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

Argued October 12, 2015

JUSTICE BROWN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE DEVINE joined.

JUSTICE BOYD filed a concurring opinion, in which JUSTICE WILLETT joined.

JUSTICE JOHNSON filed a dissenting opinion.

The Texas Medical Liability Act (Act) requires claimants pursuing a healthcare-liability claim to serve an expert report on each party no later than the 120th day after filing an original petition. About six months before actually filing suit, the plaintiffs in this case voluntarily served an expert report concurrently with a pre-suit notice letter. After filing suit, the plaintiffs attempted to serve the same previously served expert report on the defendant but mistakenly served another report—one from the same expert but addressing an entirely different patient, doctor, and claim. The

defendant made no objection, choosing instead to wait out passage of the 120-day deadline before moving to dismiss the plaintiffs' claims for failure to serve an expert report. The trial court denied that motion but the court of appeals reversed, holding that the plaintiffs failed to timely serve a qualifying expert report because pre-suit service of the correct report did not satisfy the Act's requirements and the later incorrect report fell below the Act's minimal standard as required to maintain a suit.

We disagree. Nothing in the Act compels the conclusion that a plaintiff cannot satisfy the expert-report requirement through pre-suit service of an otherwise satisfactory expert report. Moreover, the court of appeals' conclusion frustrates the Act's purpose, which is to eliminate frivolous healthcare-liability claims, not potentially meritorious ones. Therefore, the plaintiffs' mistaken post-suit service of the incorrect expert report is of no consequence—the plaintiffs met their burden with pre-suit service of the correct report. Accordingly, we reverse the court of appeals.

I

A

On February 11, 2010, a baby girl, R.M.S., was born to Haley Hebner and Darrin Scott (collectively Hebner) by emergency caesarean section. Tragically, R.M.S. died the next day. On August 12, 2011, Hebner sent the delivering physician, Nagakrishna Reddy, M.D., a pre-suit notice letter via certified mail, as the Act requires. *See* TEX. CIV. PRAC. & REM. CODE § 74.051(a). Though not required by the Act until 120 days after filing an original petition, *see id.* § 74.351(a), Hebner included with the pre-suit notice letter the expert report and curriculum vitae of expert Barry Schifrin, M.D. (the First Report). The First Report addressed Reddy, her treatment of Hebner and

R.M.S., and Hebner's healthcare-liability claims. Reddy acknowledges she received the First Report and does not dispute the First Report's compliance with the Act's substantive requirements.

On February 22, 2012, about six months after sending the pre-suit notice letter and First Report, Hebner sued Reddy[1] alleging that her negligent treatment proximately caused R.M.S.'s death. Hebner mistakenly included with the original petition an expert report Dr. Schifrin prepared for a different case involving a separate patient and doctor (the Second Report). It is undisputed that the Second Report does not implicate Reddy, Hebner, or R.M.S. Reddy did not object to the sufficiency of either the First Report or the Second Report.[2] Instead, Reddy waited for the expiration of the 120-day deadline for serving an expert report following filing of an original petition.[3] On June 29, 2012, after the 120 days had passed, Reddy filed a motion to dismiss Hebner's claims for failure

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[1] Hebner also sued the medical association to which Reddy belongs—New Braunfels Ob/Gyn, P.A.—because the alleged healthcare liability of Reddy's medical association is "purely vicarious, a report that adequately implicates the actions of [the association's] agents or employees is sufficient." *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671–72 (Tex. 2008). Accordingly, we refer to the two defendants collectively as "Reddy."

[2] *See id.* § 74.351(a) & (r)(6) (requiring that an expert report "provide[] a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care . . . failed to meet [those] standards, and the causal relationship between that failure and the injury, harm, or damages claimed."); *see also Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 879 (Tex. 2001) (explaining that a report is insufficient if it "merely states the expert's conclusions about the standard of care, breach and causation" or "omits any of the statutory requirements."); *Scoresby v. Santillan*, 346 S.W.3d 546, 557 (Tex. 2011) (holding that a report is deficient but curable if it "contains the opinion of an individual with expertise that the claim has merit, and if the defendant's conduct is implicated.").

