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 MEDINA announced the judgment of the Court and delivered an opinion in which CHIEF JUSTICE JEFFERSON and JUSTICE HECHT joined.

JUSTICE GUZMAN filed an opinion concurring in the judgment in which JUSTICE LEHRMANN joined and in Parts I & II.B of which JUSTICE WAINWRIGHT joined.

JUSTICE WAINWRIGHT filed an opinion dissenting in part and concurring in the judgment.

JUSTICE JOHNSON filed a dissenting opinion in which JUSTICE GREEN and JUSTICE WILLETT joined.

Texas Civil Practice and Remedies Code section 74.351 requires that a trial court dismiss a health care liability claim unless the claimant serves an expert report within 120 days after filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(b). This dismissal requirement is subject to the trial court's discretion to grant one thirty-day extension for the claimant to cure a timely served but deficient report. *Id.* § 74.351(c). The trial court in this health care liability case determined that claimant's

timely served report was deficient and dismissed her suit without granting her request for an extension of time to cure the report. The court of appeals agreed the report was deficient but concluded the trial court abused its discretion by denying the requested extension. 282 S.W.3d 82, 91.

We granted the petition to consider under what circumstances a trial court might abuse its discretion when denying such an extension. Like most cases involving trial court discretion, a single rule will not fit every situation, but generally a trial court should grant an extension when the deficient report can be cured within the thirty-day period the statute permits. The court of appeals concluded, among other things, that the case should be remanded to the trial court for further proceedings, and a majority of the Court agrees with that judgment. There is no majority reasoning for why we remand, however. Three members of the Court essentially agree with the court of appeals' analysis, three members disagree with that analysis and would reverse and render, and three members disagree with the court of appeals' analysis but would nevertheless remand in the interests of justice. I am in this last group.

Because the record does not establish that the deficient expert report would have been cured if the extension had been granted in this case, I cannot say that the trial court abused its discretion in denying the extension. Although I disagree with the court of appeals' analysis of the statute and its application of the abuse of discretion standard, I conclude that the interests of justice require a remand to the trial court in this case. Accordingly, I would affirm the court of appeals' judgment remanding this cause as modified by this opinion.

I

Carol Wooten was admitted to Walls Regional Hospital in Cleburne, complaining of severe abdominal pain. Dr. Eberhard Samlowski assumed Wooten's primary care and two days later performed laparascopic gall bladder surgery. The surgery failed to relieve Wooten's pain. Following additional tests and a consult recommending further surgery to explore the abdomen, Dr. Samlowski performed an exploratory laparotomy that revealed a complete bowel obstruction with perforations in the pelvic region. Dr. Samlowski attempted to repair the perforations and adhesions he found during this surgery.

Postoperative complications resulted in Wooten's transfer to Hughley Memorial Medical Center in Fort Worth. Her admission diagnosis there included postoperative cholecystectomy and repair of bowel perforation, sepsis syndrome, acute respiratory distress syndrome, renal insufficiency/failure, acute blood loss anemia, respiratory failure, type 2 diabetes mellitus, and sarcoidosis. Four additional surgical procedures were performed on Wooten at Hughley where she remained for over sixty days.

Wooten subsequently sued Dr. Samlowski for medical negligence, serving Dr. R. Don Patman's expert report 105 days later.[1] In this report, Dr. Patman discusses the standard of care and several instances where Dr. Samlowski's care fell short. In Dr. Patman's opinion, the patient's lab results, complaints, and history did not indicate the need for gall bladder surgery. Instead, Dr. Patman states that Dr. Samlowski should have performed additional tests to discover the actual cause

[1] Dr. Patman is a board-certified general and vascular surgeon and Clinical Assistant Professor of Surgery at the University of Texas Southwestern Medical School and Attending Surgeon at Baylor University Medical Center in Dallas.

of the patient's acute abdominal pain—a complete pelvic bowel obstruction with several areas of necrosis and perforation. Regarding causation, Dr. Patman concludes that Dr. Samlowski's inaccurate diagnosis and incomplete preoperative evaluation proximately caused the patient's subsequent complications and prolonged hospitalization, and that in all likelihood the patient would require future treatment and additional surgery.

