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Supreme Court of Texas.  
Jan N. Ogletree, M.D. and Heart Hospital of Austin, Petitioners,  
v.  
Nancy Kay Matthews and Luann Matthews, Respondents.  
No. 06-0502.

April 10, 2007.

Appearances:  
Terri Harris, Austin, TX, Missy K. Atwood, Austin, Texas, for petitioner.  
Charles J. Young Jr., Maxton, North Carolina, for respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to hear argument in 06-0502, Jan Ogletree, M.D. and Heart Hospital of Austin versus Nancy Kay Matthews and Luann Matthews.

COURT ATTENDANT: May it please the Court. Ms. Harris and Ms. Atwood will present argument for the petitioners. Petitioners have reserved three minutes for rebuttal. Ms. Harris will open with the first eight minutes and Ms. Harris will present the rebuttal.

#### ORAL ARGUMENT OF TERRI HARRIS ON BEHALF OF THE PETITIONER

MS. HARRIS: May it please the Court. Two issues are before this Court regarding Dr. Ogletree: One, the jurisdiction issue and; Two, whether a 30-day extension allows a plaintiff to get a new report from a new expert that was not timely filed within the hundred and twenty days under the new statute. I will address jurisdiction first. The case that was just before us under the old law is precisely one of the reasons the legislature enacted the new law to allow us to be here today. As Justice Brister pointed out in the prior argument there are different parts of the State that seems to interpret the expert requirement and the new law differently. That is precisely why we are here. Eleven of the fourteen Court of Appeals have now, as we stand here today, addressed the jurisdictional issue under the new statute. When we did our briefs on the merits, I believe there were only four or

five as-- since I only have eight minutes, as I go along, I will try to give cites to the new cases. If the Court wishes, I can certainly do a post-submission brief as to the new cases because these appear to be coming out literally almost weekly...

CHIEF JUSTICE JEFFERSON: That would, that would be helpful.

MS. HARRIS: I would be glad to do that, your Honor. As Justice Brister and Justice Hecht pointed out in *In re Women's Hospital* case before this Court under the old law in addressing whether you can mandamus under the old law, both of you pointed out in your dissent in the denial of the mandamus, quote, 'Just recently, as part as half, as part of House Bill IV, the legislature amended 51.014 of the Texas Civil Practice in Remedies Code to provide for an interlocutory appeal if a trial court refuses to dismiss a healthcare liability claim, when an expert statement does not meet the statutory standards.' This is another unmistakable statement of public policy that the legislature does not want healthcare liability cases to proceed through the legal system if the threshold requirement of an expert report has not been met. That is exactly what we have here and that's exactly why the legislature has allowed an interlocutory appeal in these cases.

CHIEF JUSTICE JEFFERSON: What did the legislature mean when it said, "An appeal may not be taken from an order granting an extension under 74.351?"

MS. HARRIS: What that means, that was precisely the issue in the *Andra* case out of the Austin Court of Appeals. That-- when I have this happen often in my cases, a plaintiff will file an expert report way prior to the hundred and twenty days and in fact I just got a new lawsuit last week where the expert report was attached to the petition. That means I've only got 21 days to object to that which sometimes is even before my answer is to which is a whole another issue that's not before this Court. But in that case, if I file an objection within 21 days, the other side has a right to set up for hearing or I could set it for hearing as if we would not wait with the hundred and twenty days run but the other side typically if, if they're smart will set it for hearing. If the Court rules that that expert report is inadequate that gives them an additional 30 days to cure that deficiency. I can't appeal that because that is a-- an extension for an inadequate report which is precisely cannot be appealed under the, the statute. What can be appealed is the failure to grant a motion to dismiss that should have been granted. Now, inherently in that, obviously the Court is going to have to look at not the what the trial court did in deciding on the motion to dismiss but any issues down the road, in other words, did they give a 30-day extension where the reports and objective good faith ever-- effort. And each one of the cases that has held jurisdiction has held that the statute clearly says, 'Dismissal under B is subject to C.'

CHIEF JUSTICE JEFFERSON: But a motion for extension to cure deficiency implies that the expert report is not adequate as it is. Right?

MS. HARRIS: If the Court, if the trial court grants an extension, yes. The trial court is saying, 'You made an objective good faith effort but it wasn't quite good enough and we're giving you an additional 30 days to cure that deficiency,' that's exactly what they're saying.

JUSTICE O'NEILL: So how would you decide the motion to dismiss in that vacuum, knowing that it's going to be supplemented and the deficiency is cured. How would the trial court be able to rule on the motion to dismiss?

