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Supreme Court of Texas.

Tyler Scoresby, M.D.

v.

Catarino Santillan, Individually and As Next Friend of Samuel Santillan, A

Minor.

No. 09-0497.

November 9, 2010.

Appearances:

Michael A. Yanof of Stinnett Thiebaud & Reminton, LLP and David L. Pratt of Decker, Jones, McMackin, McClane, Hall & Bates, for petitioner.

Jason C.N. Smith of The Law Offices of Art Brender, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first case, 09-0497, Scoresby v. Santillan.

MARSHAL: May it please the Court, Mr. Yanof and Mr. Pratt will present argument for the petitioners. Petitioners have reserved five minutes for rebuttal. Mr. Yanof will open with the first ten minutes and Mr. Hall will present the rebuttal.

ORAL ARGUMENT OF MICHAEL A. YANOF ON BEHALF OF THE PETITIONER

ATTORNEY MICHAEL A. YANOF: Mr. Chief Justice, Justices, may it please the Court. This case is to Chapter 74 what Palosios was to Article 45-90I that once and for all, a case in front of this Court to address the no-report versus deficient-report issue and in doing so ensure that the hard-and-fast deadline and mandatory dismissal for failure to timely serve an expert report as defined by the statute is carried out per the legislative intent. I'll be addressing issue one whether some documents are so deficient that they constitute, in effect, no report and, therefore, fall within the Badiga scenario. Counsel for Dr. Ducic will be addressing issue two, whether the letter from Dr. Marable, in fact, fits into that category, the third category of reports or Badiga scenario as Justice Johnson has called it. On issue one, respondent argues that this Court lacks jurisdiction on two primary

grounds. The first is because interlocutory appeals are final and, therefore, not reviewable by this Court. And the second is because the Trial Court granted an extension that is not reviewable based on 51.014 (a)(9) of the Civil Practice and Remedies Code. On the first part of the jurisdiction, this Court has recognized for a long time that while interlocutory appeals are generally final, this Court can always review whether the Court of Appeals properly exercise or denied its jurisdiction, which is exactly what happened here. This Court has done this on Chapter 74 interlocutory appeals a number of times the last few years. In *Badiga*, this Court reversed the Court of Appeals' failing to exercise its jurisdiction. This Court also looked at the jurisdictional issues on an interlocutory appeal in *Lewis and Ogletree*.

JUSTICE DAVID M. MEDINA: Let's say you're correct on the jurisdiction issue, let's talk about your so-called hard-and-fast dismissal and the legislative intent. I thought the legislative intent was to let meritorious claims go forward and claims that aren't meritorious to be resolved at the trial court.

ATTORNEY MICHAEL A. YANOF: You're correct, Justice Medina. This Court long ago in *Palacios* in interpreting Article 45.90(i) said in interpreting an expert report, the claim is supposed to have merit and that is one standard by which it is to be determined. How it --

JUSTICE DAVID M. MEDINA: If it's a hard-and-fast rule, what's the purpose of the extension?

ATTORNEY MICHAEL A. YANOF: The purpose of the extension is to offer the trial Court tremendous discretion in granting an extension for a merely deficient report. The question becomes if, can a report be so deficient and so lacking in all of the elements required of a report that while a piece of paper has been timely served, it is, in effect, no report.

JUSTICE DAVID M. MEDINA: Where does it say that in the statute?

ATTORNEY MICHAEL A. YANOF: Well the statute defines an expert report as needing four things.

JUSTICE DAVID M. MEDINA: Well where does it say there's a third category, a report that as Justice Willett and Justice Johnson said meets that so-called third category. It's nowhere in the statute.

ATTORNEY MICHAEL A. YANOF: It does not expressly say that.

JUSTICE DAVID M. MEDINA: So it's a fiction.

ATTORNEY MICHAEL A. YANOF: Well I would respectfully disagree. 74.351(c) says that an extension is available when elements are found to be deficient. And if it's a fiction to say that there's a third category, then I would say it's also a fiction to say in *Badiga* that you can appeal an extension when one is granted when no report is timely served. The Court in that case said if no report is timely served, then an extension is not available and that decision is appealable because dismissal is mandatory. What we're simply arguing is if a report or a document is absent and/or deficient in all four elements, it ceases to be a report as defined by the statute. It doesn't meet any of the elements of the statute and it cannot be, by definition, a good faith effort.

JUSTICE DON R. WILLETT: What if it meets three elements? What if it meets three elements, only one is deficient?

ATTORNEY MICHAEL A. YANOF: What we are advocating is if four elements are absent and/or deficient, this would be a bright line test once and for all to give to courts of appeals and trial courts to tell them across the state that's the bright line test.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay. So to answer his question if it has three elements and not four then the trial court can grant an extension, but if it missing all four then it is no report, is that your position?

ATTORNEY MICHAEL A. YANOF: I think the answer to that's yes. 74.351(c) contemplates that multiple elements can be deficient and I really don't know how I could argue that three would be not enough, but two would be okay to grant an extension. If it contains nothing that a report is supposed to contain sufficiently, it is no report. And I would say anything short of that --

JUSTICE EVA M. GUZMAN: What do you mean by that, a report that fails to address each element or a report that addresses them, but not in enough detail so as to allow the trial fact to determine that the case has some merit? I mean what are you talking about? Where do you draw that line?

