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Supreme Court of Texas.  
Spectrum Healthcare Resources, Inc., and Michael Sims, Petitioners,  
v.  
Janice McDaniel and Patrick McDaniel, Respondents.  
No. 07-0787.

September 11, 2008.

Appearances:

Richard Clark Harrist, Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C., San Antonio, Texas, for petitioner.

Jeffrey C. Anderson, Law Offices of Jeffrey C. Anderson, San Antonio, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht, Scott A. Brister, and David M. Medina, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in 07-0787, *Spectrum Healthcare v. McDaniel*.

COURT MARSHALL: May it please the Court. Mr. Harrist will present argument for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF RICHARD CLARK HARRIST ON BEHALF OF THE PETITIONER

MR. HARRIST: May it please the Court, your Honors. This-- in this medical malpractice case, the issue is about the 120-day expert report.

And just by way of a little background, this, this is-- an important point about this case is that it was initially filed in federal court and no 120-day report was served there. And then it was dismissed from federal court on jurisdictional grounds because the United States had been a party and Judge Rodriguez down in San Antonio dismissed the suit.

It was the, the medical malpractice suit was again filed in State Court in San Antonio. And again, the 120-day deadline ran and no Chapter 74 report had been served on us.

JUDGE WAINRIGHT: You say again that the time ran. Did it run in the federal court before it was dismissed, is that what you're saying?

MR. HARRIST: That's, that's a, that's a good question. And I, I

don't, I don't have a clear answer for you on that but what I can say is under the law at the time, the case was filed in federal court, Chapter 74 or, or Section 74.351 said that you needed to file-- to serve that report within a 120 days of your claim.

And that's, that's the way it read at the time. So I think looking back on it now, I, I, I think you can make a very good argument that it ran in federal court. It begin to run when the federal suit was filed. It ran in federal court and in that, that could be the end of it.

JUDGE WAINRIGHT: Given -

JUSTICE O'NEILL: But Judge ...

JUDGE WAINRIGHT: - sometime to think about it, would you submit supplemental briefing on the point?

JUSTICE O'NEILL: But, you mean, are are saying, Judge Rodriguez considered it a procedural rule and sort of made an eerie guess, that it wouldn't be required in federal court?

MR. HARRIST: That's, that's correct, your Honor. Judge Rodriguez did not say in what he wrote in his opinion that the de-- that the 120-days never ran in federal court. He, he simply said he was not going to enforce it there.

He did in his opinion, admonish the plaintiffs that in a situation like this it, it would be a good idea that to serve such report within a 120 days.

So, so back to, back to-- we get-- we got to back to state court. It was filed in State Court down in Bextar County. The 120 days ran again. No expert report was served. And, and then we, we filed the motion to dismiss. And you know, obviously we felt like we were on, on good grounds there, because we hadn't gotten report in both cases.

CHIEF JUSTICE JEFFERSON: Was the scheduling order before or after the time expired to file the expert report?

MR. HARRIST: The scheduling order, your Honor, was entered into two or three months before the 120-day deadline ran in a state court.

CHIEF JUSTICE JEFFERSON: If the trial court had said expressly that notwithstanding 74.351 or whatever it is on the, the 100--the 120-day requirement that the deadline for filing expert report for this Healthcare liability claim is going to be, you know, the, the day that I set which is later than the expiration date under of the statute. If that were the case, would you still be here today or would you say, "No, that the, the deadline was extended by the trial court?"

MR. HARRIST: Well, I, I think that that would not operate to extend the deadline. I think it would be an abuse of discretion.

CHIEF JUSTICE JEFFERSON: Would it be void or would it not bew-- or would it be erroneous?

MR. HARRIST: I would say it would be an erroneous order for the Court to make because the only exception to that 120-day deadline is an agreement by the parties.

CHIEF JUSTICE JEFFERSON: And then who-- then should the plaintiff in a case like that be the one whose case is dismissed because the trial court issues an erroneous order or should the defendant be the one who has to complain about that order, mandamus or, or do something to protect their right?

MR. HARRIST: Well, I think the defendant, off the top of my head, I think the best way to handle that would be to have somehow get a motion to dismiss for failure to file, file a 120-day report to get that denied by the Judge so you would then would have a basis for interlocutory appeal.

JUSTICE MEDINA: So, so what way, if any, do we give the docket control order of it?

MR. HARRIST: Excuse me, your Honor?

JUSTICE MEDINA: What way, if any, did-- do we give the docket control order of, as the Chief says, the Judge makes an error. You, you said it's error, maybe it's, it's a void or void-- voidable order. And what way do I give that if a party is relying on an order? It's an order signed by the Judge. This is-- that's a Judge's order.

