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 JOHNSON, joined by JUSTICE WAINWRIGHT, dissenting.

The Court says that a plaintiff who timely files a defective expert report is eligible for an extension of time to cure the report if

> [the report] contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit. An individual's lack of relevant qualifications and an opinion's inadequacies are deficiencies the plaintiff should be given an opportunity to cure if it is possible to do so.

___ S.W.3d ___, ___. In my view the Court's standard does not conform to requirements the Legislature imposed in authorizing an extension to cure a deficient report. I respectfully dissent.

A trial court is statutorily authorized to grant an extension to cure elements of an expert report that are found deficient, not to cure a report that substantively is not a report, nor to cure a report from which elements are absent as opposed to deficient:

> (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:
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> > (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
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> > (2) dismisses the claim with respect to the physician or health care provider, with prejudice to the refiling of the claim.
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> (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.

TEX. CIV. PRAC. & REM. CODE § 74.351(b), (c);[1] *see In re Watkins*, 279 S.W.3d 633, 634-35 (Tex. 2009) (Johnson, J., concurring) ("The definition [of expert report] requires that for a document to qualify as a statutory expert report, it must demonstrate three things: (1) someone with relevant expertise ('"[e]xpert report" means a written report by an expert'), (2) has an opinion ('that provides a fair summary of the *expert's opinions*'), and (3) that the defendant was at fault for failing to meet applicable standards of care and thereby harmed the plaintiff . . . ."). Absent an expert with relevant expertise, I do not see how there can be an expert report under the statute, because the foundation of an expert report is the requirement that the report be by a qualified expert. "Expert" for purposes of a report means:

[1] Further references to the Civil Practice and Remedies Code will be by referring to section numbers unless otherwise indicated.

> [W]ith respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of medical care, an expert qualified to testify under the requirements of Section 74.401 . . . .

TEX. CIV. PRAC. & REM. CODE § 74.351(r)(5)(A). Section 74.401 provides specific requirements for an expert to be qualified to provide the section 74.351 report:

> (a) In a suit involving a health care liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:
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> (1) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;
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> (2) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and
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> (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.

Id. § 74.401(a). The Court has said that "[a] report by an unqualified expert will sometimes (though not always) reflect a good-faith effort sufficient to justify a 30-day extension." *In re Buster*, 275 S.W.3d 475, 477 (Tex. 2008) (per curiam) (citing *Leland v. Brandal*, 257 S.W.3d 204, 208 (Tex. 2008)). The Court has recognized that not every doctor is qualified to render an opinion about every aspect of medicine or medical science. *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 463 (Tex. 2008); *Broders v. Heise*, 924 S.W.2d 148, 152 (Tex. 1996) ("[G]iven the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question.").

The Court's new test apparently allows a report to qualify as a deficient report even if the report demonstrates none of the three requirements of section 74.401(a). The test requires only that

the person rendering the opinion have some type of undefined level of expertise. It abandons the requirements that the report show the expert (1) has knowledge of accepted standards of care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the claim; and (2) qualifies on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care. *See* TEX. CIV. PRAC. & REM. CODE §74.401(a)(2), (3). Nor does the test require a showing that the expert is practicing medicine or was doing so when the claim arose. *See id.* § 74.401(a)(1).

Dr. Marable's report says nothing about his surgical qualifications. The report does not give any facts or information which would qualify him to opine on the standards of care for the type of surgery performed in this case, and he did not attach a CV to the report.[2] The report was written on a letterhead showing that he maintains board certification in neurology and psychiatry. In his report he makes it clear that he is basing his opinion on his expertise in neurology, not surgery: "As a board certified neurologist, my opinion is that Dr. Ducic violated the standards of care, as well as Dr. Scoresby, and as a result [Santillan's] damages are that of a right-sided hemiparesis with possibility of seizure foci in the future." The neurological expertise on which Dr. Marable relies does not involve surgery. *See* WILSON STEGEMAN, MEDICAL TERMS SIMPLIFIED 106 (1976) (noting that neurologists do not perform surgery); American Academy of Neurology, *Working with Your Doctor*, https://patients.aan.com/go/workingwithyourdoctor (last visited Apr. 18, 2011) ("Neurologists do not perform surgery."). Dr. Marable's report does not claim that he now performs or has in the past

[2] An amended report by Dr. Marable with a CV attached was filed on the day the defendants' motions to dismiss were heard. The CV was not considered by the trial court, but it did not show that Dr. Marable had any training or expertise in the type of surgery involved here.

performed surgery, much less this particular type of surgery. The report neither claims that he has knowledge of the standard of care for performing the surgery nor that he is qualified on the basis of training or experience to offer an expert opinion on those standards of care. *See* TEX. CIV. PRAC. & REM. CODE 74.401(a)(2), (3). The report does not say that he has participated in, observed, or even read about how to do "procedures of left mediomaxillectomy, excision of neoplasm of the maxilla, calvarial bone growth and reconstruction of maxilla and excision of tumor of pterygopalatin structures," which were the surgical procedures performed by Drs. Scoresby and Ducic.[3] In short, nothing in Dr. Marable's report raises an inference that he is a qualified expert as to this type of surgery, as prescribed by statute, and the report is all that was before the trial court in regard to his qualifications.