Dr. Samlowski promptly filed a motion challenging the report as "wholly deficient in providing any expert opinions regarding specifically how the care [he] rendered . . . proximately caused the injury, harm, or damages claimed." Dr. Samlowski subsequently filed a motion to dismiss after the statutory deadline for serving expert reports had passed. Wooten responded to both motions, arguing that her expert report was sufficient, but also asking for a thirty-day extension to cure the report, if the trial court found it deficient.

The trial court heard the motions and a few days later signed an order dismissing Wooten's case. No record was made at the hearing. The court's order expressly granted both of Dr. Samlowski's motions but did not mention Wooten's request for a thirty-day extension to cure. The court's order, however, disposed of Wooten's pending motion by reciting that all relief not expressly granted was denied. Wooten appealed.

A divided court of appeals reversed and remanded with directions that Wooten be granted a thirty-day extension. 282 S.W.3d 82, 91. Although the court agreed that the expert report was deficient, it nevertheless concluded that the trial court had abused its discretion[2] by not giving

[2] In *Walker v. Gutierrez*, we held that a trial court's denial of an extension to cure an expert report under former Section 13.01(g) of the Medical Liability and Insurance Improvement Act, Texas Revised Civil Statute art. 4590i, was to be reviewed for abuse of discretion. 111 S.W.3d 56, 62 (Tex. 2003). The procedures in former section 13.01 and

Wooten additional time to cure that deficiency. *Id.* at 90–91. The report was deficient, according to the court of appeals, because it did "not represent a good-faith effort to summarize the causal relationship between Dr. Samlowski's failures to meet the applicable standards of care and Wooten's claimed injury, harm, and damages." *Id.* at 90 (citing TEX. CIV. PRAC. & REM. CODE § 74.351(r)(6)). But the court concluded that the trial court should have given Wooten additional time to cure that deficiency because the expert report was a "good-faith attempt" to comply with the statute that could easily be cured with a supplemental report. *Id.* at 91. A dissent argued that the trial court had not abused its discretion in dismissing the underlying lawsuit because the report was not "an objective good faith effort to comply with the [statutory] definition of an expert report." *Id*. at 93 (Gray, C.J. dissenting).

II

Dr. Samlowski's argument here is similar to the dissent in the court of appeals. He complains the court's concession that Wooten's expert report was not a "good faith effort" conflicts with its abuse-of-discretion holding and submits that the former negates the latter. He further submits that the court of appeals' characterization of the report as a "good faith attempt" is a meaningless distinction through which the court has merely substituted its judgment for that of the

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section 74.351 for serving expert reports and granting extensions of time to correct deficiencies are similar, although the requirements and deadlines are not exactly the same. The former statute required, and current statute requires, dismissal of the suit in the event a timely expert report is not served. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b); former TEX. CIV. STAT. art. 4590i § 13.01(e). The former statute authorized the trial court, under certain circumstances, to grant extra time to meet the statutory requirements. *See* former TEX. REV. CIV. STAT. art. 4590i § 13.01(g). So does the current statute. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). Given the structural and substantive similarities between section 74.351 and former section 13.01, the abuse of discretion standard likewise applies to a trial court's decision to deny an extension of time under section 74.351(c).

trial court. Dr. Samlowski thus views a good faith effort in producing an expert report as the predicate for the trial court's discretion under section 74.351(c).

Wooten, on the other hand, argues that trial court discretion under section 74.351(c) should be judged by the relative good faith exhibited in a deficient expert report. The court of appeals' opinion similarly adopts this view, suggesting that the deficiency in Dr. Patman's report was too small to permit the denial of Wooten's motion to cure. 282 S.W.3d at 90. Wooten concludes that the court of appeals' judgment should be affirmed because a fair reading of Dr. Patman's report shows that her claim has merit and the report's defect easily cured.[3]

Neither party's argument proposes a reasonable scheme for the exercise or review of the trial court's discretion under section 74.351(c). Dr. Samlowski's argument suggests that trial court discretion in this instance is absolute, while Wooten's indicates that appellate review is not for abuse of discretion, but de novo. Both arguments are based on a similar faulty premise: that trial court discretion under section 74.351(c) should be measured or controlled by some notion of good faith. Good faith, however, is not mentioned in section 74.351(c).