ATTORNEY MICHAEL A. YANOF: I think, again, if we get into drawing lines of are there elements absent versus deficient, it's a gray area and I agree with Justice Medina, at some point that does become a fiction because absent versus deficient can be in the eyes of the beholder, but a report that simply misses the mark on all four elements. Whether one is absent and three are deficient or all four are deficient or all four are absent, whatever the case may be --

JUSTICE PHIL JOHNSON: What if we have a dentist. What if this were someone whose this letter that was submitted in this case was a dentist saying these doctors committed malpractice in doing ENT surgery. Is that good enough? Is that a report? We don't even have a purported expert in that case.

ATTORNEY MICHAEL A. YANOF: I think you can get into difficult scenarios when it's somebody that's clearly not qualified, but if we are to assume in your hypothetical that that dentist who's clearly not qualified but--

JUSTICE PHIL JOHNSON: The dentist may or may not be qualified. Some dentists are M.D.s also --

ATTORNEY MICHAEL A. YANOF: Mmm-hmm.

JUSTICE PHIL JOHNSON: So when we say you have to be absent to all four, we just take someone who says these doctors were negligent and that's going to get them, that's a good enough report is your position.

ATTORNEY MICHAEL A. YANOF: Well, Justice Johnson, remember the issue is not whether the report is good enough. The issue is is the document so deficient that a trial court cannot even exercise its discretion in considering an extension. There's no doubt that report you're discussing would be deficient.

JUSTICE PHIL JOHNSON: I'm not talking about deficient. I'm talking about so that it is some report. I used poor phraseology. A report by someone who doesn't even purport to be an M.D., no purporting to be qualified, but yet they just put down an opinion that these doctors are deficient and your view would still be some report?

ATTORNEY MICHAEL A. YANOF: Well I don't think it's some report if all four elements are deficient and I'm counting the fourth element being the qualifications of the expert. If that dentist or whoever it is, it may be an M.D. or not an M.D., if they miss the mark on all four elements that the statute defines as an expert report, it ceases to be a report. It is no report.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me ask, let me ask this, if, let's say it's a no-report case, but there is no interlocutory appeal taken, okay. If something was submitted, but it lacks all four elements, which is what you contend this case is. But let's assume there is no appeal taken and the case is tried and during the trial of that case there's evidence, conclusive evidence of each of the four elements showing medical malpractice. On appeal from that final judgment would the doctor be able to go back and say the case should have been dismissed initially so that judgment goes away, it's void or at least can't be enforced? Do you see what I'm saying?

ATTORNEY MICHAEL A. YANOF: Yes. I don't think the defendant would be able to argue it's no report at

that point and it would depend on what's being reviewed. If the judge granted an extension --

CHIEF JUSTICE WALLACE B. JEFFERSON: That's the question, what would be reviewed? Would it be the failure to dismiss or would it be the final judgment?

ATTORNEY MICHAEL A. YANOF: Well, the final judgment would certainly be appealable, but the Chapter 74 report would be irrelevant to the final judgment at that point.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay.

ATTORNEY MICHAEL A. YANOF: And whether or not the claim has merit would be irrelevant. At that point, you'd be appealing on sufficiency of the evidence.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay.

JUSTICE DALE WAINWRIGHT: In order to get a continuance is it your position that a good report, a good faith report has to satisfy Robinson Havner on all of the elements or at least all of them have to be mentioned? What's the standard you think has to be met there?

ATTORNEY MICHAEL A. YANOF: For the qualifications? Well --

JUSTICE DALE WAINWRIGHT: Let's put qualifications to the side. Let's just talk about standard breach causation. Do they have to satisfy, does the report have to satisfy Robinson Havner on all three?

ATTORNEY MICHAEL A. YANOF: I don't think the standard is as high as an evidentiary standard. It's a hurdle, but it's not a summary judgment hurdle and it's not even a Robison Havner hurdle. If you get into that, then you're basically saying it's got to be trial ready evidence. It doesn't have to be that. In numerous cases on causation, breach and standard of care, it simply has to lay it out sufficiently. It doesn't have to be the type of evidence you could use at trial. It can be conclusory in the sense of it relies on hearsay and those types of things.

JUSTICE DALE WAINWRIGHT: Expert testimony can rely on hearsay. Are you saying there's expert reports in satisfying this standard on the three elements we're talking about there's a middle ground between conclusory and the Robinson Havner standard that applies for expert reports?

ATTORNEY MICHAEL A. YANOF: Well it --

JUSTICE DALE WAINWRIGHT: It sounded like you said it needed to be more than just bare conclusory, but it doesn't need to satisfy Robinson Havner. What does it need to satisfy?

ATTORNEY MICHAEL A. YANOF: Well, I think Robison Havner you start getting into testing the experts' theory and in all honesty, that's impossible to do from the four corners of a report. That's what depositions are for. The four corners of the report has to lay out the very things from Palacios to the cases the Court has most recently decided. It has to lay out a standard of care.

JUSTICE DALE WAINWRIGHT: But to what degree of confidence though? If it's a make it statement that the standard of care is A, the doctor breached it and caused damages, three sentences, is that enough?

ATTORNEY MICHAEL A. YANOF: If it says nothing more than what you've said, that's conclusory, it's deficient.

JUSTICE DALE WAINWRIGHT: So conclusory's not enough, Robinson Havner's too much. What standard are you asking this Court to establish?