MS. HARRIS: In this case and in the cases that have gone up on appeal, it's the fact that the trial court had no discretion to give the 30-day extension. And therefore, it was wrong to deny the motion to dismiss and because the trial court got it wrong in not granting the motion to dismiss, then got it wrong again by giving a 30-day extension

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JUSTICE O'NEILL: Well, I guess that's ...

MS. HARRIS: - that's not allowed ...

JUSTICE O'NEILL: I guess that's my question though, how do you know when you've gotten it wrong if it's, if it's inadequate? Then, technically the trial court's gotten it wrong by not dismissing but the statute allows discretion to allow it to be cured.

MS. HARRIS: Only if, one scenario, if there is a timely filed report from a qualified expert and that the elements are there. Okay, standard of care breach causation--

JUSTICE O'NEILL: Well ...

MS. HARRIS: - but it is deficient then that, that person can cure that deficiency.

CHIEF JUSTICE JEFFERSON: Deficient how if it's ...

MS. HARRIS: Oh, for example, usually the one that's found the most is conclusory. For example, somebody insists, here's how-- here's the standard of care one, two, three, four, five.

CHIEF JUSTICE JEFFERSON: Which we've held to be another case with basically no evidence. So you're, you're filing an expert report that doesn't have any real content and you're saying that you do get an extension in that case to cure that deficiency.

MS. HARRIS: If the trial court finds it as an objective good faith effort, absolutely.

CHIEF JUSTICE JEFFERSON: And the trial court found that here.

MS. HARRIS: The trial court didn't find at all in this case whether it was ...

CHIEF JUSTICE JEFFERSON: Well, inclusively by granting the motion for extension if that's the standard then the Court found a good faith effort.

MS. HARRIS: It is the standard. The trial court did not articulate the standard. What the trial court said which gets into the second point, but is inherently important in this one as well. What the trial court held was, the three reports as to Dr.-- Dr. Ogletree is a urologist and this has to do with inserting a catheter in the bladder. The one report they got-- the only physician report they got was Dr. Karsh who was a pediatric cardiologist and a radiologist. His report doesn't even mention Dr. Ogletree by name at all in his report. The other two reports were ...

JUSTICE O'NEILL: But if you could tell from the report itself clearly he was referring to. If it says, 'The doctor that placed the catheter or not, I haven't look at the affidavits,' but if this says, 'The doctor who placed the catheter was negligent in X,' surely that would be an objective good faith effort even that the doctor's not named.

MS. HARRIS: Not according to the Courts of Appeals that have interpreted the new law. In fact, the San Antonio Court of Appeals with the Garcia case (185 S.W.3d 70) said that, 'If a defendant is not mentioned by name, it's as if no report was filed as to that person at all.'

JUSTICE O'NEILL: Well, but I would think if the record clearly demonstrates and there's no dispute as to who the doctor was, that might be a difference (inaudible).

MS. HARRIS: If there was only one defendant, say in a case, and that was the only issue and, and instead of saying Dr. Ogletree for example they said, 'Defendant did this, defendant did this,' then arguably the trial court could say, 'You know, that's a good faith effort. Go back and change defendant to Dr. Ogletree.'

CHIEF JUSTICE JEFFERSON: What I'm trying to ...

MS. HARRIS: Make it in 30 days.

CHIEF JUSTICE JEFFERSON: What I'm trying to understand is, I'm the judge and I get-- you know, and there's a motion to dismiss. The expert report is in front of me and I determine that it's conclusory. And I look at Supreme Court precedent, 'It's no evidence,' and am I then obligated to dismiss the case at that point or does the statute give me the power to grant a 30-day extension?

MS. HARRIS: The statute gives you the power to grant a 30-day extension.

CHIEF JUSTICE JEFFERSON: Even when, the report doesn't--there's no evidences as to causation or standard or what, what so ...

MS. HARRIS: No. In that case, absolutely not because ...

CHIEF JUSTICE JEFFERSON#1: Well, that's a conclusory. So what I'm trying to understand is do-- does the statute give the trial court the, the authority to grant this 30-day extension to cure deficiencies like conclusory or does it not?

MS. HARRIS: No your-- it does not, your Honor. It specifically says, 'It only can cure the deficiency in the report.' The Courts of Appeals that have looked at it, for example if no report is filed at all, if a report is filed as in this case the only causation report was from a nurse. Who'd-- whose statutorily is prohibited from giving causation opinions and standard of care as to a doctor. Reports that deal with another defendant and don't mention a defendant at all, those are clearly not an objective good faith effort and the Court has no discretion in that case under the statute to give a 30-day extension which is what we had in this case. The only way the Court can give an extension is if they find a, a-- an element, a sentence. It's almost semantics. It's to the point where the few times that I have actually filed a motion to dismiss on what I consider to be an inadequate report, the trial court was add this and change this, and it-- it's not even worth the time. Those good lawyers would never file a motion to dismiss on a report -

CHIEF JUSTICE JEFFERSON: So ...