MR. HARRIST: Well, I, I honestly I don't-- I, I can't give you a good answer to that. But I can say in this case that we did have an agreed order that was entered into. And it, it did not address the 120-day deadline.

You know, the, the whole trust of, of my argument today is really about the, the docket control order that was agreed to by the parties and entered into and if you look at it, it nowhere does it say anything about the 120-day report. It doesn't say, "Give a time period of 120 days." It doesn't ...

CHIEF JUSTICE JEFFERSON: It does refer to Chapter 74, though, right?

MR. HARRIST: It doesn't. In one instance, your Honor, down, down below all the deadlines, there's a clause or a provision in there that says-- excuse me, provision that says that basically the parties are going to go ahead and conduct discovery notwithstanding the limitations in Chapter 74.

Basically, what, what Chapter 74 would do is limit our discovery and their discovery until the report is on file. And by making that a part of our agreement, we're telling each other, we're going to go ahead and, and you can go ahead and conduct your discovery, and I conduct mine. That's the only reference to Chapter 74.

And I think that's significant because what it shows is that we're well aware of Chapter 74. We know how to say it, if we want to refer to something in Chapter 74. And, and back up in the top of the order where there is the-- there are the deadlines for expert -- testifying expert reports it doesn't say anything about Chapter 74. And that's the whole point. I, I think it's, it's, it's, it's a terrible misconstruction to, to, to say that those deadlines that pertain to testifying expert reports ...

CHIEF JUSTICE JEFFERSON: Would you agree it could be a little confusing to a lawyer in the case reading that order that it looks like-- I mean, it's a pretty broad, broad order. It looks like, to the extent these deadlines with respect to experts maybe in conflict with the statute. The deadlines established here take precedence.

MR. HARRIST: Well, I think the, the, the order taken as a whole, your Honor, would not be confusing to experienced litigators who have, you know, routinely entered into docket control orders and know about the disclosure of testifying experts.

And, and that language in the, in the docket control order actually pretty much tracks the rules pertaining to discovery and experts. You know, for example, if you go to Rule 194, you'll see 194.2. It, it, it says, you know, "You got to disclose testifying experts and their names, and information about what they're going to say." And then within that it says you, you need to provide reports and some other information for retaining testifying experts.

And that's-- this is a-- the real danger in allowing this language to, to, to, to say what the Fourth Court majority has allowed it to say is, is that, you know, we've got hundreds and I don't know maybe thousands of docket control order-- out-- orders out there in, in Med-Mal cases that could very easily be construed the same way. And, and, and, and it's easy for the parties to make it clear. And ...



JUSTICE HECHT: Is this a form order?

MR. HARRIST: It, it, it is in the form of a form order. It's a ...

JUSTICE HECHT: I mean is this, is this the same kind of order that would be entered in a sworn account and a slip and fall, and in a traffic case and ...

MR. HARRIST: It's very much like that, your Honor. And I think ...

JUSTICE HECHT: How much like it is, it is what I'm trying to get at?

MR. HARRIST: Well, I-- you know, I just-- Justice Simmons wrote a dissent. And what she said there, it's just like the, the orders that are given to the public in Bextar County.

JUSTICE HECHT: And is that true? I mean is it ...

MR. HARRIST: That, that is true. It, it-- you, you will find deadlines for, for testifying expert designations and, and reports from them and then ...

JUSTICE BRISTER: But I mean, how does it, how does it happen? I mean, some, some Courts they've got this printed out in the form when you come in the hearing and the judge says, "What date do you want for this, what date for that," and you just write in the dates. Did you-- did the Judge print this up, did you all print this up -

MR. HARRIST: Your Honor ...

JUSTICE BRISTER: - how did this order get prepared?

MR. HARRIST: This form was presented to us after we got a special trial setting in, in Bextar County. It was presented to Mr. Biechlin by the plaintiff's counsel. They're the one's who drafted it and they gave it to us to sign. And I know from talking to him he looked at it and, and this is just-- this is your, your standard form. I mean, that's what it is.

JUSTICE BRISTER: In all cases.

MR. HARRIST: In all cases.

JUSTICE O'NEILL: Well, I ...

MR. HARRIST: Now, you wouldn't make the Chapter 74 reference obviously in all cases. But that's something that, that we did want to do, is go ahead and get started with discovery.

JUSTICE O'NEILL: The standard docket control orders, I understand have these dates and these terms in it. And that was going to be my question, is the-- that non-numbered paragraphs, it's further ordered. I presumed that the, the second one before in the Chapter 34 is not in your standard docket control order that a Court issues. But what about the first one? Order to the extent these deadlines maybe in conflict with deadlines set by rule of statute, these take precedence. Is that standard form if the order comes from the Court?

