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 WAINWRIGHT, dissenting in part and concurring in the judgment.

The requirement to serve an expert report from a qualified health care expert on defendant health care providers within 120 days of filing suit is intended to cull out at an early stage of the litigation medical malpractice claims that have not been shown to have merit. The Texas Medical Liability Act instructs courts to dismiss such claims. TEX. CIV. PRAC. & REM. CODE § 74.351. At that stage, the claims that have been shown likely to have merit may proceed. *See Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (noting that section 74.351 strikes a balance between "eradicating frivolous claims and preserving meritorious ones"). The hurdle dividing the two is the expert report.

The Legislature established an expert report hurdle that should be cost and time efficient. *See In re McAllen Med. Cntr., Inc.*, 275 S.W.3d 458, 467 (Tex. 2008). The question in this case is

how to define the characteristics of an inadequate expert report that nevertheless entitle a claimant to obtain a statutory extension to cure the report.

JUSTICE MEDINA attempts to erect a just standard under the applicable statute for reviewing trial court decisions to grant or deny extensions to cure expert reports. In his view, "generally a trial court should grant an extension when the deficient report can be cured within the thirty-day period the statute permits." ___ S.W.3d ___. Unfortunately, this standard is neither cost nor time efficient. His opinion directs the trial court to consider matters beyond the four corners of the report but leaves undecided the limits on the scope of extraneous matter that a trial court may consider. Whether it's an attorney's busy schedule, the client's unavailability, the expert's mistake, or something else, the trial court must conduct a hearing on, and weigh the credibility of, such extraneous assertions. His opinion then requires the plaintiff to move the trial court to reconsider a denial of an extension with the option of filing a cured expert report, the sufficiency of which the trial court then ponders. More time passes. This procedure will often add to the litigation and raise the costs, extend the time, and undermine the purpose of the intended efficient hurdle. The statute contains no mention of extraneous evidence, additional delay, or additional hearings, and neither it nor the opinion place deadlines on completion of these new procedures.

In my view, for an extension to be considered, an expert report must address all of the elements required by statute to be in the report—duty, breach, and a causal relationship between the breach and the plaintiff's injury.[1] An expert report is:

[1] There is no challenge in this case to the expert's qualifications.

> [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 Legislature determined that a medical malpractice claim supported by an expert report that satisfies subsection (r)(6) possesses the requisite merit to proceed beyond that hurdle. If such a report has not been served on the defendant health care provider within 120 days after the original petition is filed, on motion of the defendant the court "shall" dismiss the claim. *Id.* § 74.351(b). However, if the report fails to satisfy subsection (r)(6) "because elements of the report are found deficient," then the trial "court may grant one 30-day extension to the claimant in order to cure the deficiency." *Id.* § 74.351(c). The legislative requirement that elements of the expert report be found deficient as a condition to considering an extension presumes that the elements at least be included in the report. *See Ogletree v. Matthews*, 262 S.W.3d 316, 320 (Tex. 2007) ("[A] deficient report differs from an absent report."); *Leland*, 257 S.W.3d at 207 ("The statute does not allow for an extension unless, and until, elements of a report are found deficient . . . ."). Unless an expert report addresses all of the required elements, section 74.351(c) does not authorize a trial court to consider an extension. As we explained in *Walker v. Gutierrez*, a claimant's expert report that omits one or more of the statutorily required elements fails to be eligible for a grace period. 111 S.W.3d 56, 65 (Tex. 2003) (interpreting the predecessor statute—the Medical Liability and Insurance Improvement Act, TEX. REV. CIV. STAT. art. 4590i,

§ 13.01(r)(6), *repealed by* Act of June 2, 2003, 78th Leg., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884).[2]

I also question whether the standard for a court's determination of the adequacy of an expert report, a precondition to considering an extension, should be an abuse of discretion. In *American Transitional Care Centers of Texas, Inc. v. Palacios*, we held that to be the standard. 46 S.W.3d 873 (Tex. 2001). But *Palacios* relied in large part on the statement in the predecessor statute, article 4590i, § 13.01(e), that upon failure of the report to satisfy statutory requirements the court must "enter an order as sanctions." *Id.* at 877. In the amended language of the Chapter 74 recodification of article 4590i, if an expert report is not timely served, the trial court shall "enter an order" that dismisses the claim. TEX. CIV. PRAC. & REM. CODE § 74.351(b). The characterization that such an order is a "sanction" has been removed from the text of the statute. Along with it, *Palacios*'s proper and supporting rationale that "[s]anctions are generally reviewed under an abuse-of-discretion standard" was removed as well. *See* 46 S.W.3d at 877.

Appellate review of an expert report is analogous to review of a summary judgment. Appellate courts review the same pieces of paper that the trial court reviews. Personal observations

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[2] While a trial court's consideration of a motion to dismiss and a motion for an extension are inseparable, *see Ogletree*, 262 S.W.3d at 321, the statutory grounds for dismissal of a claim versus granting an extension to cure an expert report are, to some degree, distinct. Section 74.351(*l*) instructs that a claim for which the corresponding expert report does not represent a good faith effort to provide an adequate expert report "shall" be dismissed on proper motion. TEX. CIV. PRAC. & REM CODE § 74.351(*l*). If that mandate governed the entirety of section 74.351, then the authorization to grant an extension in section 74.351(c) would be meaningless. *See Ogletree*, 262 S.W.3d at 321. Further, "good faith" is a consideration in dismissal of claims but not in extensions to cure the report. I agree with JUSTICE MEDINA's opinion that "good faith" is not a consideration in the analysis of an extension under section 74.351(c). ___ S.W.3d ____. "Good faith" is important to determining the adequacy of an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(*l*). The term is in the text of section 74.351(*l*) but not in the text of section 74.351(c). It therefore appears that the grounds for considering the dismissal of a report versus the extension of time to serve an adequate report are independent, except for the initial determination that the report is inadequate.

of human behavior that appropriately suggest deference to certain trial court rulings in proceedings with live witnesses do not arise when the trial court interprets a document. *See Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993) ("[Where] the trial court heard no evidence but expressly based its decision on the papers filed and the argument of counsel . . . there are no factual resolutions to presume in the trial court's favor."). I would suggest a de novo standard of review on appeal for rulings on the adequacy of expert reports under Chapter 74. *Cf. Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003) (reviewing a trial court's grant of summary judgment de novo); *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 650–51 (Tex. 1999) (reviewing a trial court's legal conclusions on an unambiguous contract de novo).

JUSTICE JOHNSON argues that the word "may" in section 74.351(c) provides a trial court discretion in granting or denying an extension. But the Code Construction Act also instructs that "may" could also denote a legislative grant of power to act. TEX. GOV'T CODE § 311.016(1) ("'May' creates discretionary authority *or grants permission or a power*." (emphasis added)). If courts are interpreting a document and are not issuing a sanction, the logic for an abuse of discretion standard falls away. JUSTICE MEDINA expands the extension analysis to include extraneous evidence, both before and after the trial court's decision, laying the groundwork for his argument for an abuse of discretion standard. Besides the increased litigation expense, such a standard will also result in disparate rulings in different courts addressing materially indistinct expert reports. In these circumstances, a de novo standard would promote consistency and predictability across the state.

Applying a de novo standard of review to this case, I would reverse the trial court's ruling because although elements of the expert report were found deficient, the report addressed each of

the elements required by the statute. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c); *Walker*, 111 S.W.3d at 65. I therefore concur in the Court's judgment, for the reasons explained herein. I also join Parts I and II.B of JUSTICE GUZMAN's concurrence.

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Justice Dale Wainwright

OPINION DELIVERED: February 25, 2011