trial court's determination that Wooten's report could have been cured. Therefore, I would hold the trial court abused its discretion in denying Wooten's motion for an extension to cure her report, and allow her the opportunity to attempt to cure her report.

IV. Additional Considerations

Justice Medina and the dissent conclude that the trial court did not abuse its discretion in denying the thirty-day extension because Wooten failed to prove that the report would have been cured. But the provision allowing for an extension is not punitive—it says nothing about withholding an extension when a claimant has failed do something. Rather, the provision is curative,

intending to give claimants an opportunity to save their claims from dismissal. While the Legislature, by enacting the TMLA, sought to "reduce excessive frequency and severity of health care liability claims," Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11(b)(1), 2003 Tex. Gen. Laws 847, 884, it intended to "do so in a manner that will not unduly restrict a claimant's rights," *id.* § 10.11(b)(3); *Leland*, 257 S.W.3d at 208. "In enacting section 74.351, the Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones . . . ." *Leland*, 257 S.W.3d at 208. In order to preserve the highest number of meritorious claims, trial courts should err on the side of granting claimants' extensions to show the merits of their claims. The price of preserving a meritorious claim will be thirty days, compared to a much higher price of dismissal.

V. Conclusion

Because Wooten filed an expert report from a qualified expert explaining a belief that Samlowski's actions caused Wooten's injuries, even though elements of the report were deficient, I would hold the trial court abused its discretion by denying her motion for an extension to cure. I join the Court's judgment remanding the case to the trial court.

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Eva M. Guzman
Justice

OPINION DELIVERED: February 25, 2011