MR. HARRIST: Your Honor, in, in Bextar County, we, we don't, we don't typically-- we're not typically given forms to, to fill out. I think I've been in Harris County before and I've gotten forms like that what you're saying but I do believe that that is a pretty standard provision that you would see in a docket control order.

Basically, just belt suspenders, you know, just in case any of the deadlines we have above are going to conflict with what you'll see in the rules or, or elsewhere. We're going to make these control. And I think that's just the-- a typical provision that you would see in lots of docket control orders.

JUSTICE HECHT: And whose initials are on the front?

MR. HARRIST: Your Honor, I can answer that. That's my legal assistant's, it's the copy of my own legal assistant's. And I, I think it's-- you know, I, I would, I would like to direct the Court to, I think it's *Murphy v Russell*, a, a very good decision that, that this

Court has, has made; a good discussion of the difference between testifying experts and reports they might have, and expert testimony and how that is very distinct from this, this Chapter 74 threshold report. And, and, and the reason I'm making that point is because the, the docket control order talks about testifying experts. And, and then, basically ...

CHIEF JUSTICE JEFFERSON: You know, we're talking a lot about obviously you have, you know, a great experience and Mr. Anderson does but--let's say you're, you know, a relatively new lawyer and, and you, you, you've just taken on one of these cases and you get this order.

You-- you're, you know, you're aware this is Chapter 74 case. But you get this order and it says, "Well, notwithstanding any rule in Chapter 74 or statute or, or any rule in civil procedure." Your deadline for, let's see-- designate expert-- designating expert witnesses and providing a written report, a deadline doesn't expire until January 11th which is sometime after, you know, the deadline under Chapter 74.

I'm, I'm just, you know, and then if we enforce Chapter 74 notwithstanding this order which seems to expand it, it seems to, to work an unfairness on both that new lawyer but more importantly his or her client, I guess.

MR. HARRIST: Well, and, and you're talking about the exper-- inexperienced lawyer, who is just out of law school, you ...

CHIEF JUSTICE JEFFERSON: Oh, not necessarily, you know, but any, any, any lawyer who doesn't have the, the level of experience that you bring in these sorts of cases who is looking at an order that says, "I'm the Judge, I'm ignoring the statute. You instead comply by the deadlines I set here." And you know, you're the lawyer in that court, you say, "Yes, your Honor, I will certainly do that."

MR. HARRIST: Well, your Honor, I would-- that's a good point, I would say, you know, if, if, if this lawyer does not know the first thing about Chapter 74 and in doing medical malpractice cases then there might be some confusion there.

JUSTICE MEDINA: Maybe there is confusion, by the Judge then, maybe the Judge doesn't know the proper rule there and you know, what, what are you to do?

MR. HARRIST: Well, your Honor, I think-- well, the most of the judges I've been in front know about the 120-day requirement. And, and, and, and, and I can say too that ...

JUSTICE MEDINA: That makes the answer easy. There might be one or two who doesn't and you get that scenario -

MR. HARRIST: Well, I'm sorry, your Honor ...

JUSTICE MEDINA: But, we're back to the question, how much discretion, if any, do you give the trial judge? Say judge you're an idiot; this is not the law say or it's [inaudible]...

MR. HARRIST: Not at all, your Honor. You know, I think, I think what would be important to point out is that, you know, the Intermediate Courts of Appeals that have looked at this issue and there are many of them, have all decided that the DCO does not extend the deadline. And, and, and the, the DCOs-- and the language in the DCOs in those cases is like this language or similar to it. And, and, and that's what I would point to the Judge, if the Judge didn't know that. Is, is that, you know, if the argument was being made and, and in fact in the San Antonio Court of Appeals-- what was, what was surprising about this is that, you know, we did have four to three split with the en banc court on this issue. But you know, we had opinion in *Olveda v. Supe-- Sup-- Supulveda* out of the San Antonio Court-- San Antonio Court

of Appeals just a couple of years earlier, where, where the court said with this-- and, and, and the language in that case is just like the language we have in the DCO here.

The court said, "When you're talking about retained expert, you're talking about testifying experts." And, and you know, what's, what's a little, little troubling to me is, is the-- I'm sorry, I'm out of time. Any more questions?

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel.

MR. HARRIST: Thank you.

CHIEF JUSTICE JEFFERSON: We'll hear from you on the rebuttal. The Court is ready to hear argument now from the respondents.

COURT MARSHALL: May it please the Court. Mr. Ar-- Mr. Anderson will present argument for the respondent.