Subsection (c) merely states that "the court may grant one 30-day extension" if elements of the expert report are deficient. TEX. CIV. PRAC. & REM. CODE § 74.351(c).[4] The term "good faith"

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[3] Wooten also argued in the court of appeals and in her brief to this Court that Dr. Patman's report was sufficient, but at oral argument she conceded that the report was deficient.

[4] Section 74.351(c) provides in full:

> (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.

is used in the statute, but it appears in a later provision discussing motions that challenge "the adequacy of the expert report." *Id*. § 74.351(*l*). Subsection (*l*) states that "[a] court shall grant a motion challenging the adequacy of an expert report [when] the report does not represent an objective *good faith* effort to comply with the definition of an expert report[.]" TEX. CIV. PRAC. & REM. CODE § 74.351(*l*) (emphasis added).

We have explained that a "good faith effort" in this context simply means a report that does not contain a material deficiency. Therefore, an expert report that includes all the required elements, *Jernigan v. Langley*, 195 S.W.3d 91, 94 (Tex. 2006), and that explains their connection to the defendant's conduct in a non-conclusory fashion, *Bowie Memorial Hospital v. Wright*, 79 S.W.3d 48, 53 (Tex. 2002), is a good faith effort. In contrast, a report that omits an element or states the expert's opinions in conclusory form is not a good faith effort. *Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001). Under these cases, a "good faith effort" will produce an adequate expert report for which no extension under section 74.351(c) is needed. A deficient expert report then is the predicate for the exercise of the trial court's discretion under section 74.351(c), and not, as Dr. Samlowski suggests, proof that the trial court decided the matter correctly.

Dr. Samlowski's complaint that the court of appeals has merely substituted its judgment for that of the trial court, however, is more troubling. The court of appeals described Dr. Patman's report as "thorough, well-detailed, and—except for one small and easily curable deficiency—patently

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TEX. CIV. PRAC. & REM. CODE § 74.351(c).

and sufficiently specific." 282 S.W.3d at 90. But the underlying merit of Wooten's claim and the relative ease of curing Dr. Patman's report are matters in dispute. It is not enough that the court of appeals would have decided the dispute differently because the abuse of discretion standard generally "insulates the trial judge's reasonable choice from appellate second guessing." W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L. J. 47, 62 (2006). As we have said, "to find an abuse of discretion [when factual matters are in dispute], the reviewing court must conclude that the facts and circumstances of the case extinguish any discretion in the matter." *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

A trial court therefore abuses its discretion when it renders an arbitrary and unreasonable decision lacking support in the facts or circumstances of the case. *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex. 1997). Similarly, a trial court abuses its discretion when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d 664, 666 (Tex. 1996) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). Section 74.351(c)'s text, however, provides no particular guidance on how the court should exercise its discretion, stating merely that "the court may grant one 30-day extension to the claimant in order to cure [a timely but deficient report]." *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). Guidance must come instead from the broader purposes of the Texas Medical Liability Act of which section 74.351(c) is a part.

III

A core purpose of this legislation was to identify and eliminate frivolous health care liability claims expeditiously, while preserving those of potential merit. Act of June 2, 2003, 78th Leg., R.S.,

ch. 204, § 10.11(b)(1), (3), 2003 Tex. Gen. Laws 847, 884 (seeking to reduce frivolous claims but "in a manner that will not unduly restrict a claimant's rights any more than necessary to deal with the crisis"); *see also Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008) (noting that in "section 74.351, Legislature struck a careful balance between eradicating frivolous claims and preserving meritorious ones"). To further this goal, the statute sets a deadline for the claimant to substantiate the underlying health care liability claim with expert reports.

The claimant is required to serve each defendant physician or other health care provider with an expert report within 120 days of filing suit. TEX. CIV. PRAC. & REM. CODE § 74.351(a). This report must provide a fair summary of the expert's opinions "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." *Id*. § 74.351(r)(6). If the report is deficient, it may be challenged, and a deficient report may likewise lead to dismissal. *Id*. § 74.351(a), (b) & (*l*). But a deficient report does not invariably require dismissal of the underlying health care liability claim. The statute incorporates a significant exception "explicitly giv[ing] trial courts discretion to grant a thirty day extension so that parties may, where possible, cure deficient reports." *Ogletree v. Matthews*, 262 S.W.3d 316, 320 (Tex. 2007) (citing TEX. CIV. PRAC. & REM. CODE § 74.351(c)).