[3] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(b) (requiring dismissal of the plaintiff's claim with prejudice and awarding the defendant attorney's fees if the plaintiff fails to serve the defendant with an expert report by the 120th day following the filing of the plaintiff's original petition).

to timely file an expert report.[4] The trial court denied the motion, and Reddy filed an interlocutory appeal.[5]

The court of appeals reversed, holding pre-suit service of the First Report did not "satisf[y] the relevant statutory requirements" and the Second Report did "not constitute [an] expert report[] as required" by the Act. *Reddy*, 435 S.W.3d at 328, 29. Justice Pemberton dissented. He noted that Hebner had obtained and served a qualifying expert report "well in advance of the 120-day deadline"—a fact that was "of tremendous potential significance under the statutory scheme the Legislature created in the [Act]." *Id.* at 334, 335 (Pemberton, J., dissenting). We granted review.

B

The Texas Medical Liability Act aims to "identify and eliminate frivolous healthcare[-] liability claims expeditiously, while preserving those of potential merit. To further this goal, the statute sets a deadline for the claimant to substantiate the underlying healthcare[-]liability claim with expert reports." *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011) (internal citations omitted). Under the version of the Act in effect when the events giving rise to this litigation occurred, a claimant asserting a healthcare-liability claim must serve a qualifying expert report "not later than the 120th day after the date the original petition was filed" on each party or that party's attorney. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (as amended in 2005). Once a defendant has been served

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[4] *See id.*

[5] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(9), (10) (allowing interlocutory appeals when a trial court denies a motion to dismiss for failure to serve an expert report or grants a motion challenging the adequacy of an expert report); *see also Lewis v. Funderburk*, 253 S.W.3d 204, 207–08 (Tex. 2008) (explaining a motion to dismiss based on a timely but deficient report can be reviewed by interlocutory appeal).

with an expert report, he must file any objections "not later than the 21st day after the date [the report] was served, failing which all objections are waived."[6] *Id.* On the other hand, if a claimant fails to timely serve a qualifying expert report, the trial court "shall . . . dismiss[] the claim . . . with prejudice to the refiling of the claim." *Id.* § 74.351(b).[7]

The parties agree that the Act requires mandatory dismissal when a claimant fails to timely serve a qualifying expert report. They disagree, however, on whether serving an eventual named party with a qualifying expert report before filing suit, but after providing notice under section 74.051, meets section 74.351's expert-report deadline. Reddy argues that the plain language of section 74.351 and this Court's precedent dictate that an expert report can be served only on a "party"—one who has been named in a lawsuit. Accordingly, the period in which an expert report can be served does not begin until suit has been filed and any report served before then cannot satisfy section 74.351. In this case, the only report served on Reddy after she was sued—the Second Report—was for a completely different patient, doctor, and claim. So, Reddy argues, the trial court abused its discretion when it refused to grant Reddy's motion to dismiss.

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[6] Section 74.351 was amended on September 1, 2013, and now requires that a claimant "not later than the 120th day after the date *each defendant's original answer is filed, serve on that party or the party's attorney* one or more expert reports." TEX. CIV. PRAC. & REM. CODE § 74.351 (current) (emphasis added).

[7] *See also id.* § 74.351(c) (allowing one 30-day extension to cure a report that has "not been served . . . because elements of the report are found deficient"); *id.* § 74.351(r)(6) (defining "expert report" as "a written report by an expert that provides a fair summary of the expert's opinions . . . regarding applicable standards of care, the manner in which the care rendered . . . failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed."); *Scoresby*, 346 S.W.3d at 556 (explaining that service of a piece of paper that says "expert report" is akin to serving no report at all, subjecting the underlying healthcare-liability claim to dismissal; but a statutorily non-compliant report is merely deficient and subject to cure if it is: (1) timely served; (2) contains an expert's opinion that the claim has merit; and (3) implicates the defendant's conduct.).

Hebner urges that courts should not entertain an interpretation of section 74.351 that vitiates the Legislature's intent to weed out frivolous claims while preserving potentially meritorious ones. Hebner argues her post-suit service of the Second Report should be viewed as an "obvious attempt" to provide Reddy with the correct report a second time. Further, without dispute Hebner actually served Reddy with a qualifying expert report—the First Report—"not later than" the 120th day after the petition was filed. Allowing pre-suit service to satisfy the requirements of section 74.351 furthers the Legislature's intent by preserving a potentially meritorious claim. And it further recognizes the potential constitutional implications of dismissing Hebner's case without giving her an opportunity to have a hearing on the merits.