ATTORNEY MICHAEL A. YANOF: Well I think it's some of the very same things this Court said in Palacios. What care was expected but not given? That's on standard of care and breach that's the standard. What should have been done that was not done? On causation, it is not enough to use possibility. Now you don't need to necessarily use reasonable medical probability or magic words, this Court has also said, but it has to be more than possibility because it says you have to show it caused the injury, but it is not tested, I don't believe, on a Daubert challenge or a Robinson Havner type of challenge.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it a legal sufficiency question? Is it a question of legal sufficiency? I mean what if, you know there's some small break in causation, but it's a pretty thorough report otherwise, would you say that's a no-report scenario?

ATTORNEY MICHAEL A. YANOF: Well I think it's, it's difficult to evaluate it in legal sufficiency terms because there's not true evidence before the Court. It's the four corners of the report is all that needs to be looked at it. I mean it's not legal or factual sufficiency. It's simply what is said in the four corners of the report, keeping in mind that you cannot make inferences, that it cannot simply make the ball of assertion without support otherwise and it has to tie the facts of the case and it can be facts as the expert understands them. It doesn't need to be undisputed facts, but tie the facts to the actual care and a breach and say that that actual breach caused the injury claimed.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counselor. Any further questions? We'll hear from your Co-Counsel.

ATTORNEY MICHAEL A. YANOF: Thank you, Your Honor.

ATTORNEY DAVID L. PRATT: Thank you, Your Honor. Good morning, Your Honors. May it please the Court, in my few minutes before the Court, I want to take this discussion one step further and let me first apologize for the raspiness, I developed a cough on the way in last night so I'll try to be clear. But I'm going to take a step down the board now and talk about the letter that we do have from Dr. Marable in this case and discuss the four elements that Mr. Yanof discussed with the Court and the sufficiency of those elements for purposes of crossing this Chapter 74 hurdle. Now the standard as Mr. Yanof has suggested to the Court that we are asking is that when all four elements are either absent or deficient or both, then that simply doesn't meet the standard of an expert report under Chapter 74.

JUSTICE DALE WAINWRIGHT: Define deficient.

ATTORNEY DAVID L. PRATT: Pardon me, Your Honor?

JUSTICE DALE WAINWRIGHT: Define deficient.

ATTORNEY DAVID L. PRATT: Again, Your Honor, it's a gray area of absent and deficient.

JUSTICE DALE WAINWRIGHT: It's certainly it's not I know it when I see it. Is it?

ATTORNEY DAVID L. PRATT: It could be.

JUSTICE DAVID M. MEDINA: If it's a gray area, shouldn't that discretion be left to the trial judge?

ATTORNEY DAVID L. PRATT: It should, Your Honor, and that's I think why the statute is crafted the way that it is, but there has to be enough there to satisfy not only Palacios and the standards set forth in that case, but it still has to address each of those elements and when a report doesn't do that to some degree, then that's simply not a report. In this case, we have the first issue of qualifications. There's absolutely nothing in these three pages

that set forth Dr. Marable's qualifications. There was no CV filed along with this.

JUSTICE NATHAN L. HECHT: Two things, he was a neurosurgeon and he was a diplomat or something.

ATTORNEY DAVID L. PRATT: It does and that's all that it says, Your Honor. And --

JUSTICE NATHAN L. HECHT: You said nothing, but there were two things.

ATTORNEY DAVID L. PRATT: Well that, I think, goes along the lines of that simply sets forth that he's a medical doctor and he's a neurologist.

JUSTICE DEBRA H. LEHRMANN: But isn't that a line. I mean you're saying that if there had been nothing on these four elements, but that is something. So where is the line?

ATTORNEY DAVID L. PRATT: Well I don't know that that is something, Your Honor. I think that simply puts forth that he's a medical doctor, but as this Court has recognized in a number of cases, there is a line between one practice area that is qualified to, a doctor in one practice area that's qualified to render opinions on a given case while certainly that's not a broad line that's between them and you don't have to have an expert in one specialty offering opinions on just that specialty.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why shouldn't the rule be if, okay let's say we grant your argument there that being a neurosurgeon is not enough and so there's a motion to dismiss, but there's also a motion to cure. The claimant says I think I can fix that problem, Your Honor. Why shouldn't the line be that the trial Court has discretion if the report can be cured then the plaintiff has an opportunity to do it because I mean the whole goal of this is to make sure the claim is not frivolous, that it has some merit. So even when there's a deficiency as you claim there is in this report with respect to qualifications, it's possible to cure that deficiency. So why shouldn't the trial court have discretion to permit that to happen.

ATTORNEY DAVID L. PRATT: I think the key word in Your Honor's question is if. If it is curable and if we were dealing only with a qualifications issue here then that might be the case, but we're not just dealing with that. Element two standard of care, completely and wholly absent from this report. All that this report says with regard to standard of care and the paragraph that's been cited throughout all of the briefing is my opinion is that Dr. Dusik violated the standard of care.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay, but I'm the trial judge and I say yes this is deficient, Counsel, for the plaintiff. You have 30 days. I'm going to give you a maximum of 30 days to see if you can fix that and we'll know one way or the other within 30 days if you can fix that standard-of-care deficiency. And if you can then the case ought to proceed because there's merit to it and if you can't then it's going to be dismissed and this all happens pretty quickly. Doesn't that make sense?

