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Supreme Court of Texas.
S. Murthy Badiga, M.D., Petitioner,
v.
Maricruz Lopez, Respondent.
No. 05-0801.

September 9, 2008.

Appearances:

Diana L. Faust, Cooper & Scully, P.C., Dallas, Texas, for petitioner.

Everto A. Villarreal, Jr., Law Office of E.A. Villarreal, Jr., Edinburg, Texas, for respondent.

Before:

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

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COURT ATTENDANT: Oyez, Oyez, Oyez. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention, for the Court is now sitting. God save the State of Texas and this Honorable Court.

CHIEF JUSTICE JEFFERSON: Thank you, be seated please. Good morning the Court has three matters on it's oral submission docket. And in the order of their appearance they are Docket No. 05-0801 as Murthy Badiga M. D. versus Maricruz Lopez from Hidalgo County and the Thirteenth Court of Appeal District, Docket No. 07-0043 Dynegy Midstream Services Limited Partnership and Versado Processors, LLC versus Apache Corporation from Harris County and the Fourteenth Court of Appeals District and Docket No. 07-0419 In re Labatt Food Service, L.P. And that's an original proceeding.

Justice O'Niell is participating in each of these cases but could not attend oral argument this morning. The Court has allotted 20 minutes per side for each argument and expects to complete all three before noon. We will take a brief recess between the arguments.

These proceedings have been recorded and length of the argument should be posted on the Court's website by the end of the day, today. Court is now ready to hear argument in 05-0801, Badiga versus Lopez. Proceed.

COURT ATTENDANT: May it please the Court Ms. Faust represent argument for the petitioner, petitioner has reserved five minutes for

rebuttal.

ORAL ARGUMENT OF DIANA L. FAUST ON BEHALF OF THE PETITIONER

MS. FAUST: May it please the Court, counsel. Good morning. The issue in this case is fairly straight forward can and does the Court of appeals have jurisdiction interlocutory appeal filed through section 51.014 (a) (9). And taken from the order denying relief under Chapter 74.351 and Subsection B where there has been no proper order denying-- I'm sorry, no proper order granting and extension of time under 74.351.

The answer to that question is "Yes." The Court of Appeals does have jurisdiction to consider that interlocutory appeal.

JUSTICE BRISTER: But your appeal is that the extension wasn't proper not that the report was proper, correct?

MS. FAUST: That is correct. The section 74.351 provides two means by which a party may obtained an extension in reference to providing a compliant expert report. The first is under section 74.315 ...

JUSTICE BRISTER: But the doubt in the-- but in interlocutory appeal statute says, "You can't appeal ed the extension so your appeal is really about an improper extension." How do they have jurisdiction?

MS. FAUST: Well, your Honor the, the Court of Appeals here did indicate that in, in held, that they had a jurisdiction because we were in, in essence attacking the order in granting the extension of time which was signed in this case. At the time the order granting the extension of time was signed, there was no order gran-- or denying the motion to dismissed. Which was heard in filed contemporaneously.

The first order that was signed denying the motion to dismiss was a couple of months later on August 10th of 2004. And again all of these hearings and the orders, and and the briefing that we're on in this case occurred just a few short months after the enactment of Chapter 74 and a new provisions found in 74.351.

CHIEF JUSTICE JEFFERSON: So did you appeal the denial of the motion to dismissed?

MS. FAUST: Yes, your Honor, we appealed the written-- from the written order timely, that denial of the motion ...

CHIEF JUSTICE JEFFERSON: But the appeal is on-- I guess Justice Brister's question is the appeal about an in proper extension, or is it about denial of the motion to dismissed.

MS. FAUST: Your Honor it attacks the validity of the-- at the denial of the motion to dismissed because there was no proper order granting an extension of time under Section 74.351. If we look at Section 51.014 (a) (9) then plain language say's that a person may appeal for her interlocutory order.