II

A

Whether an expert report served concurrently with a pre-suit notice letter is timely under section 74.351(a) is a matter of statutory construction, a legal question we review de novo. *See Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012). The primary goal when interpreting a statute is to effectuate "the Legislature's intent as expressed by the plain and common meaning of the statute's words." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). "Where statutory text is clear, that text is determinative of legislative intent unless the plain meaning of the statute's words would produce an absurd result." *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012). However, when, as here, "the language is susceptible of two constructions, one of which will carry out and the other defeat [its] manifest object, [the statute]

should receive the former construction." *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979) (cited in ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 63 (2012)).

In attempting to quickly jettison meritless lawsuits and save parties the expense of protracted litigation, the Act's expert-report requirement serves two purposes: (1) it "inform[s] the defendant of the specific conduct the plaintiff has called into question[;]" and (2) it "provide[s] a basis for the trial court to conclude that the claims have merit." *Palacios*, 46 S.W.3d at 879. As we have said, "knowing what specific conduct the plaintiff's experts have called into question is critical" to the defendant's and the court's ability to evaluate the viability of a claim. *Id*. at 876–77. Thus, "eliciting an expert's opinions early in the litigation [is] an obvious place to start in attempting to reduce frivolous lawsuits." *Id.* at 877. In line with this objective, the Act also requires anyone asserting a claim under the Act to provide written notice by certified mail to "each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit." TEX. CIV. PRAC. & REM. CODE § 74.051(a); *see also Williams*, 371 S.W.3d at 189. The purpose of the pre-suit notice letter is "to encourage the parties to negotiate and settle disputes *prior* to suit." *Williams*, 371 S.W.3d at 189 (emphasis added). Pre-suit service of an expert report, though not required, can only further the statute's objective of encouraging and enabling parties to settle healthcare-liability claims without resorting to the lengthy and expensive litigation process.

The issue in this case is not altogether different from that in *Zanchi v. Lane*, in which a defendant argued it had received an expert report too early to satisfy the Act. *See generally* 408 S.W.3d 373 (Tex. 2013). The plaintiff in that case served the defendant, Zanchi, with an expert report after suit had been filed but before Zanchi had been served with process. *Id.* at 376. Zanchi

argued he was not a "party" for purposes of the expert-report requirement until he was "served with process, waive[d] service, or otherwise appear[ed] in a lawsuit." *Id.* at 377. Consequently, Zanchi claimed that "transmittal of [the expert's] report to him before the date on which he was served could not satisfy section 74.351(a)." *Id.* at 376. We held that "in the context of the [Act], the term 'party' means one named in a lawsuit," without regard to whether they had yet been served or appeared in the lawsuit, noting that this definition best served the Act's purpose of "eliminat[ing] frivolous [healthcare-liability claims] expeditiously" and "preserving those of potential merit" by giving defendants "advance notice of the pending lawsuit and the alleged conduct at issue." *Id.* at 377–79 (internal alterations omitted). Thus, because Zanchi had been named in a lawsuit before being served with the expert report, he was a "party" for purposes of the Act when he received the report.

Relying on this Court's interpretation of the term "party" in *Zanchi*, Reddy argues section 74.351(a)'s 120-day deadline for serving an expert report does not begin to run until a lawsuit is filed. But by asserting that only a "party" named in a lawsuit can be properly served with an expert report under section 74.351(a), Reddy reads our *Zanchi* holding too narrowly.

In *Zanchi* we recognized that a "party" under the Act means one named in a suit. *Id.* at 375. Therefore, Zanchi was a party for purposes of the Act even if he had not yet been served with process. *Id.* at 377. But we did not mandate that physicians or health-care providers on the receiving end of a healthcare-liability claim *must* be a "party" to a lawsuit *before* they could be properly served with an expert report. Nor does the statute's plain language impose any such requirement. The statute requires a claimant to serve an expert report on a "party" not later than 120 days after filing the original petition. It does not prohibit the plaintiff from serving a report on a party before filing the

petition, and we will not write such a requirement into the statute's language. No one disputes Hebner served Reddy with a qualifying expert report on the same day Reddy received notice of Hebner's impending lawsuit. Reddy seeks dismissal of Hebner's claims simply because a second expert report—essentially a courtesy copy—served with Hebner's original petition was meant for another case.

