IN THE SUPREME COURT OF TEXAS

No. 14-0593

HALEY HEBNER AND DARRIN CHARLES SCOTT, INDIVIDUALLY AND AS NEXT FRIENDS OF R.M.S., A MINOR, PETITIONERS,

v.

NAGAKRISHNA REDDY, M.D., AND NEW BRAUNFELS OB/GYN, P.A., RESPONDENTS

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

JUSTICE BOYD, joined by JUSTICE WILLETT, concurring.

The issue in this medical-malpractice case is whether the plaintiffs complied with the Texas Medical Liability Act's expert-report requirements by serving their expert report before they filed the lawsuit. Focusing primarily on the TMLA's presumed purpose, a majority of the Court holds that they did. Focusing primarily on the TMLA's written text, the Dissent would hold that they did not. Although I agree with the Dissent's text-based approach, I conclude that the TMLA's plain language leads to the Court's result. I thus respectfully concur.

The TMLA includes a pre-suit-notice provision and an expert-report provision. TEX. CIV. PRAC. & REM. CODE §§ 74.051(a), .351. The pre-suit-notice provision requires "any person . . . asserting a health care liability claim" to "give written notice of such claim . . . to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit . . . based upon a health care liability claim." *Id.* § 74.051(a). Under the applicable version

of the expert-report provision,[1] the "claimant shall, not later than the 120th day after the date the original petition was filed, serve on that party or the party's attorney one or more expert reports . . . for each physician or health care provider against whom a liability claim is asserted." *Id.* § 74.351(a) (as amended in 2005). If the claimant fails to serve the report "within the period specified . . . , the court, on the motion of the affected physician or health care provider," shall dismiss the claim with prejudice. *Id.* § 74.351(b). If the claimant serves a timely but deficient report, the "defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived." *Id.* § 74.351(a).

The Court concludes that the plaintiffs complied with the TMLA requirements when they served their expert report before they filed the lawsuit. *Ante* at ___. In reaching that conclusion, the Court relies primarily on what it believes to be the TMLA's "purpose" and "objective." According to the Court, the pre-suit-notice requirement "encourag[es] and enabl[es] parties to settle [health care liability claims] without resorting to the lengthy and expensive litigation process." *Ante* at ___. And the expert-report requirement "eliminate[s] frivolous [health care liability claims], not potentially meritorious ones." *Ante* at ___. The Court reasons that "[a]llowing" pre-suit service of an expert report "furthers the Legislature's intent by preserving a potentially meritorious claim," *ante* at ___, and furthers "the statute's objective of encouraging and enabling parties to settle [health care liability claims] without resorting to the lengthy and expensive litigation process," *ante* at ___.

[1] As the Court notes, the Legislature amended section 74.351 in 2013, but the prior version applies to this case. *Ante* at ___ & n.6.

I believe a statute's purpose is to require what its language requires. *See Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 570 (Tex. 2014) (plurality opinion) ("[A]ll we know of the statute's purpose is that its purpose is to require 'the plaintiff' in 'any action' to file a certificate of merit 'with the complaint.' Other than that, the statute does not express its purpose."). The Court's analysis illustrates the danger that results when courts attempt to interpret a statute by relying on a presumed but unexpressed purpose. The Court asserts that the purpose of the TMLA's expert-report requirement is to eliminate "frivolous" claims but "not potentially meritorious ones," and then construes the statute to allow pre-suit service of expert reports because, otherwise, the statute would eliminate potentially meritorious claims. *Ante* at ___. The statute, however, expressly requires trial courts to dismiss any health care liability claim if the claimant fails to timely serve an expert report, *even if* the claim is meritorious. TEX. CIV. PRAC. & REM. CODE § 74.351(a). Based on the statute's actual written text, its "purpose" is to eliminate both frivolous *and* meritorious claims whenever a plaintiff fails to timely serve an expert report.

