IN THE SUPREME COURT OF TEXAS

NO. 09-0497

TYLER SCORESBY, M.D., PETITIONER,

v.

CATARINO SANTILLAN, INDIVIDUALLY AND AS NEXT FRIEND OF SAMUEL SANTILLAN, A MINOR, RESPONDENT

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

Argued November 9, 2010

JUSTICE WILLETT, concurring.

Since 2006 we have circled an issue both recurring and elusive: whether any document, even one that never accuses anyone of committing malpractice, suffices to warrant an unreviewable thirty-day extension under Section 74.351(c).[1] Until today, the issue was procedurally (and frustratingly) unreachable and thus unresolvable. Finally it is squarely presented, and I am confident today's decision will brighten the line between deficient-report cases (where an extension is discretionary) and no-report cases (where dismissal is mandatory).

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[1] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c).

In a trio of concurrences in 2007,[2] 2008,[3] and 2009,[4] I focused on this nagging question: Is there a legal difference between filing nothing and filing something that amounts to nothing? That is, can a filing be so utterly lacking in the required statutory elements as to be no report at all, thus requiring dismissal? I join today's decision, which I read to confirm my consistently stated view: If a document bears zero resemblance to what the statute envisions—more to the point, *if it never asserts that anyone did anything wrong*—it cannot receive an extension.

In *Ogletree v. Matthews*, I described what I naively hoped would be "a rare bird in Texas legal practice"[5]—a plaintiff passing off as a bona fide report a document so facially absurd that, "no matter how charitably viewed, it simply cannot be deemed an 'expert report' at all, even a deficient one."[6] The deficient-or-no-report issue was not present in *Ogletree*, but I noticed it in another then-pending case, *Lewis v. Funderburk*, filed one week before *Ogletree*.[7]

In *Funderburk*, the Court confronted "an actual sighting of this rare bird, a species that in my view merits extinction, not conservation."[8] The "report" in *Funderburk* was a thank-you letter from one doctor to another—a letter that never once in any manner, way, shape, or form accused

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[2] *Ogletree v. Matthews*, 262 S.W.3d 316, 323 (Tex. 2007) (Willett, J., concurring).

[3] *Lewis v. Funderburk*, 253 S.W.3d 204, 210 (Tex. 2008) (Willett, J., concurring).

[4] *In re Watkins*, 279 S.W.3d 633, 636 (Tex. 2009) (Willett, J., concurring).

[5] 262 S.W.3d at 324 (Willett, J., concurring).

[6] *Id.* at 323.

[7] *Funderburk*, 253 S.W.3d at 209 (Willett, J., concurring).

[8] *Id.*

anyone of malpractice.[9] This thanks-for-your-referral letter was no more a medical-expert report "than a doctor-signed prescription or Christmas card would be," I wrote, adding, "If a report is missed, not just amiss, courts are remiss if they do not dismiss."[10] Alas, the defendant did not raise the "no report" issue, thus foreclosing a merits-based challenge.[11]

Finally came *In re Watkins*, where a plaintiff merely filed a narrative of treatment, something that omitted every statutorily required element and had no apparent relationship to a medical-malpractice case.[12] Like *Funderburk*, this case also had a procedural wrinkle that kept the marquee "no report" vs. "deficient report" issue out of reach.[13] But the rare-bird sightings, I noticed, were becoming more commonplace. And they would proliferate on our docket, I predicted, absent appellate enforcement of the statute's mandatory-dismissal provision[14]—or alternatively, this

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[9] The letter is reproduced in its entirety in Chief Justice Gray's dissent in the court of appeals. *See Lewis v. Funderburk*, 191 S.W.3d 756, 762–63 (Tex. App.—Waco 2006) (Gray, C.J., dissenting), *rev'd*, 253 S.W.3d 204 (Tex. 2008).

[10] *Funderburk*, 253 S.W.3d at 210–11 (Willett, J., concurring).

[11] *Id.* at 208 (majority opinion) ("We do not reach the question addressed in the concurring opinions here because it is not raised. As stated in his reply brief, '[Dr.] Lewis has made it abundantly clear that he is not appealing the trial court's [initial] order (no matter how vehemently he disagrees with it),' but instead is only appealing the order denying his second motion to dismiss.").

[12] 279 S.W.3d at 637 (Willett, J., concurring).

[13] *Id.* at 634 (majority opinion) ("The separate writings join issue again today on the question whether the item served was a deficient report or no report at all. But here it does not matter. If no report was served, interlocutory appeal was available, so mandamus is unnecessary. If the report was merely deficient, then an interlocutory appeal was prohibited, and granting mandamus to review it would subvert the Legislature's limit on such review.") (citations omitted).

[14] My sense is that such sightings have indeed grown more prevalent, making Chapter 74 defendants perhaps "identify with the seaside residents of Bodega Bay, besieged by avian attacks," *In re Watkins*, 279 S.W.3d at 637 n.13 (Willett, J., concurring) (citing THE BIRDS (Universal Pictures 1963)), or else those Arkansans who witnessed the so-called Aflockalypse last New Year's Eve, when thousands of blackbirds and starlings fell mysteriously from the skies.

Court's express adoption of a grace-period test that is indeed gracious, allowing extensions for most everything.

Under the Court's admittedly "lenient standard,"[15] the document must merely "[contain] a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit."[16] The line is forgiving but bright: The "report" must actually allege someone committed malpractice. The genesis of this elemental requirement is found in *Ogletree*, where the Court first indicated that the purported report must implicate a provider's conduct.[17] It merits emphasis, however, that today's standard, benevolent as it is, is not satisfied by any medical-related piece of paper; the bar is low but not subterranean. For example, the "report" in *Funderburk* would surely fail even today's lax test. The thank-you letter in that case never mentioned malpractice by anyone, even in the most implicit or glancing manner. Again, it is not merely that the letter omitted every required statutory element. Rather, it never even hinted at having any relationship to a malpractice case at all—no mention of a claim or a defendant, much less a claim that "an individual with expertise" indicates "has merit."[18]

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[15] __ S.W.3d __, __.

[16] *Id.* at __.

[17] 262 S.W.3d at 321 ("Because *a report that implicated Dr. Ogletree's conduct* was served and the trial court granted an extension, the court of appeals could not reach the merits of the motion to dismiss.") (emphasis added).

[18] __ S.W.3d at __. The narrative in *In re Watkins* might also fail today's test, as it lacked every required statutory element, though unlike the referral letter in *Funderburk*, it at least mentions (twice) the defendant physician's name.

Based on my understanding of the Court's "minimal standard"[19]—requiring that someone with expertise express an opinion that the plaintiff has a meritorious malpractice claim against the defendant—I join the Court's decision.

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Don R. Willett
Justice

OPINION DELIVERED: July 1, 2011

[19] *Id.* at __.