From the Court that denials all-- or part of the relief's sought by a motion under section by a motion under Section 74.351 (b) except that an appeal my not be taken from an order granting an extension under 74.351.

There are only two ways to obtain an extension under 74.351. The first in under Sub-part A and that is an extension by agreement of the parties. The second is through Section 74.351 (c) which provides for a discretionary 30-day extension of time, one 30-day extension where a timely serve expert report is found to be deficient in one or more respects regarding the elements to be contained therein.

JUSTICE MEDINA: Do you think the judge, do you the trial judge

consider the fact that this documents was sent to the wrong place to the insurance company. And there were clear require, I think that had any role in his decision making process, and if it did is that wrong and itself for the judge use that discretion?

MS. FAUST: Your Honor I, I-- do you think the trial court-- according to the record, the trial court may have consider that and indicated that the hearing that it would look at equity issues with respect to the healthcare liability claimant in this case. The trial court abuse it's discretion in doing so however. Because as this Court in Auglutry versus Matthews and later in Lewis versus Thunderberg has, has confirmed the, the failure to provide the reports that is there-- let me just back up. There's really under section 74.351 only two possibilities regarding a compliant report there's either an absent report or there's a deficient report. There has been some talk about maybe there's a report that so deficient that it may constitute but, but this Court hasn't taken that issue yet.

Here this case falls squarely within the first, that is in absent report there was any an disputed, your Honor that, that there was no timely service within 120 days of in medical record.

JUSTICE BRISTER: But did this record reflect whether the defendant act, I mean you know, what then you should do with it? [inaudible]

MS. FAUST: The record does not reflect, you Honor. And in fact, the claimants-- the Court's record page 130 and as a brief as filed subsequent to the first hearing indicated that in this one motion that it was a clerical error that allege the report being filed within 120 days -

JUSTICE BRISTER: But I mean ...

MS. FAUST: - and ...

JUSTICE BRISTER: It would have-- I, I understand you're, you're position is, they have to send it to mail and if they send it to somebody else who gave it to me that's no good.

MS. FAUST: And also, your Honor-- that, that is correct. Also, the, there is nothing in the record to show that there was proper service under rule 21 (a) which would be required, because here it's undisputed that there was nothing received by the defense ...

JUSTICE BRISTER: So anything in the statute that says, constructive-- an actual notice is not good enough. In other words nor, normally if you're, you're right in some, some instances, you got actually serve like citation, you got actually the defendant if your never serve them but I'd learned about it does not enough. But there's other instances we're give name actually got it the fact that it was in sent right [inaudible]. How do we know which one this one is?

MS. FAUST: In this case, your Honor, the record is clear and, and it's conceded by all the parties that there was nothing received within the 120-day time period by the defendant or defendant's counsel. In fact at the hearing, I believe the first hearing there was discussion that, there was some concern whether it was medical record sent before suit was filed or even after suit was filed. It was really nothing further proved job, your Honor, in the record below.

But we cou-- remember that the purpose of serving on the defendant or the defendant's counsel is to provide noticed, here's a report, your only have 21 days now that you have to object to this efficiency of this report so there has to be noticed that something tendered to, to that you need to object to if you think it's, it's not appropriate under the elements that are require to be contained within that report.

JUSTICE HECHT: There were two motions to dismissed -

MS. FAUST: Yes, sir.

JUSTICE HECHT: And just one order is that right?

MS. FAUST: Just one order, yes sir.

JUSTICE HECHT: And the one order denied them both?

MS. FAUST: No, your Honor. There's one order on the motion to deny, it denied and that was the second, after the second hearing.

Just, just to back up after the, the first order that was signed was the order granting an extension of time and that's the one that the Court of appeals said, was the basis of the appeal.

After the 30-day time period Dr. Badiga's counsel filed the second motion to dismiss and incorporated all the same arguments from the first motion saying, "This is untimely no report was serve within a 120 days." And there was a discharge summary that had been served within the 30 day extend the time period and it was deficient. There was ...