ORAL ARGUMENT OF JEFFREY C. ANDERSON ON BEHALF OF THE RESPONDENT

MR. ANDERSON: First, it's an honor to be here, my first time. And I would like to take the opportunity to introduce my co-author who is here today, Ms. Jessica Lambert. I'm glad that she is able to be here since she is due to deliver in a few days actually. So ...

CHIEF JUSTICE JEFFERSON: Not today, though?

MR. ANDERSON: Not today, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you.

MS. LAMBERT: Thank God.

MR. ANDERSON: Your Honor, this case is-- the issue in this case is, is very clear. It has to do with the, the agreed docket control order. That was the issue before the trial court, the issue before the Fourth Court and the issue here today. Does it constitute an agreement under the procedural rules of Texas to, to extend the deadline for the filing of the 74.351 expert report. As this Court has said when you're reviewing ...

JUSTICE HECHT: Just to be clear, regards an earlier question -

MR. ANDERSON: Yes, Sir.

JUSTICE HECHT: - do you agree that there has to be an agreement?

MR. ANDERSON: Yes, I do.

JUSTICE HECHT: So the trial court couldn't just order it on its own?

MR. ANDERSON: Absolutely, your Honor, it has to be an agreement to, to extend the deadlines and I think we have one here and I'll, I'll, I'll address that here in a minute as to why I believe this order is, is very clear in that regard.

JUSTICE HECHT: And, and, and I suppose in doing so we would look at this order like we would-- any other agreed order and interpret it like a contract.

MR. ANDERSON: As any other agreed order as this Court has said in National Union of Fire Insurance Company v CVI and I, "whether a contract is ambiguous is a question of law that must be decided by reviewing the contract as a whole in light of the circumstances when the contract was entered." And I think that's important here because that puts this whole issue about was there agreement or was there not an agreement before the Court.

Let me go ahead and if, if the Court will indulge me just briefly, let me just run over a brief timeline of what happened. This suit was



initially filed in federal court in April, April 15, 2004 and it was filed against the United States of America and Spectrum and Sims. We had to file it in federal court because the Federal Court Claims Act said that's the venue we had to choose.

After the issue was joined, the scheduling order was entered by all of the parties recommending deadlines by which certain documents were to be produced including expert reports.

Spectrum and Sims, didn't request an expert report be submitted within 120 days even though they were aware that Section 74.351 fell under Sub-chapter (s)-- (h), excuse me -- of the statute that says that is a procedural provision. And they should have known that we're in federal court, usually federal procedure controls.

The federal court then entered the scheduling order just as the parties had agreed to. And the parties then undertook discovery in federal court without any restrictions.

Spectrum and Sims then sat silently during this time about the 74.35 report until after 120 days had run in federal court, at which time they filed their first motion to dismiss for failing to file the 74.351 report.

JUSTICE MEDINA: Well, I may be confused here.

MR. ANDERSON: Yes, Sir.

JUSTICE MEDINA: Which wouldn't be surprising but why is the burden on them, why can't they just sit back and make sure that you do what you need to do in filing an expert report. When you don't do it, file the motion like they did so here?

MR. ANDERSON: Yes, Sir, because as the Honorable Xavier Rodriguez has said when he denied their motion on November 16, 2004, when you're in federal court with federal procedure and there is a conflicting state procedural rule then the federal rule takes precedence. So when applying the eerie decision, the

JUSTICE MEDINA: Was if ...

MR. ANDERSON: - defendant knew or at least should have known that there will be a question about whether or not the 74.351 timeline would be initiated as a-- as an operation of, of the law rather than having to request such a report under Rule 26.

And basically, what Judge Rodriguez said is that, 74.351 is as the statute alleges, it is procedural and because it's procedural Mr. Defendant, if you want an expert report, -

JUSTICE BRISTER: And that's been--and this is -

MR. ANDERSON: - all you had to do is ask for it.

JUSTICE BRISTER: - and this is, and this is all a fascinating question, but we-- we're not going to decide that now.

MR. ANDERSON: I understand.

JUSTICE BRISTER: The quest-- the question here is just: Is this an agreement?

MR. ANDERSON: And I'm-- in, in laying the precedence ...

JUSTICE BRISTER: And I don't, and I don't mind hearing the history of the world as it relates to whether this is an agreement but whether or not this is applicable in federal court doesn't help me at all on that, does it?

MR. ANDERSON: Well, the, the issue I believe that Justice Medina was asking me about was whether or not-- I think the federal court case would even initiate their requirement for a, a report. Or whether you could get a report in federal court within a 120 days, is contemplated by 74.351. And of course, you certainly you could, but you have to ask for it under Rule 26, and Spectrum and Sims didn't do that.