MS. HARRIS: - that was probably an objective good faith effort which is not what we have here.

CHIEF JUSTICE JEFFERSON: So if its an objective good faith effort, then there's really no need to cure as what you're saying. There, there-- it would be improper to dismiss.

MS. HARRIS: It would be absolutely improper to dismiss...

CHIEF JUSTICE JEFFERSON: So, so ...

MS. HARRIS: The Court could make them fix it but in the grand scheme to the case, it's a valid case, it's going to go forward whether the sentence says, 'Dr. Ogletree versus defendant is, is immaterial to the substance.'

CHIEF JUSTICE JEFFERSON: No, I don't understand whether the-- that provision in the statute to, to grant time for curing a deficiency if it really doesn't matter in terms of whether the trial court must dismiss or not. I just don't understand.

MS. HARRIS: Well, it, it may matter to other defense attorneys. I was just talking about me in particular. What the statute says is if you don't make the effort at all either don't get a report or your

reports mention other defendants or your reports are so deficient that it's clearly not an objective good faith effort then, you cannot give a 30-day extension. And that is what we had in this case. If for example, they left out a medical term or they left out a procedure that was done or you found maybe just causation was conclusory then it's an object to good faith effort. You can go back and add that. Under any of the scenarios that we've discussed here today, this Court has jurisdiction to hear that and the Austin Court of Appeals erred by finding that there was no jurisdiction. What the Austin Court of Appeals tried to say was only if the trial court denies a motion to dismiss and denies an extension, does this Court have jurisdiction which completely ignores the whole subsection B allowing for an interlocutory appeal and it allows the trial court to say, 'You know, what, I don't like the statute. I'm going to deny the motion to dismiss but I'm going to grant you 30 days because then Supreme Court can't touch me, and we're going to go forward. And that's exactly what will happen if jurisdiction is not allowed in this case, and it ...

JUSTICE BRISTER: But then, if you grant the 30 days, you just move forward again in 30 days. Right?

MS. HARRIS: Well, in this-- the problem is in this case is the trial court allowed them to get a new expert ...

JUSTICE BRISTER: Separate, separate question, if they just used the same expert, then you just file again. What's the harm and wait 30 days-

MS. HARRIS: Well ...

JUSTICE BRISTER: - addition for 30 days ...

MS. HARRIS: We learn from the Waco Court of Appeals in Lewis (191 S.W. 3d 756) that that's not appealable either. That's exactly what happened in that case. They went ahead and waited the 30 days, got the new report, complained the new report wasn't good enough, dismiss that, went up to Waco Court of Appeals, Waco Court of Appeals said, 'You can't, you can't appeal your first motion to dismissed that should've been dismissed initially because you didn't file an interlocutory appeal within 20 days. You cannot file the second one because there's no jurisdiction under the statute.' And ...

JUSTICE BRISTER: But assuming we didn't feel ourselves bound by what the Waco Court of Appeals said, we could look at-- I mean, if it's just a matter of trial judge gives you 30 days, you wait 30 days, you filed a new motion to dismiss saying that's still not-- I mean, if you got a full report then, no harm, no foul but if you -

MS. HARRIS: Well ...

JUSTICE BRISTER: - if your report's still inadequate, you can just move again and then unquestionably have a right to interlocutory review.

MS. HARRIS: Well, the harm in that in this case is there was no report that could have been fixed. You've got a radiologist and two nurses, what the trial court did was allow them to go get a new expert from the new, you know, a new report from a new expert which clearly is not allowed. It defeats the whole hundred and twenty days and I need to let Ms. Atwood have some time to argue, and I can address any other questions in rebuttal.

CHIEF JUSTICE JEFFERSON: We will hear from Ms. Atwood.

MS. ATWOOD: Thank you, your Honor. It's undisputed in this case that at the hundred and twenty day deadline for filing expert reports, the Matthews had filed absolutely no report that even attempted to address the causation issue for the hospital or the nursing standard of care. The Matthews and the Austin Court of Appeals take the position

that this omission of a required report is somehow cured by the fact that there was not an objection to the two nursing reports that did not, because they could not address causation in the case. This Court will recall that the legislature changed the law in the State to expressly prohibit nurses and require physicians to provide causation testimony than causal nexuses between the alleged breach of the standard of care and injury or death or damages to the plaintiff. That can only be provided now by a physician expert in a medical malpractice case. Previously, that could be provided by a nurse or other healthcare professional under certain circumstances. In this case, the nursing reports that were provided were perfectly appropriate and were not objectionable as they were provided. They properly addressed the standard of care, properly addressed the breach of the standard appear and these nurses were qualified to address that issue. They also properly refrained from discussing the causation issue in the case.