JUSTICE HECHT: And if, and if there was an order denying it up.

MS. FAUST: Yes.

JUSTICE HECHT: But the second motion incorporated the, the grounds in the courtroom.

MS. FAUST: Yes, it did. In the courtroom find that second motion at the clerk's record 153 where incorporated the earlier motion that the failure to serve in 120 days, the trial court should have dismissed the case with prejudice.

JUSTICE HECHT: And the trial court never express a rule on the first motion?

MS. FAUST: Not during the hearing. And there is no written order. The only order that was signed ...

JUSTICE HECHT: [inaudible] so the answer was "No."

MS. FAUST: Yes, sir.

JUSTICE WAINWRIGHT: The first motion to dismissed that there's no ruling on, and then you filed another motion to the second motion re-urge the third-- the first motion wasn't an entirely new motion to dismissed?

MS. FAUST: Was this separately filed document that incorporated the arguments from the first motion, and then briefly address the, the sufficiency of the purported expert.

JUSTICE WAINWRIGHT: Do you characterize it as a new motion to dismiss or re-urging to the first motion to dismiss?

MS. FAUST: I would characterize it as a re-urging of the first motion to dismiss with a new section added that address the sufficiency of the purported expert report.

JUSTICE WAINWRIGHT: And your complain about the granting of the extension this is, is your position that or you're arguing that the judge should have granted the motion to dismiss the first time?

MS. FAUST: Yes, your Honor. And the second time. There was no or-- written order and writ-- assigned written judgment or order is really be absolute pre-requisites to this Court's exercise at appellate jurisdiction, we know from track 26, for example, that the deadline to perfect an accelerated appeal such as the interlocutory appeal in this case is, is 20 days from the day preorder is signed the first order that signed denying the motion to dismiss here was a timely appealed.

The-- this Court stated in Agultry that the legislator has denied the trial court's the discretion to either deny a motion to dismiss or to grant an extension of time when there is the complete absence of an expert report within 120 days following the filing of the lawsuit. The trial court abuses discretion when it fails to deny Dr. Badiga's motion to dismiss. When Dr. Badiga did get an order on a motion to-- on his, on his motion to dismiss in prior time we appealed that. The Court of appeals erroneously declined to exercise jurisdiction based on this the

exception contained in 51.014 (a) (9).

JUSTICE BRISTER: The purpose of the statute is to get early expert for it's not waste too much time and money in frivolous found out early on if it's frivolous serve substantial. If-- how is that defeated if you can't appeal the throughout that done if nothings filed for must trial judge does not in gives some extra 30 days, how, how is that extra 30 days to defeat the purpose of the statute? Do you still would be finding out earlier actually I assume everybody moves fast which didn't happened here but I assumed everybody moves fast do you get the extension happens immediately, you get report immediately and soon out your five months instead of filing earlier of statute was six months. So you wouldn't defeat the purpose of the statute.

MS FAUST: Well, in technically, your Honor I think you would defeat the purpose of the statute because the underlying case even though it might-- the trial might be stayed during the interlocutory appeal. The discovery would be on going for example, there, there would still be expenses way to fees and cost that would be burden upon the defendant, when the case should have been dismissed at the-- after the first motion was filed at the 120 days.

So I think frankly it does defeat the purpose that, that's enumerated in Section 10.11 of House Bill 4.

JUSTICE BRISTER: It's interesting which legislator could have been state everything during the interlocutory appeal expose is-- so I want it's concerned about [inaudible] expenses, otherwise they would have state them?

MS. FAUST: I'm sorry, your Honor?

JUSTICE BRISTER: Otherwise they would stated them too.

MS. FAUST: Well, there are-- there are numerous types of cases that are allowed to go up for in interlocutory review that the underlying cases ...

JUSTICE BRISTER: In fact there's done in interlocutory-- everybody kind a stands down but in practice, right?