ATTORNEY DAVID L. PRATT: It would make sense, Your Honor, again if that was the only problem, but when all four elements, when the qualifications, when the standard of care, the breach and the causation are either missing or not there, then that's simply not a curable report. If we were dealing with just this conclusory statement and the trial judge said go fix it --

JUSTICE EVA M. GUZMAN: Why isn't it curable though? They could theoretically go back and obtain a more thorough report. So it is curable hypothetically, theoretically, correct?

ATTORNEY DAVID L. PRATT: Your Honor, my time's up. May I answer?

CHIEF JUSTICE WALLACE B. JEFFERSON: You may answer.

ATTORNEY DAVID L. PRATT: May I have a few moments. It would be curable only to the extent that that element could then be cured by a subsequent report. That physician or that expert might be able to go back and expand upon that conclusory statement.

JUSTICE EVA M. GUZMAN: So shouldn't they get 30 days to go and do that? If they can't, then they're out.

ATTORNEY DAVID L. PRATT: If it's just that one, Your Honor, maybe, but when --

JUSTICE EVA M. GUZMAN: What if all four were just somewhat not as thorough as they could have been and it's hypothetically possible to go back and cure all of them, shouldn't you get your 30 days.

ATTORNEY DAVID L. PRATT: Then I think the answer to that is no, Your Honor.

JUSTICE DON R. WILLETT: Mr. Yanof said that 351C contemplates that more than one element can be branded deficient. So why is three good enough for an extension, but four is not?

ATTORNEY DAVID L. PRATT: Because the bottom line, Your Honor, is if every single element, if all four of them are absent or deficient then that simply cannot meet the standard.

JUSTICE DON R. WILLETT: But the statute contemplates that more than one element can be deficient.

ATTORNEY DAVID L. PRATT: It does, Your Honor, but if all four of them are then that simply can't fall under the category of good faith reports that are entitled to this type of extension to clear.

JUSTICE EVA M. GUZMAN: Is there a difference between absent and deficient in terms of evaluating whether it constitutes a report or a deficient report? Absent meaning not there versus deficient.

ATTORNEY DAVID L. PRATT: Well I think there's certainly a difference, Your Honor, between not there and being deficient. But the bottom line is if all four of them are one or the other, then that's when the line has to be drawn. Your Honor, do you have any?

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

ATTORNEY DAVID L. PRATT: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Smith will present argument for the Respondent.

ORAL ARGUMENT OF JASON C.N. SMITH ON BEHALF OF THE RESPONDENT

ATTORNEY JASON C.N. SMITH: May it please the Justices and distinguished Counsel, it is my honor to be here on behalf of Samuel Santillan and his family at the place where I was fortunate to begin my career. This case presents the issue for interpretation. The legislature clearly provided if an expert report was filed and the trial Court granted an extension, the Appellate Court had no jurisdiction to review the report. If the Court finds that there is a third category of reports, then this report clearly satisfies that. In this case --

JUSTICE NATHAN L. HECHT: Why wasn't a CV attached.

ATTORNEY JASON C.N. SMITH: I'm sorry.

JUSTICE NATHAN L. HECHT: Why wasn't a CV attached.

ATTORNEY JASON C.N. SMITH: I'm not sure, but I believe there was some difficulty getting it from the doctor's office. Sometimes these issues and the reports are more important to the lawyers than the doctors who have practices themselves and don't necessarily understand the impact of these deadlines.

JUSTICE PHIL JOHNSON: Well, but didn't you file a second letter from him dated that summer?

ATTORNEY JASON C.N. SMITH: We, we --

JUSTICE PHIL JOHNSON: And in that letter or CV indicated he testified quite a bit. So he knew what a deposition was and this doctor's not new to the legal process.

ATTORNEY JASON C.N. SMITH: I don't think he's new to the legal process. I just don't believe he's been involved in the legal process as of late. I'm not sure why the CV didn't appear, but as Justice, you point out, a CV was filed. An amended report was filed the day of the hearing and the doctors had the opportunity to challenge that new report.

JUSTICE PHIL JOHNSON: But the trial court was not considering the second one were they, as I understand from the briefs?

ATTORNEY JASON C.N. SMITH: They were not considering it. The doctors merely had the opportunity to challenge that, but rather than challenge the substance of the new report that addressed the areas that they complained of, they chose to fight the form of the first report.

JUSTICE PHIL JOHNSON: Which brings another question, your brief says that they have not challenged a second one and their brief says they have challenged a second one, which is it?

ATTORNEY JASON C.N. SMITH: Well I believe the record is that they have not filed a motion to dismiss based on that.

JUSTICE PHIL JOHNSON: Okay. So at this point, there's no challenge at all to the second letter by this doctor.

ATTORNEY JASON C.N. SMITH: There's no challenge and there's certainly, they have not sought a, they have not challenged nor have they sought a ruling from the judge challenging that order, that report.

JUSTICE PHIL JOHNSON: Going into the second letter, even though it wasn't considered, does this doctor say that he has ever performed this type of surgery or assisted in it or even seen one?

ATTORNEY JASON C.N. SMITH: This doctor says in the second report that he has seen one in that he has treated patients that have come out of this type of procedure.

JUSTICE PHIL JOHNSON: He treats them after the surgery.

ATTORNEY JASON C.N. SMITH: He does.

JUSTICE PHIL JOHNSON: So he's not been, he didn't, as I read his report he never, he's a neurologist not a neurosurgeon.