The overriding principle guiding trial court discretion under section 74.351(c) then is the elimination of frivolous claims and the preservation of meritorious ones. An adequate expert report is how the statute distinguishes between the two. A trial court should therefore grant an extension when a deficient expert report can readily be cured and deny the extension when it cannot. In

making that determination, a trial court may sometimes err and dismiss a claim when the report could have been cured. A reasonable error in judgment, however, is not an abuse of discretion. *See Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992) (noting that reviewing court may not substitute its judgment as to factual matters committed to trial court's discretion).

Wooten has conceded in this Court that her report was deficient but maintains that she was entitled to an extension because her expert report could easily have been cured. The court of appeals agreed, but this is only the court's best judgment in the matter. The record does not establish that the deficient report *would* have been cured if the extension had been granted, and a claimant's mere assertion or belief that it *could* have been cured with an extension of time does not demonstrate an abuse of discretion under section 74.351(c). When the trial court denies a motion to cure, the claimant must make a record that demonstrates the deficiency would have been cured.

The claimant must therefore be prepared to cure a deficient expert report whether or not the trial court grants the claimant's motion. When, as in this case, the trial court simultaneously finds the expert report deficient, denies a motion to cure, and dismisses the underlying health care liability claim, the claimant must move the court to reconsider and promptly fix any problems with the report. This should further be done within the statutory, thirty-day period, thereby demonstrating that the report would have been cured had the extension been granted. If this is accomplished and the court refuses to reconsider, the now compliant report will typically establish the trial court's abuse of discretion. Wooten didn't make such a record in the trial court, and thus we are left to speculate about whether she could have cured her expert report with an extension.

IV

I, however, agree with Justice Guzman's view that "trial courts should err on the side of granting claimants' extensions to show the merits of their claims." ___ S.W.3d at ___. The right answer in many cases will be for the trial court to grant one thirty-day extension upon timely request and be done with it. Justice Guzman agrees that this report was deficient, but good enough to warrant an extension, and again I do not disagree.

The statute, however, grants the trial court discretion in the matter, and Justice Guzman's analysis appears to be no different from that of the court of appeals, which I view as merely a substitution of the appellate court's discretion for that of the trial court. Under her analysis, it remains unclear how we are to distinguish between deficient reports that demonstrate merit and deficient reports that do not, other than by Justice Potter Stewart's famous maxim: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (stating his test for determining hard-core pornography outside the bounds of constitutional protection). Because the expert report was deficient as served, I cannot agree unequivocally that the trial court abused its discretion when denying the motion to cure. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b) (stating that if an expert report has not been served, the court shall, subject to the court's discretionary power to grant one 30-day extension, dismiss the claim).

V

Although the record in this case does not clearly indicate that the trial court abused its discretion, Dr. Patman's report is largely as described by the court of appeals—"thorough and well-detailed." 282 S.W.3d at 90. The court of appeals was plainly concerned about whether justice had

been done in the trial court. And although the claimant did not follow the procedure I set out in this opinion, I too am not unsympathetic. A claim is not typically saved by doing precisely what the trial court has refused permission to do. But when a motion to cure under section 74.351(c) is denied, the claimant must act to correct any problems with the expert report in a timely manner to demonstrate an abuse of discretion.

The statute, however, does not express the procedure I have outlined today. Because the statute is silent on the principles and procedure that should control the trial court's discretion in this area and the arguments of the parties unfocused as a result, I conclude that the interests of justice will best be served by a remand to the trial court. *See, e.g., Low v. Henry*, 221 S.W.3d 609, 621 (Tex. 2007) (remanding "to allow the parties to present evidence responsive to our [new] guidelines"); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 195 (Tex. 2004) ("Because the parties have not focused on the issue we think is crucial, we conclude that the interests of justice would be best served by a new trial.").

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The court of appeals' judgment is modified to reflect a remand to the trial court for further proceedings, and the court's judgment, as modified, is affirmed.

David M. Medina
Justice

Opinion Delivered: February 25, 2011