JUSTICE BRISTER: Yeah, I've got a question about this, it's a--

you say it's an agreement but it's drafted as an order, correct? It's a docket control order signed by the Judge, the parties don't say, "We agree." It's not a Rule 11 or any. The parties don't say, 'We agreed to waive the deadlines.' The party says, "The judge orders that the deadlines are ineffective." Right?

MR. ANDERSON: It was an agreed order signed off by, it was an, an order created after a discussion with Mr. Biechlin, the lead counsel for Spectrum and Sims at that time because of the quandary that we are placed in. And that's why I was going over the timeline with the Court. Because in this-- this, this case is, is one of which there maybe other cases that are equally confusing because once this case then was dismissed, when the Court refused to exercise supplemental jurisdiction after dismissing the United States out of the federal case, it was returned to or it was sent to state court, a hundred or-- excuse me -- 400 days after it had originally been filed in federal court.

So we knew or at least Spectrum and Sims had alleged that the 120-day timeline had already passed while this case was in federal court. So when the parties were getting together to, to put together their recommendations regarding a docket control order in this case, this is the information that they had available to them.

This is the circumstances by which this order was created. Number one, suit had already been filed in federal court. It was a healthcare claim, it was a healthcare cause of action involving the same parties and the same cause of action. Spectrum and Sims knew that a claim had been filed and asserted that the 120 days had run while the case was in federal court.

After the lawsuit was filed in State Court on June 2nd, the Houston Court of Appeals entered the case of Mokkalala v. Mead and that case said basically, "Where a plaintiff re-files the same case against the same parties with the same cause of action, you don't get another 120-days." Mr. Plaintiff, we-- if you did that, you could just avoid the statute by just keep non-suiting the case, non-- over and over again until the statute ran, but you certainly would defeat the purpose of the 120-day report, so they knew that.

They also knew that it would, it would more likely not be impossible for Mr. McDaniel to timely file a, a, a report in State Court since the timeline had probably already run in federal court, so ended in and the parties had already participated in discussions. And there was no case holding that a suit filed in federal court it was not one that would initiate a healthcare claim that could initiate a 120 timeline

JUSTICE BRISTER: Let's, let's look at the language. Whoever the report-- the 74.351 report doesn't have to be verified. Right, doesn't have to be sworn to?

MR. ANDERSON: Yes, your Honor.

JUSTICE BRISTER: It's just a letter from a doctor. Doctor doesn't have to appear at trial, doesn't have to promise to attend, appear to trial. And filing-- sending a report to the the other side, serving a report is no indication that you intend to use that expert at trial, is it?

MR. ANDERSON: It's my opinion, your Honor.

JUSTICE BRISTER: And so if we were here another case where somebody sent an expert report, they had a dead-- expert deadline like this. They didn't designate anybody but they came in and said, "Oh, well, when we send them a report that was our designation." That wouldn't be enough, would it?

MR. ANDERSON: Probably not, but that's not the facts in this case.



JUSTICE BRISTER: So, but if sending the report is not enough to designate them at trial, how can agreement as to when and who's going to be designated for trial is enough to be the report?

MR. ANDERSON: Because in the docket control order that was a, a document that was discussed and created by my office but discussed and presented to the Court, there are two classes of experts that are addressed. One, are testifying experts. The other are retained experts. Retained experts have to produce a report. The retained experts may testify at trial, they may not testify at trial. The retained expert maybe a 74.351 expert or it maybe a consulting expert.

JUSTICE BRISTER: But 74.351 doesn't have to be retained, do they?

MR. ANDERSON: Yes, they do, Judge. I haven't been able to convince any physician to prepare a report critical of another physician where I have to retain them and pay for services.

JUSTICE BRISTER: Well, but I, I, I know some will do it privately. [inaudible] know but I'd like -

MR. ANDERSON: I'll be glad to take their names.

JUSTICE BRISTER: I might be wrong, but say the doctor did the something wrong, but I'm not going to testify to it. And I'm not going to testify against him at trial. But as we've -

MR. ANDERSON: That's not been my experience.

JUSTICE BRISTER: - somebody makes another case just previous, some-- this, this is just a, a Good Housekeeping Seal of Approval that there is some merit to the claim.

MR. ANDERSON: Uh-huh.

JUSTICE BRISTER: I'm not saying they're going to win -

MR. ANDERSON: At-- at that ...

JUSTICE BRISTER: - and I'm not saying I'm going to testify against them. So why your, your argument that retained experts-- there's nothing in 74.351 that says that expert has to be retained?

MR. ANDERSON: That's correct.