ATTORNEY JASON C.N. SMITH: That's correct. Your Honor.

JUSTICE PHIL JOHNSON: And a neurologist is an internal medicine person who does not operate as I understand, is that correct?

ATTORNEY JASON C.N. SMITH: That's my understanding, Your Honor. He did actually teach at John Peetersmith, which is the hospital where Mr. Santilan was treated, and he taught doctors with regard to how to determine whether or not you need this actual type of surgery or another type of surgery and which doctor should handle it, which is one of his allegations where the standard of care was breached.

JUSTICE PHIL JOHNSON: But isn't the standard of care how to do this surgery?

ATTORNEY JASON C.N. SMITH: Well the standard of care is two things. In his subsequent report, he has said it's how to do this surgery and it's who does this surgery. His opinion is that a neurosurgeon actually do the surgery. That's all set forth in the report that they have not sought a challenge of.

JUSTICE PHIL JOHNSON: Okay. So --

JUSTICE DAVID M. MEDINA: Is there ever a situation where the trial judge doesn't have any discretion and needs to dismiss a report because his opposing counsel said if every element is absent then it can't fall into a category of a good faith report and I think that's a very compelling statement.

ATTORNEY JASON C.N. SMITH: I would assert that the legislature has given us a bright line and it really is a bright line that punishes lawyers who are lazy and rewards lawyers that show some diligence and file something called an expert report. In Badiga, the Court said --

JUSTICE DON R. WILLETT: No matter what the content of that reported report is?

ATTORNEY JASON C.N. SMITH: That is our position. That is the bright line that the legislature has provided.

JUSTICE DON R. WILLETT: Your bright line is anything that has the word report on top of it.

ATTORNEY JASON C.N. SMITH: Can be a deficient report.

JUSTICE DON R. WILLETT: Ok. So if they file a stack of, if their 120-day deadline arrives, you wake up that morning, oh my gosh, I forgot to get a report. You scurry around, say you file the medical record. Boom, here's a two-foot stack of medical records. We're going to call that my report because it's all kind of in there somewhere. Is that good enough to get an extension?

ATTORNEY JASON C.N. SMITH: Well I would say that's the bright line the legislature has given us; however, you provided --

JUSTICE DON R. WILLETT: But you think it is good enough to get an extension?

ATTORNEY JASON C.N. SMITH: I believe that it is enough for the Court to give an extension. Now that doesn't --

CHIEF JUSTICE WALLACE B. JEFFERSON: Is it enough for a court to, is it deficient enough for a court to deny an extension?

ATTORNEY JASON C.N. SMITH: Like in the Waco case?

CHIEF JUSTICE WALLACE B. JEFFERSON: In Justice Willett's example, you file what is clearly not ex-

pressly contemplated by the statute. It's a stack of medical reports and you go to the trial court and you admit, yes, this is deficient, judge may I have an extension. Trial court says no; this was clearly a bad faith effort, you know I'm not going to give you an extension. Doesn't that end the case?

ATTORNEY JASON C.N. SMITH: Well I think that in that case, which is not this case, I think the judge has some discretion on whether or not to give that extension. I think it's always good to have a record unlike the case that the Court is considering now so you can determine what the judge did consider or what evidence is out there. If that's not enough, Justice Willett suggested in Ogletree that there at least be some accusation of wrongdoing which we have here in the first report and that would at least be sufficient enough to be a bright line if my first proposition is not sufficient, my proposition would be that at least it accuse some medical provider of wrongdoing.

JUSTICE DON R. WILLETT: In the Thunderburk case, what we had in that case and again we couldn't reach the issue procedurally, but the purported report there was a letter from one doctor to another doctor thanking him for this referral of this patient, kind of describing generally her symptoms. Never accuses anybody of doing anything wrong. Never wags a finger. Never implicates any providers' behavior top or bottom, would that thank you for this referral letter from doctor A to doctor B be enough to warrant an extension? Can a judge ever be justified in denying that extension in that case?

ATTORNEY JASON C.N. SMITH: Well can a judge be justified in not granting an extension in his or her discretion, yes.

JUSTICE DON R. WILLETT: Can a judge dismiss the case, no extension, your case is over?

ATTORNEY JASON C.N. SMITH: Under some circumstances, yes I think under that report.

JUSTICE DON R. WILLET: What circumstances?

ATTORNEY JASON C.N. SMITH: Well I think that the judge is, I think what the legislature has given, done is they've given the trial judge the discretion to make that call about the extension. I think that's really what the legislature has done is they've left that decision to the trial judge and then --

JUSTICE DON R. WILLETT: So you do seem to kind of come to a bottom line that there are some, there are some document that on its face is so kind of grossly substandard it never accuses anybody of malpractice. There are certain documents that warrant dismissal. Yes or no?

ATTORNEY JASON C.N. SMITH: I don't think that, my reading of the statute, the legislature said if you file a report and it's deficient you can get an extension and there's no interlocutory appellate jurisdiction.

JUSTICE EVA M. GUZMAN: Counsel? The statute also defines an expert report and it's pretty clear that you have to state the applicable standards of care, the manner in which the care was rendered, how you failed to meet the standard and the causal relationship. Does none of that have to be in your first attempt at a report? Do you just ignore that?

ATTORNEY JASON C.N. SMITH: Well in this case, we actually have some of those elements. Dr. Marable states that because the doctors nicked the cortical, had a cortical laceration that they caused an injury, that that was negligent activity and that it caused and he lists what that negligent activity caused on Mr. Santillan, the hemoparisis of the right side. So in this case we actually have some of those elements.