If a plaintiff fails to timely file an expert report, we cannot refuse to dismiss the claims because we think they are or may be meritorious. We are constrained by the written language of the statute, not its presumed purpose. Whatever the Legislature's actual purpose or objective may have been, courts must interpret and apply the statute's requirements as written. *In re Tex. Dep't of Family & Protective Servs.*, 210 S.W.3d 609, 614 (Tex. 2006) ("It is not the Court's task to choose between competing policies addressed by legislative drafting. We apply the mandates in the statute as written." (citation omitted)). To be faithful to the limits of our judicial role, we must avoid the temptation to construe a statute based on an unexpressed legislative purpose or objective. "[N]o legislation pursues its purposes at all costs," and where, "as here, 'the language of a

provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . "[there is no occasion] to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute."'" *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (alteration in the original) (quoting *Aaron v. SEC*, 446 U.S. 680, 695 (1980)). To the extent we may believe it worthwhile to divine the Legislature's intent, the "plain meaning of the text is the best expression of legislative intent." *Post* at ___ (JOHNSON, J., dissenting (quoting *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011))). So I agree with the Dissent that we must simply determine whether the text of the TMLA requires dismissal of a health care liability claim when the plaintiffs serve their expert report before they file the lawsuit. I disagree, however, with the Dissent's conclusion that it does.

The applicable version of the TMLA expressly required a claimant to serve an expert report "not later than the 120th day after the date the original petition was filed." TEX. CIV. PRAC. & REM. CODE § 74.351(a). Here, the plaintiffs undisputedly served their expert report before that deadline. The defendants complain that the plaintiffs served the report before they filed their original petition, but the 120-day deadline does not prohibit them from doing so. The statute expressly sets an end date but not a start date. *See id.*

The defendants argue that the statute prohibits pre-suit service of an expert report because it requires a plaintiff to serve the report on a "party or the party's attorney." *See id.* § 74.351(a). Since a defendant is not a "party" until he is named as a defendant in a lawsuit, they contend that the plaintiffs failed to meet the statute's requirements because they failed to serve their expert report on a "party." *See Zanchi v. Lane*, 408 S.W.3d 373, 377 (Tex. 2013) (holding that a person becomes a "party" under the TMLA when the person is named as a defendant in a lawsuit, even if

the person has not yet been served with process). The issue here, however, is whether the TMLA requires a plaintiff to wait until the person becomes a "party" before serving the expert report, and we did not address this issue in *Zanchi*. We stated in *Zanchi*: "Beginning the period for serving an expert report on the date of filing suggests that a 'party' on which to serve the report exists on the date of filing." *Id.* at 378. But we did not hold that the period in fact begins on the filing date because that issue was not before us. I thus agree with the Court that neither our holding in *Zanchi* nor the language of the TMLA "expressly or implicitly prohibit service before the defendant is named as a party to the suit." *Ante* at ___. The TMLA only requires that a plaintiff serve the report on a party, and does not specify whether the person must be a party on the date of service, on the date the court hears the motion to dismiss, or on some other date. Here, the defendants were parties when they filed their dismissal motion, so the plaintiffs filed the expert report on a party, as the statute's express language requires.

Finally, the defendants note that the former statute required a defendant to "file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served." TEX. CIV. PRAC. & REM. CODE § 74.351(a). The defendants argue that the statute must require service of the expert report when a defendant is a party, otherwise a defendant cannot file and serve an objection. But we resolved that issue in *Zanchi*, holding that the "twenty-one-day period for objecting to the report [does] not begin to run until [the defendant is] served with process." *Zanchi*, 408 S.W.3d at 380. Although the statute does not provide for the "tolling" of the twenty-one-day deadline, "even the most ardent textualist would read a statute of limitations in light of the common-law rules of equitable tolling." *Roccaforte v. Jefferson County*, 341 S.W.3d 919, 930 n.24 (Tex. 2011) (WILLET, J., concurring) ("It is hornbook law that limitations periods are customarily

subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." (quoting *Young v. United States*, 535 U.S. 43, 49 (2002))). I thus agree with the Court that, consistent with *Zanchi* and our well-established equitable-tolling principles, "the 21-day objection period will not begin to run for a defendant upon whom an expert report was served before suit was filed until the defendant has actually been sued and served with process." *Ante* at ___.

Conclusion

I agree with the Court's construction of the TMLA, but disagree with the Court's reliance on anything beyond the Act's actual language to support that holding. Because the TMLA's text did not expressly require the plaintiffs to wait to serve the expert report until the defendants were parties, I concur in the Court's judgment.

_____
Jeffrey S. Boyd
Justice

Opinion delivered: May 27, 2016