MS. FAUST: Generally, that does happen, your Honor. But I think with respect to what the legislator comple-- stated within Section 10.11 and what this Court said, recently in Megallon here that can be forwarded if discovery has to go forth. Deposition taken because if the part of report is given in a-- after the extended period.

Because there was no proper order granting an extension under 73-- 74.351. The trial court did abuse it's discretion because Dr. Badiga did timely bring his appeal under Section 51.014 (a) (9) from the order denying his motion to dismiss and there was no proper order granting an extension req-- that's required under (a) (9) to meet the exemptions. The Court of Appeals did error in conclude, in concluding that it do not have jurisdiction.

This Court should reverse and should remand to the trial-- to the Court of Appeals to consider the issue or within an instruction to dismiss the case with prejudice and remand should the trial court to have the issue of Attorney's fees and cause to determine out with as was first sought in original motion.

CHIEF JUSTICE JEFFERSON: No further questions. Thank you counsel.

MS. FAUST: Thank you, your Honors.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court Mr. Villarreal, represent argument for the respondent.

ORAL ARGUMENT OF EVERTO A. VILLARREAL, JR. ON BEHALF OF THE RESPONDENT

MR. VILLARREAL: May it please the Court. My name is Everto A. Villarreal Jr. I am from Edinburg Texas I represent the original plaintiff in this case respondent in this appeal. We have two or three actually statute said, control the statute to a properly construed by the Thirteenth Court of Appeals. The first one is 74.351 in Section B as to the expert-- expert report, Section C also applies.

However, Section 51.014 (a) (9) of the, of the statute says, the jurisdiction applies only when no extension has been granted. Now, what petitioner's trying to do is get behind the, the language in the second, second part of the sentence on it is only one sentence ...

JUSTICE MEDINA: How, how can an extension be granted if there's no report on filed?

MR. VILLARREAL: But ...

JUSTICE MEDINA: But that in a self is the violation of, of the statute, if you read it.

MR. VILLARREAL: If, if, if it was exactly that and nothing more possibly, so the Court did consider that there have been a report filed prior to the, the loss with as have been filed with-- what we consider opposing side or with-- we didn't think it was necessary to be dealing with more than one side, we were told this is for the insurance company, this is for the defendant at that time.

JUSTICE MEDINA: Was it filed with-- was it sent to Adjuster Insurance Company or is it a lawyer representing the insurance company?

MR. VILLARREAL: We were led to believe that it was actually both, if I remember correct, your Honor. The request, the day to day contact was within adjuster there, there was two or three communications, again if I remember correctly that request that the information so that we could probably or possibly reach a quick resolution to the case basically which what if you got, let's take care of it.

When the loss would happened because nothing further was done as far as settlement negotiations, it was done because time was running out. There were several factors at contributed to that time running out but that's, that's not an issue for this Court. What I think is an issue for this Court is it the trial Court exercise the proper discretion in looking at the overall picture there, there is no explanatory language in what is a proper report ...

CHIEF JUSTICE JEFFERSON: Would you, would you agree then, that if there were absolutely no report filed, whatsoever or sent to the insured, insurer or the insurance counsel within a 120 days that interlocutory appeal could be brought from the granting of the extension. And the denial of motion to dismiss.

MR. VILLARREAL: I would not agree with that because the statute doesn't say that 51 -- I'm sorry -- yeah 51.014 (a) (9) is, is a one sentence section, and it does not qualify what parameter are, are to be satisfied ...

CHIEF JUSTICE JEFFERSON: No, it says, you can appeal from in interlocutory order that denies all the part of the relief regarding the 120 day requirement, how to file the expert report. There's an exception for an extension, but what I'm asking is, if there is no report filed whatsoever within a 120 days and no, and no report was send erroneously to the insurer or to the insured attorney. Doesn't that statute under sub practice remedies code if the defendant the right to, to appeal.

MR. VILLARREAL: I don't believe that's what the statute says, your Honor. I believe what, what (a) (9) says, is that, is that there, there can be no appeal for an extension was granted -

CHIEF JUSTICE JEFFERSON: Does any says ...

