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 JOHNSON, joined by JUSTICE GREEN and JUSTICE WILLETT, dissenting.

Texas Civil Practice and Remedies Code section 74.351 provides that a trial court must dismiss a health care liability suit unless the claimant serves an expert report within 120 days after filing suit. It also provides that if a report is served timely but is deficient, the trial court "may" grant one thirty-day extension for the claimant to cure the report.

I agree with Justice Medina that the trial court did not abuse the discretion afforded it by statute in denying Wooten's motion for an extension. I do not agree with him to the extent he indicates that if Wooten had served a cured report and motion for reconsideration within thirty days after the trial court denied her motion for extension, those actions and the cured report could be considered in determining if the trial court abused its discretion by denying the motion for extension.

The trial court's ruling on a motion for reconsideration or motion for new trial would have been reviewable for abuse of discretion had Wooten filed either of them, which she did not. But events occurring after a trial court's ruling on a motion should not be considered in determining whether the ruling was an abuse of discretion.

The Court's action in affirming and modifying the court of appeals' judgment results in the reversal of an errorless trial court judgment. I would reverse the court of appeals' judgment and affirm that of the trial court. Because the Court does not, I dissent.

I. Background

After Carol Wooten sued Dr. Samlowski, alleging that he negligently treated her, she timely filed and served a report by R. Don Patman, M.D. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (requiring a healthcare liability claimant to file an expert report within 120 days of filing suit). Dr. Samlowski timely objected to the report, asserting that the report was conclusory as to the causal relationship between his care and the damages Wooten claimed. *See id.* In her response to the motion, Wooten essentially repeated part of the report's contents, claimed the report met the requirements of section 74.351, and requested a thirty-day extension to cure any inadequacies the trial court found in the report. *See id.* § 74.351(c). Dr. Samlowski then filed a motion to dismiss Wooten's suit because the report was deficient. *See id.* § 74.531(b).

After a hearing where no evidence was introduced, the trial court determined that Dr. Patman's report did not represent a good faith effort to comply with the expert report requirements of section 74.351 and granted Dr. Samlowski's motion to dismiss. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001) (noting that a report that does not set out

elements required by the statute or states those elements in conclusory fashion does not constitute a good faith effort to comply with the statute). Without taking any further action in the trial court, Wooten appealed.

II. Discussion

A. Expert Report

The claimant in a health care liability suit must serve each defendant with an expert report within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a).[1] If an expert report is not timely served, the trial court "shall" dismiss the claim. *Id.* § 74.351(b). The statutory directive to

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[1] In relevant part, Texas Civil Practice and Remedies Code section 74.351 reads as follows:

> (a) In a health care liability claim, a claimant shall, not later than the 120th day after the date the original petition was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.
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> (b) If, as to a defendant physician or health care provider, an expert report has not been served within the period specified by subsection (a), the court, on the motion of the affected physician or health care provider, shall, subject to subsection (c), enter an order that:
>
> > (1) awards to the affected physician or health care provider reasonable attorney's fees and costs of court incurred by the physician or health care provider; and
> > (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.
>
> (c) 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. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.
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> . . . .
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> (l) A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in subsection (r)(6).

dismiss applies to both absent and deficient reports. *See id.* § 74.351(c); *Lewis v. Funderburk*, 253 S.W.3d 204, 207 (Tex. 2008). However, if an expert report has not been timely served because elements of the report are found deficient, the court "may" grant one thirty-day extension to allow the claimant to cure the deficiency. TEX. CIV. PRAC. & REM. CODE § 74.351(c).