JUSTICE EVA M. GUZMAN: But shouldn't it be though that your first attempt at a report should at least comply in some form or fashion with the definition of expert report that's in Chapter 74?

ATTORNEY JASON C.N. SMITH: I don't believe that, the language that the legislature used, I think they talked about expert report and if an expert report is filed, then I think that the trial judge has the discretion to extend it if it's deficient.

JUSTICE EVA M. GUZMAN: Well, but, in order to even get to that threshold, I've attempted to comply with the definition of expert report in 74.351(r)(6). Here's my attempt. Shouldn't you at least address every component in some form or fashion of what the definition of expert report is?

ATTORNEY JASON C.N. SMITH: Well ideally; however, if a party doesn't, if it's deficient then in the elements and Justice Willett talked about that in --

JUSTICE EVA M. GUZMAN: Just ignore the definition?

ATTORNEY JASON C.N. SMITH: Well no, I don't think, I don't think lawyers should ignore the definition and I think these are very complicated cases and ideally if you have a very cooperative expert witness who will sit down with you and go through the report, it should have those things, but the legislature gave a safety valve that if all of those elements or not all of those elements are met then we can, the trial judge can give that 30-day extension.

JUSTICE EVA M. GUZMAN: Is there a difference between the element being just deficient because the explanation wasn't thorough enough and an element being completely missing?

ATTORNEY JASON C.N. SMITH: Well, I believe the statute talks about deficient in the elements and talking about, the way I read that is one or all of the elements aren't present in the expert report. Again, I think it's the, what the legislature wanted was the Counsel on behalf of the parties to at least try and file something and they weren't going to reward, the way the Court interpreted the statute in Badiga, they weren't going to reward the lazy lawyer, but they might reward the diligent lawyer who files some sort of report.

JUSTICE DALE WAINWRIGHT: But that position requires us to equate the word or to include within the definition of the word deficient the term absent or missing. I don't read deficient as including missing. Deficient means it's there, but it doesn't quite measure up.

ATTORNEY JASON C.N. SMITH: Well and I would argue a report that doesn't have arguably four elements. There have been four elements that have been designated standard of care breach, causation and qualifications. If there's a report that doesn't have any of those and in this case, we have some of those, but for future cases it can be deficient if the report doesn't have any of those.

JUSTICE DALE WAINWRIGHT: In this case, standard of care, the statement of the standard of care is missing, it's not in the report, correct?

ATTORNEY JASON C.N. SMITH: The statement of the standard of care in the first report is arguably missing --

JUSTICE DON R. WILLETT: You say it's inferred, you can infer it.

ATTORNEY JASON C.N. SMITH: Well I think the Court has said that sometimes you can't infer it, but I think Dr. Marable clearly states that the cortical laceration by these two doctors is a breach of the standard of care, but I guess --

JUSTICE DALE WAINWRIGHT: I'm not, you say the report clearly says that. It's not in here. Maybe you can say it's inferred, but it's not stated in here.

JUSTICE DAVID M. MEDINA: That's a matter of interpretation. That's a matter of interpretation for the trial judge.

JUSTICE DALE WAINWRIGHT: If, well read me the sentence where the report says that.

ATTORNEY JASON C.N. SMITH: Had it not been for Dr. Duscik and Dr. Scoresby's negligent activity in causing cortical laceration of this patient's left parietal lobe, he would not have needed further hospitalization.

JUSTICE DALE WAINWRIGHT: That's causation or at least a conclusory statement about causation. Is it your position that states the standard of care?

ATTORNEY JASON C.N. SMITH: It does not. It does not. It states the breach, but it does not state the standard of care [inaudible].

JUSTICE DALE WAINWRIGHT: Now are you familiar with Walker v. Gutierrez 2004 case under the old law 45.90(i)?

ATTORNEY JASON C.N. SMITH: I am vaguely familiar with it.

JUSTICE DALE WAINWRIGHT: Now the standard for getting a continuance were different, but in that case we said if a report omits one or more of the elements. Doesn't mention them at all and not just not in a conclusory fashion. Then under some additional standards there it said you don't get a continuance. Why shouldn't we require that for a deficient report on some elements that it at least mention all of the elements and follow at least in concept Walker v. Gutierrez?

ATTORNEY JASON C.N. SMITH: Well because I think we have a new statute that's being interpreted and as Justice Owens said in the Women's Hospital case is also in 2004 and concurring in the setting from the denial of those petitions for review that the appellate jurisdiction in the new statute is narrower and what we're focusing on here is the appellate jurisdiction. Furthermore, the Court has also indicated in Ogletree since Walker, that a report, if it's deficient, an extension can be granted and there's no jurisdiction. So if --

JUSTICE DALE WAINWRIGHT: If it's deficient?

ATTORNEY JASON C.N. SMITH: If it's deficient.

JUSTICE DALE WAINWRIGHT: But deficient and missing I think are two different things pretty clearly aren't they? There's an element missing here, not just deficient, but missing in this case.