JUSTICE BRISTER: But-- Under your argument, you just-- could you waited two years rather than raise this objection two years later?

MS. ATWOOD: Your Honor, there is no requirement for, a timeliness requirement for a motion to dismiss, and in fact, when there is an absence of a report under the statute, the only correct vehicle to proceed is a motion to dismiss and not an objection in this case. And I think what the Court of Appeals, where they missed the boat in the poor error that they made was messing up or mixing up the function of an objection and a motion to dismiss. We're the-- we are directed by the statute to look at the specific report to determine whether implicates the conduct of a defendant to decide whether you need to evaluate it and make an objection in any case. In this situation, clearly the reports of the nurses implicated the conduct of the hospital in this case but to rule that the hospital would then have to make an objection that the nurses failed to address causation when they can't address causation, stands on it's head the legislative intent ...

JUSTICE BRISTER: But, but it says that's any objection must file and serve any objection to the sufficiency of the report. Why, why wouldn't this be if your objection is they don't and nobody else addresses causation, why would not that be any objection to the sufficiency of the reports?

MS. ATWOOD: Well, your Honor for the exact reason that the Austin Court mixed up the function of objections. There's no context in the law where we object to omitted a testimony. The role and function of an objection is to raise deficiencies in the testimony given. That's true with summary judgment affidavits, with testimony from witnesses at trial. You object if there's some deficiency or problem with the offered testimony, you don't object when there has been an omission of testimony.

JUSTICE BRISTER: As I read C, it treats expert's reports that are deficient as if they had never been served at all. If an expert report is not been served within the periods specified by [inaudible] because elements of the report are found deficient.

MS. ATWOOD: Right.

JUSTICE BRISTER: So it seems to equate a deficient report with one that's not been served at all. It treats them as if they've never been served at all.

MS. ATWOOD: Well, I do think, your Honor, that-- I mean, unfortunately the legislature chose three different words to use in the same section of the statute. They talked about objection to sufficiency and then they talk about deficient reports. And I think really the issue before this Court is probably whether those are mirror images of

one another. And then, it talks about dismissal if a report is found to be inadequate. I mean, that's where the ambiguity arises but if I may conclude briefly, your Honor, the ...

JUSTICE WAINWRIGHT: Let me ask you, as I read your brief, it seems to indicate that by not having any, any report address causation as to the hospital that there was no report as to the hospital on causation, which as you pointed out, causation is required to be opined to by a physician now.

MS. ATWOOD: That's correct.

JUSTICE WAINWRIGHT: And you seem to distinguish sufficiency of a report that's made -

MS. ATWOOD: Right.

JUSTICE WAINWRIGHT: - from no filing of a report at all.

MS. ATWOOD: That's correct.

JUSTICE WAINWRIGHT: The latter case you see, you don't have to object to -

MS. ATWOOD: That's correct.

JUSTICE WAINWRIGHT: - the former, you say you do.

MS. ATWOOD: That's correct.

JUSTICE WAINWRIGHT: Would you equate sufficiency and adequacy under the statute, adequate report versus a sufficient report. Would you say they're similar or the same?

MS. ATWOOD: No. I think that they're different, different issues to be decided. Sufficiency has to do with the sufficiency of the areas addressed in the report. In other words, maybe the nurse didn't sufficiently address standard of care and breach because she had insufficient detail perhaps she's not qualified or there are some problem with it. And if I don't object to that, I'm going to waive my right to complain about the content of what she said. I don't ...

JUSTICE WAINWRIGHT: And adequacy?

MS. ATWOOD: Adequacy on the other hand when it referred to in the last section there of 731, is talking about whether the plaintiff has met their entire burden to provide the trifecta or the tripartite complement of the expert reports. And don't lose side of the fact that the legislature said, 'You know, we're going to require in all of these hospital cases effectively that the plaintiff provide at least two reports: One, addressing the standard of a care from a nurse or pharmacist, physical therapist, any non-physician healthcare provider whose conduct could be challenged and; we're going to also need to provide an extra separate report from a physician on the element of causation.' Because we expect that people are going to need to provide separate report were directed to look for the sufficiency of the testimony or the sufficiency of the opinions offered in the report that you have in front of you. It doesn't mean that it gives a plaintiff a pass where they don't have to ever provide a report on causation when they have provided a perfectly sufficient, perfectly adequate report from a qualified expert limited properly to those topics that that expert can address under the statute.