MR. VILLARREAL: - that doesn't say whether the extension would have been valid or not.

CHIEF JUSTICE JEFFERSON: So what is the first part mean, that have-- that you, you can appeal an order that denies all the part of the relief sought concerning the 120-day report. What is that mean then?

MR. VILLARREAL: I believe it means exactly what it says, but there's an exception that qualifies it under, under (a) (9) of, of 51.014.

JUSTICE HECHT: But the exception-- but the exception is for an extension under Section 74.351.

MR. VILLARREAL: Yes, your Honor.

JUSTICE HECHT: How is this under Section 74.351? What in any part of that section authorizes an extension in this circumstances?

MR. VILLARREAL: As I read the statute, no report being filed includes one that is deficient, so ...

JUSTICE HECHT: Fine. But if-- you mean it-- so even if no report was filed at all, that's still a grounds for an extension under 3-- 74.351 as you mean.

MR. VILLARREAL: If the trial court determined at ex-- either an extension was warranted, yes.

JUSTICE WAINWRIGHT: So then a plaintiff could, if the trial court grants the extension always get not a 120 but a 150 days to filed the expert report.

MR. VILLARREAL: Again, depending on what the trial court does with the extension request does, it doesn't mean always. It means the trial court uses discretion.

UNKNOWN SPEAKER: and ...

JUSTICE WAINWRIGHT: Under 70-- under 74.351 (c) regarding an extension says, the expert report is not been serve with an appeared specified, because elements if the report are found deficient. The Court may grant 130 ay extension to cure. Now what is the phrase elements of the report are found deficient mean, that, that's not pre suppose that the must be some report at least served in order to found elements of it deficient.

MR. VILLARREAL: I don't know that it means that, your Honor. Because at the statute does say in the same [inaudible], if no report had been filed. So it is considered not to have been filed if there's a deficiency. As far as the, the definition of what is a deficiency, I believe that would have to be something brought up by, by the defendant in his request for that dismissal based on a deficient report.

JUSTICE WAINWRIGHT: No, I don't say no report having been filed and the language here, you're inferring that from your reading of 51.0149 (a) (9), about the extension?

MR. VILLARREAL: Yes, your Honor, 51.014 (a) (9) doesn't give a reason for an extension as far as what's necessary. It simply says, no appeal is, is viable if an extension has been granted. It doesn't look behind the reasons for the extension being granted. That's has been brought up earlier in this Court there, there was a question about whether or not there was actual notice, whether there was an actual report that had been tendered to the opposing side whether there was a opposing counsel of the individual.

We had to assume that, that they are the same. The, there should--

I don't think there's anyone in this room is going to say, the insurance company has not who-- the [inaudible] hired the individual said, they are defense counsel.

JUSTICE MEDINA: That's two different issues, since the strained interpret the statute that way, it seems to me would, wouldn't give any meaning that you got 120 days to do nothing, were-- cause you can get a dis-- cause that the judge's discretion give another of 30 days.

MR. VILLARREAL: I think if, if the trial court found that nothing, as, as we all know the -- the normal meaning. If nothing was done the trial court would not grant the extension, that's ...

JUSTICE BRISTER: Well, some would, some wouldn't, I mean that's, that's the bottom line. That's, that's what we see in the basis.

MR. VILLARREAL: Yes, your Honor.

JUSTICE BRISTER: Some would and some wouldn't. So that means, I'm ju-- I'm concerned about the form of shopping. We already have enough of that in Texas and have had for a long time, now we're going to add to that well, I mean what's in reduce file in a jurisdiction were trial judge don't care, that you filed nothing and I'll give you a 30-day extension, which in this case actually worked out to four month extension, cause by the time we said it for hearing and filed their body for motion to stuff.

It took four months before the deadline, they extended 30-day deadline was actually four months after they works no deadline. And then they just encourage even more for plaintiff's to filed cases and places where they know the trial judges will really don't care for the statute own enforce it.