JUSTICE BRISTER: That's just your understanding of the way that it usually works?

JUSTICE WAINWRIGHT: Look-- when look at ...

MR. ANDERSON: That's the way it usually works. It's not just an understanding, Judge.

JUSTICE WAINWRIGHT: Looking at the rules of procedure 194.2(f) sub (4), if the expert is retained by or employed, or otherwise subject to the control of a party, then they have to produce certain things which suggest a definition of retained experts under the rules of civil procedure. The expert that you hire to provide an expert report under Chapter 74, you don't have to produce these things for that re-- for that expert, do you?

MR. ANDERSON: Not unless he subsequently is identified as a testifying expert at trial in which case we have to produce all of those things.

JUSTICE WAINWRIGHT: And you didn't do that in this case?

MR. ANDERSON: We haven't gotten that far yet.

JUSTICE WAINWRIGHT: So, so I guess what I'm hearing is that the implied definition of retained expert under the rules, at least 194.2, seems to be different from what you're saying you intended retained experts to mean under this docket control order that you drafted?

MR. ANDERSON: No, not necessarily. And that's why the language in the paragraph that says that the deadline set out here take precedent was written so generally, so that if there was a conflict between the rules or other deadline set in statutes that the parties could look at a specific day in which the expert report was going to be produced and

could rely upon that day.

This-- At this particular point and in-- and even today, and even in lieu of *Leelan v. Brandel* of this Court's decision back in June, there still hasn't been a definitive determination about whether or not a suit that's filed in federal court actually initiates the 120-day time line.

JUSTICE WAINWRIGHT: Well, let, let me, let me be a little clearer. I think, I think my earlier statement might have been accurate, I'm may have been confusing to you. Under the rules, a retained expert has to provide certain things, you have to provide certain things for retained expert's discovery, 1-- 194.2. Some experts that you generically retained, you may not have to provide this discovery form, correct, under 194.2?

MR. ANDERSON: Yes, Sir.

JUSTICE WAINWRIGHT: So in your docket control order, did you mean the-- for retained expert to refer to the narrower 194.2 definition or a broader definition of retained, generically retained?

MR. ANDERSON: I, I-- I'm, I meant it to include retained experts including those retained who may only be asked to, to prepare a expert report utilized to pursuant to provision 74.351.

JUSTICE JOHNSON: Well, I couldn't-- what about defendant? What if they had-- What if the defendant have retained experts just to consult and they had reports. Does this, does this require them to give you that?

MR. ANDERSON: No, absolutely not, your Honor.

JUSTICE JOHNSON: Or if you retained experts and you don't want to provide a report? And you just want to find out what this about. Does this require you to give that?

MR. ANDERSON: No. What, what it does is if the defendant or the plaintiff uses a retained expert and they subsequently intend to rely upon that expert's testimony or evidence, then, then they have to comply and produce the documents that are, are require by the, the rules.

JUSTICE JOHNSON: So there are retained experts-- there could be retained experts, that are not covered by this?

MR. ANDERSON: That's why the, the-- whether it's-- I'm certain this is possible.

JUSTICE JOHNSON: Okay. So you got a testifying experts and retained experts provided that the retained experts-- It looks like we may have something that's not so unambiguous after all.

MR. ANDERSON: The, the, the disclosure requirements of ...

JUSTICE WAINWRIGHT: In other words, if I may?

MR. ANDERSON: I'm sorry.

JUSTICE WAINWRIGHT: In other words, you said that under your drafted docket control order, retained experts only have to produce written report in CV, if they subsequently are used in a way that triggers that under the rules. Is that -

MR. ANDERSON: If they relied ...

JUSTICE WAINWRIGHT: - is that accurate?

MR. ANDERSON: Yes, your Honor, if they're relied upon by ...

JUSTICE WAINWRIGHT: But that's not in this docket control order, you don't say that?

MR. ANDERSON: I did the best we could, then thought we had the language that was necessary to affect the object to the parties. And that was to clarify when that 74.35 order was going to be produced. And it was all because of the, the filings in federal court, the filings in, in state court and the fact that I believe just a pure reading of

the statute today that the 120-day time line expired while the case was in federal court.

The only way then that that report can be produced would be by this docket control order which constitutes an agreement to extend that deadline to a date specific. Even if my client had filed her, her expert report when she filed her petition, it could still be argued that without an agreement it was already too late.

So under the circumstances I think, looking at the document in light of the circumstances to the parties, there were a lot of gray areas. We were on the fog about a lot of, of what the impact of something was in. This document was intended to create a specific timeline by which the defendant was going to be given an expert report.