JUSTICE CHIEF JUSTICE JEFFERSON: Further questions? Thank you, Counselor. The Court is ready to hear argument now from the respondent.

COURT ATTENDANT: May it please the Court. Mr. Young will present argument for the respondent.

JUSTICE WAINWRIGHT: Counsel do you agree that we need to parse out sufficiency versus deficient report versus an adequate report, here? And if so, how do you define those consistent with the language and purposes of this section?

ORAL ARGUMENT OF CHARLES J. YOUNG ON BEHALF OF THE RESPONDENT

MR. YOUNG: Sufficiency and adequacy, I'm not sure that we do have to parse those but I do believe that in, in determining whether a, a report is sufficient under the, the criteria of whether or not there can be a finding of merit would require all the elements maybe at, all three of the tripartite elements be met.

JUSTICE O'NEILL: Why, why shouldn't we be able to review an affidavit to determine in the first instance if it constitutes an objective good faith effort, separate and apart from whether it can be cured by a continuance.

MR. YOUNG: An, an affidavit your Honor?

JUSTICE O'NEILL: Yes. If, If the trial court abuses discretion in finding that the affidavit was an objective good faith effort, why should the Court not be able to review it on appeal, you know, interlocutorily?

MR. YOUNG: The-- By affidavit your talking about the reports themselves?

JUSTICE O'NEILL: Yes.

MR. YOUNG: Yes. I believe that what we have here is the legislative intent to grant broad discretion to the trial court to determine if a report is filed whether or not an extension can be granted.

JUSTICE BRISTER: And you think that's essentially unlimited?

MR. YOUNG: I think it is unlimited as long as a report has been filed.

JUSTICE WAINWRIGHT: What if the report is from a plumber?

MR. YOUNG: Then certainly no, that, that does not set the the pre ...

JUSTICE WAINWRIGHT: What if the report has words but doesn't say anything about linking anything that the hospital or doctor did to the death or injury of the plaintiff, that's a report but it just doesn't do anything.

MR. YOUNG: I think that there could potentially be cases where there is a report where, quote unquote, 'there's not a report.'

JUSTICE WAINWRIGHT: So this gets us back to, I think Justice O'Neill's question and that is, why shouldn't the trial court be able to look first whether the report filed is a good faith effort and then if it is permit in the curing of deficiencies in that report.

MR. YOUNG: And I believe that that is what the, the cases require and that is what is implied when a Court grants the 30-day extension.

JUSTICE O'NEILL: And why can't we review the trial court's decision as to whether it constitutes an objective good faith effort in the first instance? So if as the chief posited a plumber had filed the report, why can't we review that regardless of whether the trial court granted an extension.

MR. YOUNG: And I believe that we have to look at the legislative intent to expedite these cases to give the trial court, much like in a summary judgment case, a lot of discretion in determining whether or not a 30-day extension is granted and then at that point after that 30-day extension is granted. There typically is another hearing on which case everything is reviewed by the Court. And I, I think that, that is the key in this new statute is the discretion that the legislature



intended by prohibiting an appeal. Specifically, adding language, prohibiting an appeal where a 30-day extension is granted, basically taking the appellant process to the next level after that 30 days has run.

JUSTICE JOHNSON: Doesn't it, doesn't it just prohibit the review of the order granting the extension?

MR. YOUNG: As I read it, it prohibits an appeal of an order that includes an extension.

JUSTICE JOHNSON: Okay. So as you read it, once the extension is granted, that's it, there is no further review forever of the adequacy or sufficiency or of anything in regard to the reports?

MR. YOUNG: Up to that level, I believe that is correct, your Honor.

JUSTICE JOHNSON: Well, it-- at any point, when wouldn't have been reviewable? After trial, before trial, is it-- in your view, is the adequacy and sufficiency of the report or reports ever reviewable if the trial court grants an extension?

MR. YOUNG: I believe it as I said, there is typically a second hearing after the third ...

JUSTICE JOHNSON: Well, no. Not typically. Is it ever, is it ever reviewable as you view it under your scenario by an appellate court?

MR. YOUNG: I, I believe not. I, I believe that was a legislative intent specifically adding the provision that it would not be reviewable that there would not be jurisdiction. Much as in the, in the new statute there is no appeal on the qualifications hearing under "L" of Section 74.351. The ...

JUSTICE BRISTER: Is it, is it ...

MR. YOUNG: Except by the plaintiff that might lose at hearing, but the ...