ATTORNEY JASON C.N. SMITH: I think under the Badiga case when there's no report, I certainly think that's clear from how the Court has interpreted the statute. But I think that the statute talks about deficient in the elements and it can be deficient in all of them the way it's written now and this language is new and that's why I think it's important for the bright line of the lazy lawyer versus the diligent lawyer that files something. Realize this case, we have some of the elements. We have the Ogletree situation where they argue it should have been a different doctor, but Ogletree said that's a deficiency that can be cured and they could have attacked the new report. They could have attacked the new CV and they chose not to do it.

JUSTICE DALE WAINWRIGHT: How is a trial judge who's not a doctor supposed to know if the report can be cured or not? This is a complex surgery. One side's saying this can be cured and there's no additional experts, there's no neurosurgeon on the stand, there's no additional affidavits and the other side is saying this absolutely cannot be cured. This case is frivolous. How is the doctor supposed to know what is possible to be cured in the context of complex medical procedures?

ATTORNEY JASON C.N. SMITH: Well, I think --

JUSTICE DALE WAINWRIGHT: Is that what the statute contemplated that the trial judge would have discretion to make that medical judgment?

ATTORNEY JASON C.N. SMITH: I think the legislature said we'll give the judge one 30-day, discretion for 30 days and that's it. So I think the way they solved that problem was we'll give judges discretion to grant one 30-day extension, but not one 30-day extension after one 30-day extension after one 30-day extension. I think that's how they balance that out.

JUSTICE DON R. WILLETT: I'm having trouble understanding your bottom line position. This may be a shortcoming on my end and not yours. Is it your position that if a plaintiff submit something, anything before the deadline, that a trial judge has no discretion to stop the case at that point? If there is anything at all submitted that purports to be a report regardless of content, the trial judge cannot dismiss that case. They have to give at least a 30-day extension to try to cure it.

ATTORNEY JASON C.N. SMITH: I don't think they have to give a 30-day extension because the statute says a trial judge may. It does not say a trial judge shall. But a trial judge may if they address, if the report is deficient and I think, I would argue the way it's written it could be deficient in all four elements that we're talking about, but in this case, I'm arguing for future cases. In this case, Dr. Marable has written a book about the Wright Brothers that at least mentions Orville if not Wilbur. We meet some of the elements if not, we probably don't meet standard of care as --

JUSTICE DON R. WILLETT: But you say trial judge can exercise his or her discretion depending on the content of what is submitted. They can say this is pitiful, I'm going to deny, I'm going to grant the motion to dismiss, no extension for you and there are instances where that would not be an abuse of discretion.

ATTORNEY JASON C.N. SMITH: I believe because the legislature included the word may, I think that's correct.

JUSTICE DON R. WILLETT: Discretion can be abused. I mean you can abuse your discretion, but you agree there are certain occasions where if the report is facially laughably terrible, there's no charitable way to view it as a report, a trial judge can dismiss that case and that would not be an abuse of discretion.

ATTORNEY JASON C.N. SMITH: I think the legislature has invested that discretion in the trial judge just as in Federal courts, the Congress has invested in a district court judge the right to remand which there's no appellate jurisdiction to review. I think it's very similar. I think the legislature has invested that discretion in the trial judge and a trial judge could look at a deficient report and say there are no elements here. I am not in my discretion going to grant you an extension.

JUSTICE DALE WAINWRIGHT: Could the word may mean authorization rather than discretion?

ATTORNEY JASON C.N. SMITH: It could, Your Honor.

JUSTICE DEBRA H. LEHRMANN: And isn't that creating a third category if you concede that?

ATTORNEY JASON C.N. SMITH: No, I don't believe so because that goes to, that's whether or not a trial judge can grant the extension, not whether or not there's a third category. A report can be filed, but a judge could decide well you filed a report and it's deficient and I'm not going to grant that extension.

JUSTICE DALE WAINWRIGHT: Why isn't this like a, in terms of the standard to look at this when, in terms of the trial court's decision, why isn't this like a summary judgment? The trial court gets discretion and gets de-

ference in situations where there are disputed questions of fact and the judge and the jury can see the witness' face and are they sweating as they're testifying. Do they look credible? Are they fidgeting and credibility context where they can hear the inflection of the voice. With the summary judgment, we review those de novo. The trial court picks up a piece of paper and says this meets it or doesn't. In this case, the trial court picks up a piece of paper, an expert report, it either meets the statutory standard or it doesn't. There's no credibility contest, there's no is the witness blushing or sweating. Why shouldn't we just say this is, we can look at the same piece of paper, the expert report that the trial judge did and review it de novo. Why is there discretion that precludes us from looking at an expert report de novo in this Chapter 74 situation?

ATTORNEY JASON C.N. SMITH: I don't know that there is discretion in reviewing the report. I think there is discretion in granting the extension.

JUSTICE DALE WAINWRIGHT: Because of the word may.

ATTORNEY JASON C.N. SMITH: Because of the word may, Your Honor. And I think these reports are, really serve the function of that Justice Hecht addressed in Transamerica to show that the cases have some merit and that they won't be dismissed if it doesn't justify the presumption that they lack merit. In this case, we have an amended report that has not been challenged in court. They haven't gotten a judge to say that the report, the amended report is bad. That's their remedy and they could have appealed that ruling and then saved all of the, really the energy and time. If the Court doesn't have a bright line, then it's going to encourage more interlocutory appeals, form over substance, instead of attacking the amended reports that really allow them to know what they're being accused of.