As in *Zanchi*, "the statute does not appear to contemplate the exact factual scenario presented here." *See* 408 S.W.3d at 379, 380. But the statute does not say that the party must be a party at the time the report is served, and none of the statute's other provisions expressly or implicitly prohibit service before the defendant is named as a party to the suit. Accordingly, we determine that the best course is to adopt a construction that "does the least damage to the statutory language, and best comports with the statute's purpose." *See id.* at 379–80. Dismissal would dispose of a potentially meritorious claim and punish Hebner for demonstrating her claims had merit from the moment she asserted them—a result the Legislature did not intend and our state constitution potentially does not allow. *See Scoresby*, 346 S.W.3d at 554. We conclude that Reddy was properly served with Hebner's correct expert report on August 12, 2011, the same day Reddy received Hebner's Chapter 74 notice letter and well before the expiration of section 74.351(a)'s 120-day deadline. Accordingly, the trial court did not abuse its discretion in refusing to grant Reddy's motion to dismiss.

Our interpretation of section 74.351 "does not prejudice the defendant; rather, it gives the defendant advance notice of the pending lawsuit and the alleged conduct at issue." *See Zanchi*, 408 S.W.3d at 378. And it properly protects a plaintiff's ability to vindicate her rights, considering that "there are constitutional limitations upon the power of courts to dismiss an action without

affording a party the opportunity for a hearing on the merits of [her] cause, and those limitations constrain the Legislature no less in requiring dismissal." *See Scoresby*, 346 S.W.3d at 554 (footnote and internal alterations omitted). Allowing pre-suit service complies with the plain language of section 74.351(a) and furthers the Legislature's purpose of identifying and disposing of frivolous claims.[8]

B

As in *Zanchi*, we turn next to the implications of our interpretation on a defendant's duty to object to an insufficient report. *See Zanchi*, 408 S.W.3d at 379. Section 74.351(a) provides that a defendant "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." TEX. CIV. PRAC. & REM. CODE § 74.351(a) (as amended in 2005). We unanimously[9] held in *Zanchi* that when a defendant is served with an expert report before being served with process, the "twenty-one-day period for objecting to [a] report [does] not begin to run until he [is] served with process." 408 S.W.3d at 380. We now adapt that rule to these circumstances: 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. The statute's current version notably

[8] *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a) (as amended in 2005) (requiring claimants to file an expert report "not later than the 120th day after the date the original petition was filed."); *Loaisiga v. Cerda*, 379 S.W.3d 248, 258 (Tex. 2012) ("The [expert report] requirements are meant to identify frivolous claims and reduce the expense and time to dispose of any that are filed."); *Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 631 (Tex. 2013) ("The Legislature's goal was to deter baseless claims, not to block earnest ones.").

[9] Chief Justice Hecht concurred with the opinion, but he did not disagree with the Court's interpretation of the 21-day period for objecting to a report. *See Zanchi*, 408 S.W.3d at 381–83 (Hecht, J., concurring).

requires "[e]ach defendant physician or health care provider whose conduct is implicated in a report" to "file and serve any objection to the sufficiency of the report not later than the *later of the 21st day after the date the report is served or the 21st day after the date the defendant's answer is filed*." TEX. CIV. PRAC. & REM. CODE § 74.351(a) (current) (emphasis added). Thus, future defendants served with expert reports pre-suit will have 21 days following the filing of their answer in which to object.

Consequently, by choosing to remain silent until the 120-day deadline expired and then arguing Hebner had filed "no report," Reddy has waived any objection to the First Report. Reddy argues she had no obligation to object because the Second Report constituted "no report," as it failed to address Reddy, Hebner, or R.M.S. *See, e.g.*, *Scoresby*, 346 S.W.3d at 549 (explaining that "a document utterly devoid of substantive content will [not] qualify as an expert report."). However, having determined that the First Report—the report that implicated Reddy and her treatment of Hebner and R.M.S.—was properly served on Reddy within the meaning of section 74.351(a), Reddy was required to object to the sufficiency of that report or risk waiver. Reddy could have objected within 21 days of being served with process, at which time she had already had the expert report for more than six months. This gave her "ample opportunity to prepare [her] objections, but [she] failed to raise them." *See Zanchi*, 408 S.W.3d at 380. Instead, Reddy intentionally remained silent until passage of the 120-day deadline in hopes that she could leverage an obvious mistake to achieve outright dismissal of Hebner's claims. That gambit was unsuccessful. The consequence is that Reddy has waived any objection to Hebner's pre-suit expert report.

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Hebner properly served a qualifying expert report on Reddy well before expiration of the statutory deadline and Reddy waived any objections to Hebner's expert report by failing to file them with the trial court within 21 days of being sued and served with process. Accordingly, we reverse the court of appeals' judgment and remand this case to the trial court for further proceedings consistent with this opinion.

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Jeffrey V. Brown
Justice

OPINION DELIVERED: May 27, 2016