JUSTICE BRISTER: Is it true that some judges who just don't believe there should be this requirement are ignoring it?

MR. YOUNG: I believe that is true. And I believe that there have been cases where the appellate court, and I believe properly have said, 'If there were no reports filed at all then the precedent for granting a 30-day extension was not satisfied therefore, the appellate court did have jurisdiction.'

JUSTICE BRISTER: But are you saying that judge could get a-- judge that disagreed with what legislature pass could get around it by just granting a 30-day extension?

MR. YOUNG: No. I believe that the Courts of Appeals in the case where there is no report at all should be allowed to say that you abused your discretion because there was no report at all.

JUSTICE HECHT: But you also think, just to be clear, that sometimes a report can be so deficient that it's no report, like a report from a plumber?

MR. YOUNG: Pro-- yes, a report from a plumber.

JUSTICE HECHT: So the question in your view on this issue, it all boils down to, what does deficient mean in the-- in paragraph C?

MR. YOUNG: I believe that, that is correct. But I believe in looking at what is deficient, again the, the, the statute is very clear that you have to look at all of the reports entitled as one report and what was filed was-- were three reports, one of which was by an indeed total of some, about 25 pages of discussion regarding the actions by the hospital -

JUSTICE HECHT: What ...

MR. YOUNG: - and the doctor.

JUSTICE HECHT: What is-- help me, help me with the argument the a,

a, defendant is supposed to object to the nurses' report because it doesn't address causation when it can't address causation. How can you object to something which doesn't have something in it that it can't have in it?

MR. YOUNG: First of all, I believe that the nurses' reports did talk about causation.

JUSTICE HECHT: But shouldn't have.

MR. YOUNG: And, and that is improper that the-- but that goes as to qualifications whether or not they are qualified to talk about causation. And that is certainly a matter that would require an objection and a hearing on that objection and the ...

JUSTICE HECHT: Well, if the nurses' reports were properly in a, in a case, were properly saddled on the issue of causation. Just didn't touch it-- because they're not supposed to. Well, should the defendant object to those reports.

MR. YOUNG: I believe so, where as in this case, it's clear. I believe that the plaintiffs were relying on those reports to satisfy the statute. They were served with a doctor's report that at least made some reference to the hospital. Granted, they did not adequately address the causation issue ...

JUSTICE: The doctor's report?

MR. YOUNG: The doctor's report but, but with the three reports taken together talked at, at length about the action of the nurses. And, and it was filed the day before the hundred and twenty days period ran, so it's not a situation where it was filed with the petitioner in the first few weeks of the-- after the petition was filed. And the nurses or the hospital needed to wait to see if another report was filed by the doctor. So I, I think that in this case, the hospital was clearly on notice that these three reports, entitled were being relied upon by the plaintiff as their reports and therefore, they had an obligation to file an objection.

JUSTICE JOHNSON: Counsel, the opposing counsel said that they-- you actually in, in looking at the nurses' standard care in causation would be required to file both the nurse and the physician's affidavit to get the standard of care and causation as I understood her argument. Would you be able to get both of those, both standard of care and causation with a physician affidavit?

MR. YOUNG: I believe you could with a correct physician qualification...

JUSTICE JOHNSON: But with the correct physician, physician, in other words, can testify about a nurse standard of care as well as causation. Nurse on the other hand, can only go to standard of care, and not causation. And it's up to the, the plaintiff to choose which of those affidavits or all of them they want to file.

MR. YOUNG: That is correct. And, and again I believe that the, the cause of the discretion that it's allowed the trial court that the appeal by Dr. Ogletree of the 30-day extension is prohibited. The Court does not have jurisdiction and that in essence, to, to rule otherwise, Dr. Ogletree would have to show this Court that the reports that were filed were in essence, no reports at all. And I don't believe that, that is the case when you look at the reports, they clearly implicate Dr. Ogletree. They talk at length about what he did. And I, I believe that that is enough to give the trial court the discretion to grant the 30-day extension. There was a subsequent hearing and no appeal from yet after the reports were filed. As to the issue of regarding whether or not another expert can be used, I think there are some cases that, that do state that is okay and you have allowed that. The only one that I