JUSTICE DALE WAINWRIGHT: There are situations where cases can be legitimately dismissed without some indication of whether they have merit or not or, are frivolous or not. If there's an expert report deadline and the case requires an expert by the plaintiff and none is designated, that case gets dismissed even if it's a very good case. There's no Transamerica standard imputed there.

ATTORNEY JASON C.N. SMITH: I would argue if a report was filed late that showed all of the elements --

JUSTICE DALE WAINWRIGHT: No, I'm talking about an expert for trial purposes not an expert report. You missed the deadline on designating the expert, even a very good case gets dismissed because there's no evidence where the case requires expert testimony. No Transamerica standard there at all.

ATTORNEY JASON C.N. SMITH: Because the lack of expert justifies the presumption that the claim lacks merit.

JUSTICE DALE WAINWRIGHT: It's because there's no evidence. I don't think there's a presumption period. There's no evidence of the element.

ATTORNEY JASON C.N. SMITH: I agree with that. I think that's consistent with Transamerica.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions. Thank you, Counsel.

ATTORNEY JASON C.N. SMITH: Thank you, Your Honor.

MARSHAL: May it please the Court, Mr. Hall will present the rebuttal for the petitioners.

REBUTTAL ARGUMENT OF RANDY J. HALL ON BEHALF OF PETITIONER

ATTORNEY RANDY J. HALL: May it please this honorable Court.

JUSTICE PHIL JOHNSON: Mr. Hall, before you get started, have you challenged the second report.

ATTORNEY RANDY J. HALL: Yes, sir, we have.

JUSTICE PHIL JOHNSON: What's the status of that?

ATTORNEY RANDY J. HALL: It's still pending. If you need the date, it's August 5th, Dr. Dusick challenged the second report and on August 15th, Dr. Tyler challenged the second report and motions for dismissal were filed. If the Court would like, we could have a supplemental record sent up to show that, but it was challenged, the second report was challenged.

JUSTICE PHIL JOHNSON: Thank you.

ATTORNEY RANDY J. HALL: I'm going to suggest something for your consideration. There were some questions about whether or not what is a deficiency and I think that's a very, very good question. What is a deficiency and going even a step further, how many deficiencies can you have before you don't have a report? Can I suggest one thing for your consideration? Could there be a fatal deficiency and by that let me give you an example and see what you think. We know that conclusions by themselves alone are not enough and yet in this report, there are some conclusions that they arguably cover one or more of the elements. But if the conclusion by itself without anything else is not enough, even though it's in the report, would that not be a fatal deficiency as opposed to just a deficiency that could be cured. And if you have a report that has nothing but fatal deficiencies or no mention at all like we have here, then if it's no report at all by the definition because of that, then doesn't the trial court lose its discretion to grant an extension because there's no report as defined by Chapter 74 beforehand.

CHIEF JUSTICE WALLACE B. JEFFERSON: But isn't it also true that any deficiency is fatal.

ATTORNEY RANDY J. HALL: I don't necessarily agree with that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why not? Let's say you don't cure, in that 30 days you don't cure it; isn't the trial court going to dismiss the report that it's insufficient as to elements?

ATTORNEY RANDY J. HALL: Yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: So any deficiency is fatal, but the legislature said there are going to be circumstances where a lawyer files on behalf of his or her client a report where the elements are deficient, which means they don't qualify as an expert report. And in those circumstances, the trial court has discretion to grant an extension.

ATTORNEY RANDY J. HALL: Here's what I mean by fatal deficiency and it answers your question. Any deficiency can potentially be fatal if it's not cured, but I think there's some deficiencies that cannot be cured, such as in this report a conclusion, a bare conclusion. That's what I mean by a fatal deficiency, one that cannot be cured. Let's use an example. In this report, Dr. Marable says the defendants were negligent. But let's say that he did define a standard of care just for purposes of argument. Let's say he did supply something other than a conclusion on causation. That would be a deficiency I think that could be cured. What do you mean by negligent? How did he violate the standard of care? What did these doctors do that they shouldn't have done? That could be curable I would think. When I use the term fatal deficiency just for your consideration, I'm talking about a deficiency that can't be cured such as nothing but a conclusion only with no factual discussion, no elaboration, just a bare conclusion.

JUSTICE EVA M. GUZMAN: Why can't you go back and add in the facts when you get that extension?

ATTORNEY RANDY J. HALL: Because in order to get an extension before we ever get to that point, you have to have a report. And if all you have is two bold conclusions and two elements missing like we have here, there is no report and, therefore, you can't grant an extension. That's really what we've been trying to argue. We're trying to get you to consider the possibility that a report can be fatally deficient or have no elements whatsoever to where it is no report and, therefore, there is no discretion vested in the Court to grant that extension. You can argue, I guess, it's not a good faith effort, I guess you could make that argument, but I'm going a step further. I'm saying it is absolutely no report. It doesn't fit the definition. It doesn't give you the elements. And going to what you brought up earlier about our poor trial judges, they're not doctors. No, that's true, they're not doctors, but they can sure look at a report and see if a standard of care is defined. They don't have to agree with a definition and they're not asked to say whether the definition is good enough. They just have to look and see if there's a standard of care defined, if there's an explanation no how it was breached and if there's an explanation on how that breach led to the damages. Now a trial judge can certainly do that, but he couldn't do it in this case because all he has is two conclusions and two missing elements. And so that's basically what we're trying to present. This is no report at all and there shouldn't been any discretion in the trial court. Thank you so much. Can I answer any other? Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHALL: All rise.

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