IN THE SUPREME COURT OF TEXAS

NO. 14-0593

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

v.

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

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

JUSTICE JOHNSON, dissenting.

As applicable to this case, the Texas Medical Liability Act (Act) provides:

> In a health care liability claim, a claimant shall, not later than the 120th day after the date the claim was filed, serve on each *party* or the *party's attorney* one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties. Each *defendant* physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived.

TEX. CIV. PRAC. & REM. CODE § 74.351(a) (emphasis added).[1]

[1] Unless otherwise noted, all cites to this section will be to the section that was in effect at the time this suit was filed. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 875 (amended 2003) (current version at TEX. CIV. PRAC. & REM. CODE § 74.351(a)).

Our aim in construing the Act, as with any statute, "is to determine and give effect to the Legislature's intent, which is generally reflected in the statute's plain language." *Zanchi v. Lane*, 408 S.W.3d 373, 376 (Tex. 2013) (quoting *CHCA Woman's Hosp., L.P. v. Lidji*, 403 S.W.3d 228, 231 (Tex. 2013)). We have emphasized that courts must take statutes as they find them, and when construing them, must presume the Legislature included words in them that it intended to include and omitted words it intended to omit. *See, e.g.*, *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010); *Entergy Gulf States Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (noting that we must enforce statutes as written and refrain from rewriting text that lawmakers chose).

In my view, the court of appeals properly applied foundational statutory construction principles and reached the correct conclusion, which is that the Act requires the claims in this case to be dismissed. TEX. CIV. PRAC. & REM. CODE § 74.351(a), (b); 435 S.W.3d 323, 329 (Tex. App.—Austin 2014). The Court misconstrues the words lawmakers chose. I dissent.

Before suing Dr. Nagakrishna Reddy and New Braunfels Ob/Gyn P.A. (collectively, Dr. Reddy), and the hospital where Haley Hebner gave birth, Hebner and Darrin Scott sent pre-suit notice letters to Dr. Reddy and the hospital as required by the Act. *See* TEX. CIV. PRAC. & REM. CODE § 74.051. Included with the letter to Dr. Reddy was a curriculum vitae of Barry Schifrin, M.D. and a report from him (The First Report) that was critical of Dr. Reddy's treatment of Hebner and her newborn child. But when Hebner and Scott sued Dr. Reddy, they mistakenly served the doctor with a report from Dr. Schifrin that did not reference Hebner, her child, or Dr. Reddy's treatment of them (the Second Report). Rather, the report referenced a different patient and case, and therefore was no report at all as to Dr. Reddy. *See Scoresby v. Santillan*, 346 S.W.3d 546, 549 (Tex. 2011)

("[A] document qualifies as an expert report if it contains a statement of opinion by an individual with expertise indicating that the claim asserted by the plaintiff against the defendant has merit.").

When Hebner and Scott filed suit, they were not confused about the Act's expert report requirements. As reflected in their brief, they understood the requirement that reports be served on a "party" meant that reports had to be served on a defendant named in a lawsuit, and the reports had to be served within 120 days after suit was filed:

> *In an attempt to fulfill their 120-day expert report requirement*, Hebner and Scott attached to their Original Petition expert reports and *curricula vitae* of Barry Schifrin, M.D. . . . However, unbeknownst to Petitioners or their counsel, the incorrect expert report of Dr. Schifrin – one written for another lawsuit – was inadvertently attached to the Petition. . . . Because the Reddy parties did not object to the expert reports *served with Plaintiffs' Original Petition within the 21-day statutory period*, Petitioners and their counsel were not aware that the incorrect report of Dr. Schifrin had been attached to the Original Petition . . . . Once the plaintiff serves an expert report or reports, it is incumbent on the defendants to serve any objections to the sufficiency of those reports within 21 days after the date the reports were served, failing which all objections are waived.

(emphasis added) (record references omitted). After Hebner and Scott did not serve Dr. Reddy with a report referencing Dr. Reddy's treatment of Hebner and her baby within 120 days after suit was filed, the doctor moved for dismissal. Before the hearing on the motion to dismiss, Hebner and Scott again served Dr. Reddy with the First Report.