MR. VILLARREAL: Well, it may have that effect, your Honor. In, in this particular case the events occurred in Hidalgo county ...

JUSTICE BRISTER: There's-- years is-- years is sympathetic case if you had a report, you send it quick, you just going to send it to the address. But of course we going to worry about some less sympathetic case is where I actually don't have a report.

MR. VILLARREAL: Yes, your Honor. Well, I just-- I want it-- I want to Court to, to know in, in case the procedure in Hidalgo County is not known. We don't have-- we do have, I believed it 12 or 13 district courts in addition to six county courts of law. And and we don't have any control of whether which the Court they fall in, is purely random and as far as the, the jurisdiction itself. Hidalgo County is with this event occurred, it, it's where both parties are from so they was properly filed.

In, in other possibilities, I agree with the Court there could be the, the possibility of, of abuse in, in form shot. But we don't have it before this Court. Now my concern is we're looking behind the reasons for the extensions when the statute does not provide for that. The statute says, we're an extension was granted, no appeal can be taken.

So I've-- I'm, I'm reasonably sure that, that by itself precludes the jurisdiction of the Court of Appeals, they construed the statute properly in, in making that determination. Then sub-- subject to that being correct. Section 22.225 (c) of the Texas Government code, then says, that, that interlocutory appeals are finished at the, at the appellate court level.

So that in the Texas Supreme Court would not have jurisdiction. So what we have is, is 51.014 (a) (9) of the Text prac-- practice in remedies code. And also the government code at 22.225 (c).

So that even if there was a problem with jurisdiction which we don't think that there was, there was no jurisdiction in the Thirteenth

Court of Appeals as, as pronounce by the Court. Then the next step in coming to this Court unless there we're a couple of exceptions to that rule. Then this Court doesn't have jurisdiction.

Now is there a conflict-- I don't know that any case have been cited that there is a conflict. The Gonzales case which is, which is cited regularly in, in a briefs Gonzales versus Avalos at 907 South West 2nd 443. Addresses the issues that, that are close to this case. There isn't one exactly on point, but again it does not provide any basis for, for claiming that the Thirteenth Court of Appeals was wrong in denying jurisdiction.

Most of the cases that had been cited have to do with temporary injunctions. Is this a case of first impression well, I, I think it has some first impression items in it and possibly the legislator needs to do a little more with the statute. But at this time there is nothing in the statute that allows the appeal, there is nothing in ...

JUSTICE BRISTER: Well, we always have jurisdiction to, to sad whether the Court of Appeals brightly found that they have jurisdiction. Otherwise Courts of Appeals could just, I mean legislator could say, "At right didn't like to appeal." Court of Appeal say, "No, we don't have jurisdiction, we're to going to do that." We always the right to arraign them and then say, "No, you actually have to look at it."

MR. VILLARREAL: Yes, your Honor.

JUSTICE BRISTER: That would apply here.

MR. VILLARREAL: That would apply, but I think that the statute are very clear. Again, the biggest problem that we have is that, is that petitioner's trying to look behind the Court's-- the trial court's ruling on the extension. And the trial court had that hearing and heard evidence and made a decision. And it would it be there were three or four months time like there. But that was not another control of either the, the petitioner or the defendant at that time, which in this case the petitioner and a respondent. We had ...

JUSTICE JOHNSON: Counsel, counsel let me interrupt you just a second. If, if the peti-- if the petitioner were appealing the order granting the extension, would they not have had to appeal within a certain time frame after that order was entered?

MR. VILLARREAL: I believe is 21 days yes, your Honor.

JUSTICE JOHNSON: Okay and they didn't, they did not do that. That's not why we're here is it?

MR. VILLARREAL: That's not why we're here as far as I'm concern, your Honor.

JUDGE JOHNSON: Okay, so there was an order in granting in a extension they did not appeal on that. Then we get down to where the final order was entered, and there were orders entered denying the motion to dismiss at that point in time.