B. Standard of Review

As Justice Medina discusses, the standard by which the trial court's order is reviewed is abuse of discretion. *See* ___ S.W.3d at ___ n.2. And when a trial court order is reviewed for abuse of discretion, the order necessarily is reviewed based on the record as it was at the time the trial court made its ruling. *See Univ. of Tex. v. Morris*, 344 S.W.2d 426, 429 (Tex. 1961); *Stephens County v. J.N. McCammon, Inc.*, 52 S.W.2d 53, 55 (1932) ("When an appellate court is called upon to revise the ruling of a trial court, it must do so upon the record before that court when such ruling was made."); *Beard v. Comm'n for Lawyer Discipline*, 279 S.W.3d 895, 902 (Tex. App.—Dallas 2009, pet. denied); *Methodist Hosps. of Dallas v. Tall*, 972 S.W.2d 894, 898 (Tex. App.—Corpus Christi 1998, no pet.) ("It is axiomatic that an appellate court reviews actions of a trial court based on the materials before the trial court at the time it acted.").

C. Abuse of Discretion and Section 74.351

The Legislature has provided that in statutes "unless the context in which the word or phrase appears necessarily requires a different construction or unless a different construction is expressly provided by statute . . . '[m]ay' creates discretionary authority or grants permission or a power" and "'[s]hall' imposes a duty." TEX. GOV'T CODE § 311.016. The parties do not contend, and the context does not indicate, that in section 74.351 either "shall" or "may" should be given different

meanings than those prescribed by section 311.016. *See FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 633 (Tex. 2008); *see also Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Thus, if the trial court properly determines that an expert report is deficient, then the statutory language not only authorizes dismissal of the suit, it imposes a duty on the trial court to dismiss it. TEX. CIV. PRAC. & REM. CODE § 74.351 (b)(2). That duty, however, is subject to the permissive power afforded in the same section for the trial court to grant an extension. *Id.* § 74.351(c).

The situation is similar to the one the Court faced in *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670 (Tex. 2007). There, the Court was called upon to construe a statute providing that if a trial court "finds that in the interest of justice a claim or action to which this section applies would be more properly heard in a forum outside this state, the court *may* decline to exercise jurisdiction." *See* TEX. CIV. PRAC. & REM. CODE § 71.051(a) (emphasis added), *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.09 2003, Tex. Gen. Laws 855. We had previously held that section 71.031 of the Civil Practice and Remedies Code afforded non-residents an absolute right to try cases such as the one filed against Pirelli in Texas courts. *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 676, 678 (Tex. 1990). Thus, the issue before us in *In re Pirelli* was whether the trial court abused its discretion by failing to grant a forum non conveniens motion to dismiss pursuant to the permission granted in section 71.051, despite section 71.031's effective mandate that the trial court exercise jurisdiction over the case. We held that the trial court abused its discretion. We explained that the purposes of the forum non conveniens doctrine informed the guiding principles against which we measured the trial court's exercise of discretion. *In re Pirelli*, 247 S.W.3d at 675-76.

In construing the trial court's authority under the permissive statute, the Court relied, in part, on *In re Van Waters, Inc.*, 145 S.W.3d 203 (Tex. 2004), where the Court concluded mandamus relief was available because the trial court abused its discretion by consolidating twenty cases for trial even though the rule governing consolidations was permissive in nature. *See* TEX. R. CIV. P. 174(a). The Court looked to the principles underlying the rule and said that in *Van Waters* "the trial court's consolidation order did not comport with the principles we have articulated that must guide a court's exercise of discretion under the rule." *In re Pirelli*, 247 S.W.3d at 676.

Similarly, in *In re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998), the Court considered the permissive language of Texas Rule of Civil Procedure 174(b), which provides that a trial court "in furtherance of convenience or to avoid prejudice may order a separate trial" of claims or issues. *See* TEX. R. EVID. 174(b). The Court referenced with approval *Womack v. Berry*, 291 S.W.2d 677 (Tex. 1956) and the principle set out there: the permissive "may" does not afford a trial court unlimited discretion, but rather requires the exercise of sound discretion based on all the circumstances of the particular case. *Ethyl Corp.*, 975 S.W.2d at 610.

Just as the Court determined that the trial court's discretion was not unlimited in *In re Pirelli* and *Womack*, a trial court's discretion should not be unlimited pursuant to the permissive "may" in section 74.351(c). Section 74.351(c) requires the court to exercise sound discretion under all the facts and circumstances of the case, including the language and purposes of Chapter 74. *See Ethyl Corp.*, 975 S.W.2d at 610.