saw that didn't was the Danos case (Tex. App. LEXIS 1568) out of Houston where the trial court said, 'No. I granted the 30-day extension but I'm not going to allow a new expert.' I believe that's perfectly within the discretion of the trial court since the trial court granted the 30-day extension. In our case, we-- after the 30-day extension was granted or actually before it was granted but after the hundred and twenty days, we did file a report of a urologist, a very eminent urologist of UCLA Medical School, very detailed report and, and within the 30-day extension there was also a report filed, a supplemental report filed by Dr. Karsh, the original physician that filed the, the short report within the hundred and twenty days. After reviewing Dr. Claman's urologist report, he supplemented his report and incorporated that report. So we did not retire-- rely totally upon the expert report by the new doctor. I believe that as to the hospital, the, the 21 days is pretty clear. I think that the legislature intended hard and fast deadlines here. They wanted to expedite these cases. They wanted to, to get rid of these cases that don't have merit. And I don't believe that's the situation in our case. Certainly, neither of the judges that heard the two hearings on these-- on, on, on the motions by these defendants felt that this was a meritless case and denied their motion to dismiss after reviewing the reports. And I believe that the 21 days is a hard and fast rule intended by the legislature to make the defendants speak up early as opposed to waiting until this case gets two years down the road just before trial and start filing motions to dismiss. And I believe that if you looked at it, it also-- is in-- is a, a situation where the 21-day objection notice and in fact, the objection notice in general, is intended to create a fair playing field whereby, if the defendants have a problem with the report, that they put the plaintiff on notice of those problems so that the plaintiff then can request a 30-day extension to correct those reports. And again, of all these being in a timely fashion so that there can be a quick determination of whether these are meritorious cases that need to go forward.

JUSTICE WAINWRIGHT: What's the specific objection that you claim the hospital should've made here in this case?

MR. YOUNG: I believe that they should have stated that-- objected that the reports in total, in looking at all three of them, fail to properly address the causation issue as required by the statute.

JUSTICE WAINWRIGHT: And your counterpart says that plaintiffs have an affirmative duty under the statute to file a report that affirmatively addresses causation in a proper way.

MR. YOUNG: Correct.

JUSTICE WAINWRIGHT: So whose burden is it?

MR. YOUNG: It is the plaintiff's burden to file a report.

JUSTICE WAINWRIGHT: And then the defendant's burden to point out problems, so that you can fix them?

MR. YOUNG: Correct. And I believe that that is the, the purpose. One of the purposes of the 30-day extension granted to the discretion of the trial court to say, 'Okay, we've, we got a problem, it's been pointed out by the defendants. And I want to give the plaintiff 30 days to cure that and then as, as typical, there's another hearing at the of the 30 days to determine whether or not the statute has then been satisfied.'

JUSTICE WAINWRIGHT: And, and as you read the statute, as long as there are some written document called a 'report served,' then the defendant has an obligation to point out deficiencies within the 21 days?

MR. YOUNG: I believe that is correct. Again, going back to what Chief Justice stated, you know, if, if it's a plumber's report, I don't believe that, that gets you there.

JUSTICE WAINWRIGHT: But doesn't the statute treat a nurse's opinion on causation just like it would a plumber's report on causation. Does neither one can-- is sufficient? Neither one is appropriate on causation?

MR. YOUNG: It, it does cite that a nurse's opinion on causation is improper but it does-- nurses are allowed to, to proper opinions regarding a number of issues ...

JUSTICE WAINWRIGHT: And-- Well, we're just talking about causation here and not to belittle nurses that when it comes to giving an expert report on causation, the statute treats them like plumbers, doesn't it?

MR. YOUNG: I, I don't know that it treats them like plumbers ...

JUSTICE: Well, it says that only physicians may testify on causation...

JUSTICE WAINWRIGHT: So no one else in the world except physicians can provide an expert report on causation. So everyone else in the world but physicians are treated the same for purposes of the statute with regard to causation.

MR. YOUNG: I can see the Court's argument in that regarding-- and I, and I don't necessarily -

JUSTICE WAINWRIGHT: Is it an argument or is it ...

MR. YOUNG: - disagree with that ...

JUSTICE WAINWRIGHT: Is it an argument or is it the way that statute's drafted?

MR. YOUNG: I, I believe the statute is drafted that way. On the same token of the plaintiff did present a doctor's report, albeit brief, that did albeit brief, (inaudible) nurses. It did not go into causation as it would be, as would be required to satisfy the statute?

JUSTICE MEDINA: I, I don't, I don't want to pile on here but, Ms. At-- Ms. Atwood seemed to make a pretty compelling argument as it pertains to that report. But it seems to me that your argument, unless I missed it, is that you talked in totality of all of three of these reports and therefore that was adequate enough to meet the requirements to put the hospital on notice of your claims, is that right?