The Act is not ambiguous on the issue before us. It requires that a claimant "shall, not later than the 120th day after the date the claim was filed, serve on each *party* or the *party's* attorney one or more expert reports." TEX. CIV. PRAC. & REM. CODE § 74.351(a) (emphasis added). We recently addressed who is a "party" under this statutory provision and concluded that a "party" is "one named in a lawsuit." *Zanchi*, 408 S.W.3d at 377, 379. Our conclusion was, in part, based on our reading

the statute to specify that the statutory period during which an expert report must be filed begins on the date suit is filed. *Id.* at 378. As we explained in a section entitled "The Meaning of 'Party' under the TMLA":

> Recognizing a person named in a filed pleading as a "party" is consistent with dictionary definitions of the term as well as the Texas Rules of Civil Procedure. Black's Law Dictionary defines "party" as "[o]ne by or against whom a lawsuit is brought <a party to the lawsuit>," BLACK'S LAW DICTIONARY 1231-32 (9th ed. 2009), and Webster's International Unabridged Dictionary defines party as "the plaintiff or defendant in a lawsuit," WEBSTER'S INT'L DICTIONARY UNABRIDGED 1648 (3d ed. 2002). Further, the pleading rules in the Texas Rules of Civil Procedure refer to those named in petitions as "parties," supporting a conclusion that service of process is not a prerequisite to that designation. TEX. R. CIV. P. 79 (requiring that a petition list the "parties").
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> Not only does construing "party" to mean someone named in a lawsuit better comport with the common usage of the term, this construction is particularly persuasive under the TMLA, where "defendant"—a type of party—is statutorily defined as a "physician or health care provider against whom a health care liability claim is asserted," without regard to whether the physician or provider has been served. TEX. CIV. PRAC. & REM. CODE § 74.351(r)(4). . . . *Beginning the period for serving an expert report on the date of filing suggests that a "party" on which to serve the report exists on the date of filing.*

Id. (emphasis added); *see Stroud v. Grubb*, 328 S.W.3d 561, 564-65 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) ("[T]he expert report requirement is not triggered until the claimant files a cause of action naming a particular physician; it is only then that the defendant becomes a 'party' to a suit involving a health care liability claim."). Further, our understanding and interpretation of "party" was consistent with other sections of the Act. *Zanchi*, 408 S.W.3d at 378; *see State v. Gonzalez*, 82 S.W.3d 322, 327 (Tex. 2002) (noting that when determining legislative intent, we do not examine a term or provision in isolation, but we instead read the particular statute as a whole).

Our interpretation of "party" in *Zanchi* was also confirmed by the Legislature's 2013 amendment to section 74.351(a):

> In a health care liability claim, a claimant shall, 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, with a curriculim vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted.

TEX. CIV. PRAC. & REM. CODE §74.351(a) (effective September 1, 2013) (emphasis added). In the amended language, "party" is equated with "defendant," and there is no indication that the relationship between the two words is any different than it was intended to be in the predecessor language that governs the case before us. *See Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008); *Dick v. Kazen*, 292 S.W.2d 913, 915-16 (Tex. 1956).

What we said in *Zanchi* is hard to misconstrue. Indeed, in their brief, Hebner and Scott demonstrate how straightforward our opinion was and how clear section 74.351(a) is on the question:

> Petitioners are not suggesting that this Court overrule *Zanchi v. Lane*, 408 S.W.3d 373 (Tex. 2013) and create a *new* rule that pre-suit service of an expert report would alone serve to satisfy the report requirements of Chapter 74 and give rise to an obligation to object to such a report. Rather, Petitioners believe that under the unusual circumstances specific to this case, Petitioners sufficiently fulfilled the report requirement of Chapter 74 by serving a statutorily compliant report on Respondents, *then attempting to comply with the letter of Chapter 74* by serving the same report on Respondents again.

(emphasis added).

Dr. Reddy was not a "party" to anything when Hebner and Scott sent the First Report with their pre-suit notice letter. They knew that they had not sued the doctor as of the time they served

her with the report and understood the 120-day statutory period for serving the required report would begin the date they sued. Thus, their attempt "to comply with the letter of Chapter 74" was too late.

The pre-suit notice requirement does not reference an expert report, require one to be served with the notice, or imply that serving a report before suit is filed fulfills any purpose under the Act. *See* TEX. CIV. PRAC. & REM. CODE § 74.051(a) (requiring persons asserting health care liability claims only to give written notice before filing suit "to each physician or health care provider against whom such a claim is being made"). Hebner and Scott do not argue otherwise. What they essentially argue is that under their particular circumstances, the statutory language should be disregarded. They begin by positing that the Court "must not pay blind allegiance" to the rule that we are to be guided by the words used by the Legislature "if the result of the plain meaning of the language yields absurd results." So far, so good. That argument restates what we have said many times. *See, e.g.*, *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) ("The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results.").