D. Factors for a Trial Court to Consider

Wooten argues that if a report such as Dr. Patman's is deficient, the trial court should not be limited to the report in deciding whether to grant an extension. I agree.

When a defendant challenges the adequacy of an expert report, the trial court is to determine whether the report is adequate based only upon the contents of the report. *See Palacios*, 46 S.W.3d at 878. As we noted in *Palacios*, the prior statute focused on the contents of the report with regard to the trial court's determination of whether the report was an objective good faith effort. *Id.* at 878. The current statute also focuses on the report's contents. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(l) (stating that a motion challenging the adequacy of a report shall be granted only if "it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply" with the statutory expert report requirements). In contrast, section 74.351 is not so focused. It places no limitation on what the court may consider in exercising its discretion:

> (c) 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.

Id. § 74.351(c). So, although the deficient report's content is one factor the trial court must consider in determining if it will grant an extension to cure, the court should not be limited to considering only the content of the report. *See id.*; *Womack*, 291 S.W.2d at 683.

The statute provides guidance as to what factors a trial court may consider when determining whether to grant an extension to cure. Part of the purpose of requiring an expert report in health care liability suits is to remove unwarranted delays and the attendant litigation expense involved in disposing of non-meritorious claims. *See In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 467 (Tex.

2008). Hard-and-fast deadlines for both serving and objecting to reports advance that purpose by accelerating the disposition of such cases. *See Intracare Hosp. N. v. Campbell*, 222 S.W.3d 790, 797 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Mokkala v. Mead*, 178 S.W.3d 66, 76 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). From the Legislature's establishing of a deadline for serving a report and directing that the suit shall be dismissed unless the deadline is met or the trial court grants an extension "in order *to cure* the deficiency," at least three criteria for the granting of an extension of time can be distilled. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c) (emphasis added). First, the deficient report must qualify as a report, albeit a deficient one. Second, the deficient report must have been served within the statutorily-specified time limit. Third, the deficient report will be cured during the extension if one is granted.

In many, if not most, instances the determination of whether a report will be cured if an extension is granted will be a fact question. And a trial court generally will not have abused its discretion by denying a motion for an extension if there is conflicting evidence on the matter. *See Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) ("With respect to resolution of factual issues or matters committed to the trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court."); *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978) (noting that an abuse of discretion does not exist where the trial court bases its decision on conflicting evidence). So, the trial court's discretionary refusal to grant an extension will not ordinarily be an abuse of discretion unless the record conclusively shows that the report would have been timely cured if an extension had been granted.

The import of Justice Medina's opinion is that a cured report served within thirty days after the denial of an extension can be considered in determining whether the trial court abused its discretion in denying the extension. Because a trial court's actions are reviewed based on what was before the court at the time it ruled, I disagree. *See Univ. of Tex.*, 344 S.W.2d at 429; *Stephens County*, 52 S.W.2d at 55. Which is not to say that if a claimant such as Wooten were to make a proper record on a motion to reconsider or motion for new trial, an appellate court could decline to fully review the trial court's action on the motion. For example, if a trial court denied an extension to a claimant whose timely-served report was deficient, then the claimant timely filed a motion for new trial or motion to reconsider and served a cured report, the trial court's ruling on the motion would be reviewable on appeal. *See In re R.R.*, 209 S.W.3d 112, 114 (Tex. 2006) ("We review a trial court's denial of a motion for new trial for abuse of discretion."); *Simon v. York Crane & Rigging Co., Inc.*, 739 S.W.2d 793, 795 (Tex. 1987) (concluding that the decision whether to grant a motion for new trial is addressed to the trial court's discretion, and the court's ruling will not be disturbed on appeal absent a showing of an abuse of discretion). And that review would necessarily be in light of the Legislature's purpose to have non-meritorious cases promptly disposed of while allowing meritorious cases to proceed.