JUSTICE HECHT: And that, that makes quite a bit of sense if the deadline had been 120-days from the filing of this case, but why would the defendant agree to extend it another what? Four months?

MR. ANDERSON: The quid pro quo would be the, the continued participation in discovery that had already been initiated in, in federal court, but continue then for six months in state court which is the second paragraph in the docket control order that basically said that the defendant can participate in discovery without limitations even those imposed by Section 74. That was the, that was the quid pro quo to the defendant to go ahead and, and do that. But the, the problem is ...

JUSTICE HECHT: And the-- and the other thing is-- the other part of I'm having trouble with is by the time discovery is completed or been extensively conducted in the federal court and then again in the state proceeding by January of 2006, does anybody care what the expert report says?

MR. ANDERSON: Well, I furnished the expert report on January 11th to the defendants in accordance with the docket control order. Then three weeks later, the defendants filed their, their motion to, to dismiss based upon not filing within 120-days. They never challenge the, the report on its adequacy or the qualifications of the expert to give the report just that they hadn't been filed in 120-days. And also my ...

JUSTICE HECHT: Well, usually the purpose of the report is to kind of indicate early on that this case has some substance to it. By January of 2006, surely, you knew about as much about the case as could be known about it.

MR. ANDERSON: Well, I don't know if we knew all about it. But we knew enough about it, both in federal court and in state court, to know that: Number one, the ca--case wasn't a frivolous case which was the direction of the legislature or their-- the purpose for the statute that set out by the legislature. And it, and it wasn't one that was completely meritless. In another words it was, it was a prima facie case that was supported by an expert testimony.

So the issue in the case is: What did we know when we entered the docket control order and what didn't we know? And what we didn't know was, what was the, the 120-days.

Given them Morkala decision that said that just because I re-filed the case in State Court, it was, it was a change from federal to state court. And a little bit different than Morkala which was just as repetitive, non-suit by the plaintiff.

In this case, we were involuntarily dismissed out of the federal court and has to file back in state court again. And we filed the same cause of action against the same parties that we had in state court. And that was the dilemma that we were faced with when we entered this



order.

If this order does not constitute an agreement of the parties to extend the deadline, when did the deadline run? Did the deadline run in federal court? Did it run 120-days after the case was refiled in state court. I mean, we didn't know that then, we don't know that now.

JUSTICE BRISTER: But it wouldn't matter for this case because either one of those would have run before it was sent.

MR. ANDERSON: In, in this case it wouldn't matter because the 120-days ran in federal court not in, not in state court.

JUSTICE BRISTER: But even if it didn't run in federal court, you have a new one in state court, it ran too.

MR. ANDERSON: It ran in state court. That would be correct.

JUSTICE HECHT: Suppose in another case we have the same docket control order but none of these extraneous facts about first filed in federal court, confusion about when the deadlines run, we just have this simple order in a simple case, would it extend the deadline too?

MR. ANDERSON: You mean if the circumstances were different would the order mean something different, I don't think so. The order of the paragraph is very clear. It says the deadline for identifying testifying experts and retained experts in producing a report is a specific day and that take precedence over any of the rules in statutes. That is, that is very clear. If you just looked at the four corners of the document in a vacuum, that's what it says. And I-- I don't believe there's any ...

JUSTICE BRISTER: And you say the order is unambiguous?

MR. ANDERSON: It is absolutely unambiguous, your Honor.

JUSTICE BRISTER: If it was ambiguous, trial court found against you, right?

MR. ANDERSON: It is, I don't know what is the basis for the trial court's decision was they-- I requested but they didn't enter finding of facts and conclusion of law.

JUSTICE BRISTER: Well, I mean should that count for something it is drafted as a Court order? And the Court says that's not what this provision means.

MR. ANDERSON: No, it shouldn't, your Honor. Because the question of this contract is matter of law for the Fourth Court and this Court to determine.

CHIEF JUSTICE JEFFERSON: Any other questions? Thank you, Counsel.

MR. ANDERSON: Thank you, your Honor.

COURT MARSHALL: May it please the Court, Mr. Biechlin will present the rebuttal for the petitioner.

REBUTTAL ARGUMENT OF THORNTON, BIECHLIN ON BEHALF OF PETITIONER

MR. BIECHLIN: May it please the Court.

JUSTICE GREEN: Does it make any difference whether it's an order or it's, or it's an agreement, a Rule 11 agreement?

MR. BIECHLIN: I, I think, I think not. I, I think that if it is agreed between the parties, I think that if there is an agreement and and is signed off on by the Court as an order, I, I would say, not. The ...

JUSTICE BRISTER: There was a little difference. I mean, a Rule 11 agreement, you just file with the Court and it doesn't matter whether the Court agrees with it or not.