MR. VILLARREAL: That correct, your Honor.

JUSTICE JOHNSON: And so they've got an order now and that's the order appealing from the order denying, is their position?

MR. VILLARREAL: That is correct, your Honor.

JUSTICE JOHNSON: Okay, so you're not. How is at that your position isn't your appealing the order granting the extension and when, when you just said, "They, did not appeal that order."

MR. VILLARREAL: Your Honor, I'm not saying that that's what they appealed, I'm saying that they trying to look behind, first the order denying the dismiss their motion and they're basing it on an improper extension. I'm not saying that they appeal the extension but what they're saying is it, is it that, that extension should not have been

granted and for that reason the denial should have been granted at the trial court level. And then they appeal the denial.

JUSTICE JOHNSON: They couldn't appeal the denial until I had the order either, could they?

MR. VILLARREAL: No, your Honor they could not.

JUSTICE JOHNSON: They had to have an order as, as counsel said earlier.

MR. VILLARREAL: That is correct, your Honor. But as the Court, just said, maybe they should have appealed the, the granting of the extension.

JUSTICE JOHNSON: But how, how could they because your position is, the statute says specifically they could not do that.

MR. VILLARREAL: Again, your Honor that, that is correct. But e-- but, but what I'm saying is if their argument going to be that the extension was incorrect then that what they should have appealed. They're trying to go behind what the trial court didn't granting then extension in order to justify their appeal on the denial of the motion to dismiss. And I'm saying you can't do that.

JUSTICE GREEN: Are you familiar with the Brennan case -

MR. VILLARREAL: I'm sorry, your Honor.

JUSTICE GREEN: - the Brennan case Texarkana two years ago. Do you familiar with that case?

MR. VILLARREAL: I don't recall it, your Honor.

JUSTICE GREEN: All right. Apparently it is a case where the Court of Appeals exercise jurisdiction in a case just like this one. Similar to this one, but you're not, you don't know enough about it.

MR. VILLARREAL: No, your Honor.

JUSTICE BRISTER: I'm concern if whether this come back at the end of the trial. If you go through, do you prevail and case goes to trial. All take still be able to argue on appeal, this case should have been final appeal. This case should have been dismissed four months in to it goes no report was served.

MR. VILLARREAL: I don't think that they can appeal something that's already been decided by both the Court of Appeals and the Supreme Court of Texas.

JUSTICE BRISTER: If, if the Court of Appeals decides but I mean if we decide the Court of Appeals just right has no jurisdiction. And they wouldn't have decided that. Your, your position is Court of Appeals was right then have jurisdiction -

MR. VILLARREAL: That's right.

JUSTICE BRISTER: - so that issue hadn't been decided. So we decide it at the end of the trial, that be a lot worse, wouldn't it?

MR. VILLARREAL: There's already been a, a ruling on that and as it turns out we are [inaudible] ...

JUSTICE BRISTER: By the trial judge, but there's not a ruling on the merits by the Court of Appeals. They said, they don't have jurisdiction to decide it -

MR. VILLARREAL: I understand it ...

- which means it's postponed to the end. Which means we're going to waste a lot more effort that's in fact no report was ever decide.

MR. VILLARREAL: Well, again, your Honor. If, if there are clarifying additions to Section 51.014 (a) (9) or even to 74.351 (b) or actually all of, all of 351 then maybe that will preclude those potential problems but I don't think that this Court should be making a decision based on what we're going to have to look at this case again later on.

If the Court denies it now, then as far as this case is concern

there are no further basis for appeal as to this issue.

CHIEF JUSTICE JEFFERSON: Counsel, do you have any further argument?

MR. VILLARREAL: No.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you very much.

MR. VILLARREAL: Thank you.

JUSTICE JOHNSON: Counsel if the report had been served on the defendant's before suit was filed. Would that have been timely filed under the statute? Well, the same as I read the statute says, your report should be filed not later than 120th-day after the day you raise your petition was filed.