In *Ogletree v. Matthews*, we considered a defendant's contention that no statutory expert report had been filed because the report was by a radiologist who was not qualified to express an opinion on the standard of care for a urologist. 262 S.W.3d 316, 319 (Tex. 2007). The urologist defendant had performed a urethral catheterization during which the patient suffered bruising and bladder perforation. *Id.* at 317. We held that the radiologist's report was deficient, not absent. *Id.* at 320. But in *Ogletree* the radiologist was opining about whether the urologist should have performed the catheterization under flouroscopic guidance in order to avoid or more timely diagnose the perforation. *Id.* at 318. In that instance, the radiologist was opining about whether the urologist should have involved radiology-related devices and techniques (the specialty in which the expert

[3] Santillan's attorney represented during oral argument that he believed Dr. Marable's amended report contained statements by Dr. Marable that he had seen surgery of this type because he had treated patients after they had the surgery.

was qualified) in treating the patient and whether the failure to do so resulted in injury. The matter before us is different from *Ogletree* because there is no apparent closely related connection between the expertise involved in the specialty of neurology and the expertise involved in knowing how to perform, and performing, the surgery performed by Drs. Scoresby and Ducic.

In *McAllen Medical Center*, 275 S.W.3d 458, we considered the validity of a doctor's expert reports in negligent credentialing suits against the medical center. McAllen challenged the adequacy of the reports on the basis that the doctor was not qualified to express opinions as to the credentialing process. *Id.* at 462. We agreed with McAllen and held that the reports were inadequate:

> On this record, the plaintiffs have not established Dr. Brown's qualifications. "The standard of care for a hospital is what an ordinarily prudent hospital would do under the same or similar circumstances." Nothing in the record here shows how Dr. Brown is qualified to address this standard. Nor can we infer that she may have some knowledge or expertise that is not included in the record.
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> Moreover, "a negligent credentialing claim involves a specialized standard of care" and "the health care industry has developed various guidelines to govern a hospital's credentialing process." Dr. Brown's reports contain no reference to any of those guidelines, or any indication that she has special knowledge, training, or experience regarding this process. Nor was Dr. Brown qualified merely because she is a physician; "given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question."

Id. at 463 (citations omitted).

The substance of the issue before us is similar to the issue we decided in *McAllen Medical Center*. Dr. Marable's report indicates that the defendants violated standards of care for the surgery and their negligent activity caused damages to Santillan. But Dr. Marable's report does not show

he was qualified under the statute to give such an expert opinion, nor did his opinion about the surgeons' decisions and actions during surgery involve his specialty except to the extent a physician with his specialty would have been involved in post-surgical care and possibly a decision to re-operate.

If Dr. Marable's report had in some manner demonstrated that he was qualified to render an opinion about the standard of care for the surgery involved, then I might agree that his conclusory statements about the defendants having negligently violated applicable standards of care and those negligent activities having caused damages were sufficient to support an extension of time. But the report sets out his opinion as a neurologist, not a physician with surgical expertise. The Legislature did not intend that an expert report could be by a doctor with no demonstrated or inferable experience and training in a practice area who reads medical records and writes a report containing the simplistic indictments in the report here: the defendants negligently lacerated the brain and further surgery was required. *See* TEX. CIV. PRAC. & REM. CODE § 74.401(a).

The Court says that "'there are constitutional limitations upon the power of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.'" ___ S.W.3d at ___ (quoting *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 918 (Tex. 1991)). I agree. But the statement does not fit here. First of all, the constitutionality of the statute is not challenged. Second, even if it were, the statutory requirement of a timely report by a qualified expert did not spring upon Santillan without warning. The requirement was in place before the surgery took place in January 2006, while suit was not filed against the defendant doctors and

Tarrant County Hospital until January 2008. Santillan had time to find a qualified expert to provide the report required to show his claim had merit, if he could find such an expert.

I would hold that failure to timely serve a report by an expert qualified under the statute is not merely a deficiency in an element of the report, it is a deficiency going to the question of whether the report is competent and is entitled to be given any weight. And I would hold that it is not an expert report and the filing of such a report supports inferences that a proper report by a qualified expert was not available, the claim lacks merit, and the claim should be dismissed.

I would reverse the judgment of the court of appeals and dismiss the case. *See Badiga v. Lopez*, 274 S.W.3d 681, 684-85 (Tex. 2009).

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Phil Johnson
Justice

OPINION DELIVERED: July 1, 2011