MR. BIECHLIN: That's true, your Honor.

JUSTICE BRISTER: But yawl's was kind of a conditional agreement. I assume the Trial Judge didn't have to accept your trial setting?

MR. BIECHLIN: The way, the way it works in Bextar County -

JUSTICE BRISTER: Are Judges, are Judges in Bextar County such pushovers that they let lawyers tell them when they're going to try the cases?

MR. BIECHLIN: The way it works in Bextar County, your Honor, we, we went into the monitoring court, which assigns trial settings, you can't get a trial setting, especially a special setting without the approval of the monitoring judge.

The monitoring judge makes the assignment of the trial date. Then typically what happens and what happened in this case is the parties say, "Your Honor, we can agree on dates, we can agree on deadlines." And they leave the courtroom, go outside and if you can reach an agreement then you fill in the blanks and if you can't, you go back in.

JUSTICE BRISTER: But it would have to be conditioned on the Court's approval.

MR. BIECHLIN: Yes, Sir, that's correct.

JUSTICE BRISTER: So it's, it's a little different from a written agreement that's enforceable, Rule 11 and

MR. BIECHLIN: Immediately.

JUSTICE BRISTER: This one is conditional?

MR. BIECHLIN: In that respect it would be, your Honor.

JUSTICE: And the condition was satisfied, the Judge approved it?

MR. BIECHLIN: That's correct.

JUSTICE WAINWRIGHT: Is this a form order?

MR. BIECHLIN: It is in essence a form order. It is very typical of almost all the docket control orders that I am familiar with and have signed over the years. The, the differences in that order, every, every lawyer has his or her own preferred form. The similarities are in the numbered of paragraphs. The differences are in the, the orders at the end.

My typical docket control order does not have the paragraph that, that talks about conflicts with other statutes or rules. The typical one that I've signed doesn't talk about doing discovery it-- each party doing discovery notwithstanding Chapter 74.

JUSTICE WAINWRIGHT: But, you don't see any conflicts in this order base on your position with Chapter 74 -

MR. BIECHLIN: Well, ...

JUSTICE WAINWRIGHT: -You don't think retained experts includes the expert that provides an expert report?

MR. BIECHLIN: I, I believe and, and my understanding of the way this was drafted, because I, I have run into problems in the past with a concern about experts who are not retained experts in particular medical malpractice cases we have a, a lot of times, occasions to use the testimony of treating doctors. We have no control over those experts. We expect them to be identified by each party because if the party intends to call them or may call them as an expert, it should be identified so we know about them.

JUSTICE HECHT: Have the treating physicians been deposed or taken discovery from them before this January of 2006 deadline?

MR. BIECHLIN: Not in this case, your Honor.

JUSTICE HECHT: Any another experts that were deposed before this deadline?

MR. BIECHLIN: No, your Honor. The, the, the distinction that-- for better or for worse the, the distinction that was intended by me at

least in referencing designation of experts and reports and CVs from retained experts was really because the retained experts are the ones that are controlled by the parties. They are the ones from whom you can get a report. You can't get a report from a treating doctor. You can't get a report from someone that don't you don't have any control over.

So that clearly was my intention. And at-- as long as Mr. Anderson is talking about the circumstances giving rise to this docket control order, I think one circumstance is very important that hasn't been discussed is: What was in the motion to dismiss that we filed in federal court.

In that motion and the majority made reference to this in, in its opinion. In that motion, we spent nearly three pages and an entire section taking a position that the scheduling order in that case in federal court, did not constitute an agreement between the parties. Even that was an agreed scheduling order did not constitute an agreement by the parties to extend the deadline on the Chapter 74 report. They knew that. We knew that. And it's our position ...

CHIEF JUSTICE JEFFERSON: And there's-- And there's similar language in, in there about this order and it takes precedent over conflicting rules or statute?

MR. BIECHLIN: In the federal court?

CHIEF JUSTICE JEFFERSON: Yes.

MR. BIECHLIN: I doubt it very seriously, your Honor. That was a-- that was an order that was more than likely, it's been a long time. But form orders supplied by the federal court that we sat down and filled in the blanks to and, and agreed to.

JUSTICE WAINWRIGHT: So I'm going to presume then that you all in, in discussing the agreed docket controlled order that's before us today did not discuss whether it specifically extended the Chapter 74 expert report deadline.

MR. BIECHLIN: Absolutely, did not.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you Counsel. The cause is submitted. That concludes the arguments for this morning. And the Marshall will adjourn the Court.

COURT MARSHALL: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

2008 WL 4609918 (Tex.)