MR. YOUNG: That is correct. And in closing, you know, I, I think that the key here is looking at what the legislature intended as far as giving the trial courts a lot of discretion, I mentioned this before but I believe that, that they have a lot of discretion in granting the 30-day. And, and I believe that the-- Dr. Ogletree is trying to circumvent that discretion by saying that this report this not a report at all. And I just don't believe that, that is the case. And I don't believe that the two trial courts that looked at this reports felt that this was a non-meritorious case and they both felt they should go forward. And similarly that the trial court that heard the, the hospital's argument felt that an objection was proper again to allow the, the plaintiff to correct any perceived deficiencies in that report as taken as a whole.

JUSTICE: Thank you, Counsel.

MR. YOUNG: Thank you.

CHIEF JUSTICE JEFFERSON: Let me ask as you're walking up, -

REBUTTAL ARGUMENT OF TERRI HARRIS ON BEHALF OF THE PETITIONER

MS. HARRIS: Sure.

CHIEF JUSTICE JEFFERSON: - did, did you move to dismiss after the second round of reports?

MS. HARRIS: Did not. Did not and ...

CHIEF JUSTICE JEFFERSON: Do you, do you, do you agree that those supplemental reports cured deficient-- were they defi-, where they sufficient?

MS. HARRIS: Yes, and I objected to them.

CHIEF JUSTICE JEFFERSON: Right.

MS. HARRIS: Yes but have not filed an, an, an appeal on that motion to dismiss. Yes, I filed an objection. Yes, I filed a motion to dismiss but this has been pending and there was no report as to Dr. Ogletree filed, period. There were two nursing reports filed which the Court knows can't address standard of care causation or breach as to Dr. Ogletree, the only doctor report ...

CHIEF JUSTICE JEFFERSON: So if we were to disagree with you on, on the merits of this appeal, it would go back down to the trial court and there'd be another hearing on the motion to dismiss, is that ...

MS. HARRIS: No, your Honor. This-- The, the trial court had no discretion but to dismiss the case.

CHIEF JUSTICE JEFFERSON: No. I'm, I'm saying, let-- let's just assume that we disagree with that trial court had plenty of discretion not to dismiss the case, to grant the extension not to dismiss. What the-- and that's what we held, would the posture be that it goes back down to the trial court and the trial court would then hear your motion to dismiss based on the inadequacy of the new report.

MS. HARRIS: Yes, if, if I chose to have that heard, I'm sure, absolutely otherwise, we just go to trial or, or continue with the case and ...

JUSTICE HECHT: Sometimes it's kind of hard to tell whether a physician is going to be in the area of expertise to be able to testify but that's very close 'till you bring in an expert that's kind of in one area related to the claims and-- but the trial court says, 'Well, no. I don't think that does it. I think what we need here is not an, an expert in this area but one in this area.' Why shouldn't you get-- (inaudible) almost have to have a second expert on that case.

MS. HARRIS: If the trial court found that the first expert was not qualified?

JUSTICE HECHT: No.

MS. HARRIS: Absolutely, either they have to get a second one if that was allowed. The hundred, the hundred and twenty day, in this case, the hundred and twenty day deadline, there was no report filed as to Dr. Ogletree. There was a letter, a report from Dr. Karsh that says, 'I'm not qualified to address urologist standard of care.' The only thing he says in there is, 'I would defer to a urologist and these questions are better asked of a urologist.' It is not an expert report by any means and nobody claims it is....

JUSTICE HECHT: But then if he said, 'I think I am,' and the trial judge disagreed, why couldn't you go get a second expert?

MS. HARRIS: Because then that defeats the entire purpose of having the hundred and twenty day deadline that the legislature enacted. It's not the trial court's job to go tell a plaintiff's attorney how to work up his case.

JUSTICE HECHT: But if he thinks, if the trial, if attorney thinks in good faith that this expert ought to qualify, but the trial judge disagrees and the case is just over in your view.

MS. HARRIS: It, it is, it is over although they could certainly appeal the granting of the motion under 'L,' then that is certainly appealable as well. But the Danosi case which counsel referred to, is a new Houston Court of Appeals case. And in that case the Court said, 'The, the legislative intent in the language of the statute says, you only get 30 days to cure the deficiency in the report.' And they compare that with what we were allowed to do under the old statute 4590(i) which says you get 30 days to comply with the subsection. The Anos Court said, 'As this Court has held many times, when the legislature changes the language, you've got to give intent to that.' Under the old 4590(i), you could comply with the subsection i.e. you could go get a new report from a new expert under the new one. It says, 'You only can cure the deficiencies in the report.' And that is why the, the Houston Court of Appeals said, "You only can fix what's there."

JUSTICE JOHNSON: Are there other questions? Thank you counsel. The cause is submitted. That concludes the arguments for this morning and the marshall will now adjourns the Court.

COURT ATTENDANT: All rise. Oyez. Oyez. Oyez.

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