REBUTTAL ARGUMENT OF DIANA L. FAUST ON BEHALF OF PETITIONER

MS. FAUST: Your Honor, the-- this Court clarify, I believe in Lewis versus Thunderbird that under the first version of 74.351 it was 120 days after the lawsuit was filed. To-- and that's the provision at issue here ...

JUSTICE JOHNSON: So couldn't count it-- your position is could not count if there were filed bef-- if they furnish the report says, "Here what we have, got it to the right person and then filed the lawsuit that getting it to the right person still does not count."

MS. FAUST: Under the technical languages 74.351 I think they would need to serve it again after the lawsuit was filed.

JUSTICE JOHNSON: After the lawsuit was filed.

MS. FAUST: Yes, your Honor.

JUSTICE WAINWRIGHT: If you're technical reading of that provision consistent with the purpose of that provision?

MS. FAUST: Probably not, your Honor. I would concede that. And and typically not to be threaten to anything that we, we try not to raise those kinds of issues because we, we like to refer to them as pig moves but the ...

JUSTICE MEDINA: Was a question a pig move?

MS. FAUST: Pig move yes, your Honor. With all due respect to the Court. But under the language you just say after the filing of, of the lawsuit. So ...

JUSTICE JOHNSON: Who says actually shall not later than the 120th-day? Say that, that might be inclusive of one file for. And what I wondering is this, this Court is recently said that in some instances an insurer interest are congruent with those of the insure. And if you insure an insurer and it's not-- and it's-- it may or may not be in the record here, I, I just-- but if the insured interest or congruent with those of the insured. And if the insurer receives the report saying, here are the problems that we allege and that's even bef-- before the 120-day afterward and our whole purpose on the statute is to without previous claims but not to have the meritorious claims cause out because of it-- a default of some nature that was unintentional.

MS. FAUST: Yes, your Honor.

JUSTICE JOHNSON: How is Justice Wainwright question, "How have we enhance the purpose of the statute." But ...

MS. FAUST: Well, reflecting on it, your Honor. The reason for notice is to make sure that it, because the defendant only has a 21 days to file an objection if it's a deficient report. And there can be

no filing of an objection if no lawsuit has been filed.

JUSTICE JOHNSON: Well, that-- but what this file do you could certainly have 21 days? Is that they is-- is ...

MS. FAUST: Well, if it ...

JUSTICE: Go ahead you have some points to make [inaudible].

MS. FAUST: Yes, your Honor. I know that there's one case out of the Houston Court of Appeals recently the James versus Eulmatt. Dr. Eulmatt matter that has concluded otherwise it stated that. When a report was served prior to service of the lawsuit.

Then as service of the lawsuit occurs later that 21 days following the service of the report, then that doesn't count because there is no way that the defendant has had notice in can timely file its objection to a deficient report. So I believe that the service would have to be after the filing of the lawsuit to be able to make sure that all the provisions of 71.351-- through 74.351 (a) are justified, your Honor and if ...

CHIEF JUSTICE JEFFERSON: Your opposing counsel says, we don't have jurisdiction, there's no conflict among Courts of Appeals, no decent, no other ground under the government code. What's your response.

MS. FAUST: You Honor, we cited two cases of the Court, the Ameritas case and then that [inaudible] versus Vernon Matter out Texarkana. Both of those cases on similar issues they did have conceitedly, your Honor. Orders granting the extension and an order denying the motion at the same time. With those Court's concluded was when there's a complete absence of the report, then there is no proper extension under 74.351 and the exception to (a) (9) does not apply because the grant-- the order granting the extension is not an extension to cure a deficient report.

And again, you only have two ways to get an extension, one is to cure a deficient report that was timely serving the other as by agreement, your Honor. Those two cases give this Court complex jurisdiction we believe, your Honor.

CHIEF JUSTICE JEFFERSON: Are there any further questions. Thank you counsel, the cause it is submitted and the Court will take a brief recess.

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