E. Application

Wooten timely served Dr. Patman's report, but there was no evidence before the trial court when it ruled on the motions of Dr. Samlowski and Wooten to prove that the report would have been cured if a thirty-day extension had been granted. Dr. Samlowski's motion to dismiss was heard on August 28, 2007, over three months after he filed his objection to Dr. Patman's report. As relevant

to this matter, the record before the trial court at the hearing consisted of Dr. Patman's report dated April 15, 2007 and served on April 26, 2007, Dr. Samlowski's objection, and Wooten's response to the objection. Wooten's response asserted the report was sufficient and requested an extension of time to cure the report if it was not. Yet there was no evidence in the record about whether the report could or would be cured if an extension were granted. Certainly, Wooten did not conclusively prove that the report would be cured by offering evidence such as a supplemental report actually curing the deficiency in Dr. Patman's report. Thus, she has not shown that the trial court abused its discretion by denying her request for an extension.

III. Remand

Even though a majority of the Court is not of the opinion that the trial court abused its discretion or otherwise committed error by dismissing Wooten's case, the Court nevertheless determines that remand for further proceedings is appropriate. I disagree with that decision for two reasons.

First, our rules provide that a judgment may not be reversed on appeal on the ground that a trial court committed an error of law unless that error (1) probably caused the rendition of an improper judgment, or (2) probably prevented the appealing party from properly presenting the case to the appellate courts. *See* TEX. R. APP. P. 44.1, 61.1; *In re Columbia Med. Ctr. of Las Colinas, L.P.*, 290 S.W.3d 204, 211 (Tex. 2009) ("[A]ppellate courts are limited to the issues urged and record presented by the parties and . . . are specifically limited to reversing judgments only for errors that probably resulted in entry of an improper judgment or precluded a party from properly presenting its case on appeal."); *Pat Baker Co., Inc. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998) ("It

is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error."); *Sears, Roebuck & Co. v. Marquez*, 628 S.W.2d 772, 773 (Tex. 1982) (noting that it is not within the power of an appellate court to reverse a judgment absent error); *Barnum v. Lopez*, 471 S.W.2d 567, 568 (Tex. 1971) (noting that an appellate court may only reverse a case for error committed by the trial court). Neither of those situations exist here because the trial court did not commit error. The substance of the Court's action today is to endorse an erroneous court of appeals judgment that reversed an errorless trial court judgment. The Court then, in effect, grants a new trial even though the rules of procedure adopted by this Court vest such discretion in trial courts, *see* TEX. R. CIV. P. 320, not appellate courts. *See* TEX. R. APP. P. 44.1, 61.1.

Second, when a litigant is faced with a motion to dismiss because of some defect in her pleadings or filings, there is nothing procedurally new about her filing a corrected pleading or, in this case, a corrected report, before seeking relief from the trial court. *Cf. Leland v. Brandal*, 257 S.W.3d 204, 205 (Tex. 2008) (discussing a supplemental expert report served in response to defendants' objections). Nor is there anything new about a litigant whose case has been dismissed seeking a new trial or moving the trial court to reconsider its dismissal ruling and filing post-dismissal affidavits or presenting evidence in support of his or her motion. *See, e.g.*, TEX. R. CIV. P. 320, 329b.

The "procedure . . . outlined today" by Justice Medina is not new, *see* ___ S.W.3d at ___; it encompasses well-known procedural devices. Wooten was not ambushed; she knew exactly what Dr. Samlowski's objection was and had adequate opportunity to show the trial court that the alleged defect in Dr. Patman's report was curable—if it was. She failed to either file a supplemental report attempting to address Dr. Samlowski's objection or present other such evidence at the hearing. Nor

did she seek relief by filing a post-dismissal motion for reconsideration or motion for new trial, serving a supplemental report or offering other evidence to demonstrate that Dr. Patman's report was curable, and requesting a trial court ruling.

In sum, Wooten did not avail herself of standard procedural avenues. She does not present a record that supports reversing the trial court's judgment.

IV. Conclusion

The court of appeals' judgment is erroneous because it reverses an error-free trial court judgment. I would reverse the judgment of the court of appeals and affirm that of the trial court.

Phil Johnson
Justice

OPINION DELIVERED: February 25, 2011