But while dismissal of a claim for failure to comply with requirements prescribed by the Legislature under these circumstances may be a harsh result, it is not an absurd or nonsensical one. We have recognized that aspect of the Act's expert report deadline. *E.g.*, *Ogletree v. Matthews*, 262 S.W.3d 316, 319-20 (Tex. 2007) (stating that the Legislature "created a statute-of-limitations-type deadline within which expert reports must be served. . . . This strict 120-day deadline can lead to seemingly harsh results"). In agreeing with Hebner and Scott, the Court does not conclude that interpreting the Act according to its plain language leads to an absurd or nonsensical result. Rather,

the Court effectively concludes that its choice of how to handle this factual situation is better than the Legislature's choice. The Court says that pre-suit service of an expert report "furthers the Legislature's intent by preserving a potentially meritorious claim." *Ante* at ___. However, the Court's statement flies in the face of our innumerable recitations of one of the cardinal principles of statutory construction: the plain meaning of the text is the best expression of legislative intent. *E.g.*, *Molinet*, 356 S.W.3d at 411.

In considering the requirement that an expert report be served on each "party or the party's attorney," TEX. CIV. PRAC. & REM. CODE § 74.351(a), we must—or at least should—presume that the Legislature chose the word "party" with purpose. *See Wasson Interests, Ltd. v. City of Jacksonville*, ___ S.W.3d ___, ___ (Tex. 2016) ("[T]his Court presumes the Legislature deliberately and purposefully selects words and phrases it enacts, as well as deliberately and purposefully omits words and phrases it does not enact.") (quoting *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 452 (Tex. 2012)). The reason for such a presumption is reflected by the Act, in which the Legislature differentiated between health care providers according to their status at various points in the process of a health care liability claim. As one example, the Act provides that a person asserting a claim shall give written notice before filing suit "to each physician or health care provider against whom such a claim is being made." TEX. CIV. PRAC. & REM. CODE § 74.051(a). This language noticeably does not refer to a "party" or "defendant." But when the effect of the notice is set out, the statute provides for tolling of the applicable statute of limitations as to "all parties and potential parties." *Id.* § 74.051(c). Then the Act requires dismissal of a claim if an expert report has not been served on "a *defendant* physician or health care provider." *Id.* § 74.351(b) (emphasis added). And it

specifies that a plaintiff must serve answers to interrogatories "on the *defendant's* attorney or . . . the *defendant*." *Id.* § 74.352 (emphasis added). And it is the Court's function to honor the Legislature's intent as expressed in its words, not to look for ways to interpret those words to reach a result that might seem to be better to the Court than the result that would follow from applying the statute's words.

The Court does not point to any of the Act's language for support of its conclusion that the time for serving an expert report begins before the defendant has been sued on the claim. And for good reason; the Act's language does not say what the Court construes it to say. There is no reference in the Act to "eventually named" or "potential" parties regarding serving an expert report. The Legislature could have used those words or phrases, but it did not. Holding that Hebner and Scott's service of the First Report outside the Act's 120-day period satisfied the Act's requirements does not reflect legislative intent as expressed in the words of the statute.

Hebner and Scott vaguely suggest there may be some constitutional infirmity with the Act's expert report requirement as does the Court and as did the dissenting justice in the court of appeals. 435 S.W.3d at 336 (Pemberton, J., dissenting). But Hebner and Scott never bothered to actually make that challenge. Which is understandable. After all, Hebner and Scott knew they had to have a report and timely serve it—they had one long before they sued; they just mistakenly failed to comply with the Act's requirements regarding serving it. To its discredit, the Court does not bother to do more than revisit a similar vague constitutional reference in *Scoresby*, 346 S.W.3d at 554, and reiterates Hebner and Scott's unbriefed suggestion that the expert report provision might have a constitutional infirmity if it is interpreted as it is written. *Ante* at __.

Hebner and Scott also assert that the concepts of due diligence and relation back should apply to preclude dismissal of their suit. They argue that under the relation-back doctrine, the filing of suit and serving of the Second Report should relate back to the serving of the First Report and the pre-suit notice, and the Second Report was in effect a deficient but curable report. Hebner and Scott argue that Dr. Reddy did not notify them that they served the wrong report with their suit, they were entitled to a 30-day extension to cure the report, and in any event, they cured the error by again serving Dr. Reddy with the First Report before the hearing on the motion to dismiss. But applying either or both of those doctrines would require supplanting or adding to the clear, unambiguous language in the Act. First, Hebner and Scott and the Court seem to fault Dr. Reddy for not pointing out Hebner and Scott's mistake to them. But a party being sued is not obligated to tell the party suing her how to do it. Trying to somehow fault Dr. Reddy for not telling Hebner and Scott how to conduct their lawsuit is a fallacious position.

Hebner and Scott also point to *Stockton v. Offenbach*, 336 S.W.3d 610, 616 (Tex. 2011) to support their arguments, but the Court did not determine in *Stockton* that the due diligence exception applies to serving expert reports under the Act. Rather, we stated "even assuming that a due diligence exception applies to service completed after Chapter 74's expert report deadline, we are not persuaded that the evidence here is legally sufficient to raise the issue." *Id.*; *see also Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003) (noting that a predecessor statute did not require a defendant to notify a claimant of the claimant's failure to comply with the Act's expert report requirements before moving for dismissal). I would not apply those equitable concepts here in light of the clear statutory language, our prior construction of it, the legislative intent reflected in the clear

language, and the clear lack of any duty on Dr. Reddy to object within 21 days after being sued when the report served with the suit was undisputably not an expert report under the Act. In my view, the court of appeals correctly decided these issues. 435 S.W.3d at 330-31.

Finally, legislative intent as to not excusing a mistake in failing to timely file an expert report is clear from the language of the Act, but it becomes overwhelmingly manifest when the predecessor statute is examined and compared to the Act applicable to this case. Before 2003, the relevant statutory language specifically allowed trial courts to grant a 30-day extension of time for an expert report to be filed if the failure to timely file was due to accident or mistake:

> Notwithstanding any other provision of this section, if a claimant has failed to comply with a deadline established by Subsection (d) of this section [relating to expert reports] and after hearing the court finds that the failure of the claimant or the claimant's attorney was not intentional or the result of conscious indifference but was the result of an accident or mistake, the court shall grant a grace period of 30 days to permit the claimant to comply with that subsection. A motion by a claimant for relief under this subsection shall be considered timely if it is filed before any hearing on a motion [to dismiss] by a defendant under Subsection (e) of this section.

TEX. REV. CIV. STAT. ANN. art. 4590i § 13.01(g) (repealed 2003). The substance of that provision was not carried forward into the current statute, indicating legislative intent that a mistaken failure to timely serve a report does not justify extending the time for filing such a report. *See Scoresby*, 346 S.W.3d at 554; *Badiga v. Lopez*, 274 S.W.3d 681, 683-85 (Tex. 2009).

Whether the Court views the procedural structure enacted by the Legislature as the best, the worst, the most efficient, or the least efficient way to accomplish the Legislature's goal is not the proper test for reading words into or out of legislation. Reading words into or out of statutes raises the risk of crossing the dividing line between judicial and legislative prerogatives. Thus, we tread

lightly when doing so, and the longstanding test we apply is whether, absent our reading words into or out of a statute, the statute yields an absurd, nonsensical, or unconstitutional result. *See Presidio Indep. Sch. Dist.*, 309 S.W.3d at 930. In this instance, the statute's requiring an expert report to be served during a 120-day window beginning with the filing of suit effects a harsh, but not nonsensical or absurd, result, and it should be interpreted to effect the legislative intent manifested by its words. And as previously noted, Hebner and Scott do not challenge the provision's constitutionality.

The Court's erroneous conclusion about when a report is properly served under the Act requires it to find a way around statutory language that provides "[e]ach defendant physician or health care provider whose conduct is implicated in a report must file and serve any objection to the sufficiency of the report *not later than the 21st day after the date it was served*, failing which all objections are waived." TEX. CIV. PRAC. & REM. CODE § 74.351(a) (emphasis added). Otherwise, as the Court realizes, pre-suit serving of a report would likely result in many persons who later become "parties" or defendants—but who were neither at the time the report was served—waiving their objections by default because they did not realize that being served with a report triggered their 21-day period for objecting to it. The Court finds its way around the language by the simple device of saying that what the Legislature intended is not what it said: what it really meant, but did not say, is that if a physician or health care provider is served with a report and eventually becomes a defendant, the 21-day period runs from the date the physician or provider becomes a defendant in a lawsuit. And in what Dr. Reddy will surely regard as a remarkable turn of events, she ends up on the wrong end of a waiver determination because she did not take action she was not required to take

by the Act, while Hebner and Scott prevail despite not taking action they were required to take by the Act.

The bottom line is that Hebner and Scott failed to comply with the Act's requirements and their suit against Dr. Reddy should be dismissed. I would affirm the judgment of the court of appeals.

Phil Johnson
Justice

OPINION DELIVERED: May 27, 2016