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Supreme Court of Texas.
In re McAllen Medical Center, Inc., d/b/a McAllen Medical Center and Universal
Health Services, Inc., Relator.
No. 05-0892.

December 5, 2006.

Appearances:
Roger W. Hughes, Adams & Graham, L.L.P., Harlingen, Texas, for relator.
Brandy W. Wingate, for respondent.

Before:

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

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JUDGE: The Court is now ready to hear argument in 05-0892 In re McAllen Medical Center.
JUDGE: May it please the Court, the Court has new argument later [inaudible].

ORAL ARGUMENT OF ROGER W. HUGHES ON BEHALF OF THE PETITIONER

MR. HUGHES: May it please the Court. I'd like to address [inaudible] this morning. The first one imply and appeal is not an adequate remedy for the erroneous denial in this resolution of a medical liability improvement insurance and [inaudible] when the lack [inaudible] report shows that the case is now [inaudible]. The second issue is whether Dr. Brown is radically employed general practitioner in family medicine with otherly no hospital credential. He's somehow qualified by training and experience to render an opinion on cardiovascular surgeon that's part by heart surgery to any other surgery or credential surgeon to do perform those proceeding when she does states that she has a training in those procedures or activities. Or has ever even done. The first issue out of that remedy in law and that prudentially in are you places that the Court's detail. It is very specific elements begun to it in order to determine the practicality of the acquisition for remedy. On the public side, the public factors before it takes to take a look or rather at the proceeding has now

simply a waste of time and a burden on the Court's system on the public. The Court looks on whether Jack Anglin opinion now, will provide important guidelines to the Court and whether avoid providing any temptation of a legislature for pre- in apting another another individual interlocutory appeal. On the private side, the Court looks or whether this-- all might all this shake out and becomes thoremous error and whether this at temptation to the Court of Appeal to micro-manage Trial Court practice. Another element is whether the nature of the right is such that postponing any remedy, renders the right and illusion and denies the full effective the right. And then the last factor is whether then the they were what would they called the reversible error, what kind of tool would that become in the hands of the opposing party. Here, there were three in intercepting things all of which are legislative policies, so that I think that is strongly favored in finding there is no adequate remedy by appeal. The first one is an announced policy by the legislature that if you don't have an expertise in this cases, you don't have a case. It's near those, that it, it's the out of assistance. The second, is another announced policy by the legislature that there's more than the interests of the litigants and more than just one individual Court's final state is a matter of public health. With the cost that this suit or being transferred to the insurance to the doctors who determined the act by the the detainment services living the area for raising rates to the public. None of which help public health. The third, is on also a legislative finding that the current remedies were disposing as such cases, or in out of the the task and that the only remedy which serves not just the interest of the litigant and the trial courts, but the public health in general is to get his places out of the system within six months. That's the remedy that works.

JUDGE #2: We just [inaudible].

JUDGE: We just all selected all of those factors that you talked about, when it to will make sure of it's importance legislative record but then in the amendments to 4590 in the LA, the legislature did not provide the these matters should be reviewed on mandamus. So it is easily could have equipment. Or could have made them interlocutory appeal retroactive, could make.

MR. HUGHES: Well, they could have done that. But I think if the legislature given the situation of time that the attendant know she all settled it's not necessary. Of course, I know that the time the legislature approach this in way back in 2006. Only two-fourths of the appeal had addressed decisions and both of that have said there is a remedy by mandamus. Therefore, the legislature acted at all if we're not to say, that we're going to abolished the remedy but the Court's have already created. There would be indamned necessity cre-- to go ahead and create the statutes and had a retroactive is going to allow mandamus appeal. When that remedy already existed, the Court's complain and said that. The second thing is what we would then supposed if that the legislature had personate the decision that these case are miracles. They need to be removed from system. All we now going to have a bifurcated system cases before 2003 we will allow any of [inaudible] review and which allow all of the current to the public to occur the case is after 2003, we want to have the appeals that have that I think will be attributing of certain modus to legislature which just don't reflect in the entire scheme. The entire scheme is to get them out of the system. Take the Swaunder's assumption is the Court decided to create a statutory-- an appeal for the new Texas and perpetuate the old one not abolished them. Putting them ...

JUDGE: [inaudible] the legislature.

MR. HUGHES: I'm sorry.

JUDGE: I mean the legislature.

MR. HUGHES: The legislature, yes. If they wanted to abolished it, they would have done what they did in several other statutes, which would they say, there would be no mandamus and no appeal. I think that what they would have done if that continue. Thank you. Rather than there is if, put it in other words, there is no sense. It's hard to find a legislative rationale for purpose of having bifurcated system.

JUDGE #2: The elements that you resided, they would meant mandamus here.

MR. HUGHES: Yeah.

JUDGE #2: Which of that was not present in, in Reiwoman's Hospital in Texas?

MR. HUGHES: Well, all of-- the, the situation has change if that's the nature of the questions. The-- at the time when Reiwoman's hospital has decided the legislature over reacted.

JUDGE #2: But all of the elements that you recide for impelling mandamus predictly and that's-- and that's [inaudible].

MR. HUGHES: Yes. Of all-- all, all, all of the elements that we're talking about were existed at that time.

JUDGE #2: And this Court applying to review by mandamus.

MR. HUGHES: At majority keep on will review by a mandamus but it's the Court later on and said and I believed it was saying are you in denial mandamus is not present.

JUDGE #2: But it's a pretty strong indications. Is it not I was saying the elements were present here or present there. Is that a pretty strong indication that the Supreme Court didn't considered this review for a mandamus.

MR. HUGHES: The only thing I could say is that, if, if, if, if that were the case then the majority would driven opinion plaintiff saying this is the case. There are lots of reasons to not grant the mandamus as I often been told for continuous not you there is the appropriate case to take up the issue. At this time, there maybe a lot of reasons that don't have anything to do with the atmosphere of remedy by appeal. That one neutralizes at a majority not to not to choose this particular cases. Like the denial petition for review, one can't say that the majority agree with any particular rationale what so ever. The other thing that it is since the time we'll had the two opinions in credential and a are you will said out this factors. When -

JUDGE: When you go through the statutes and even some of our rules you can find legislature saying the Trial Court must dismissed, shall dismissed, must grant, shall grant in various content. And many of them have the same factors that you missed, you know that the reality of the uses appeal because must, must again no evidence on summary judgment the motion for attempt. If there is no evidence presented, by the respondent doesn't present evidence of responsive to know at the summary judgment opposed the Trial Court child grant the motion. If the Court doesn't grant the motion what happens, do we-- do we have mandamus jurisdictions. I've heard that the right to issue mandamus with those cases.

MR. HUGHES: No, if, if, if you made any case, for example, the no evidence summary judgment. No, I would say not in those cases are -

JUDGE: Or that is a billion dollar case.

MR. HUGHES: Not in that case. And I would say, it goes not to the amount of money involved. But the nature of the right being denied. In-- the-- anyway, for about the legislative continuance case one could

have made exactly the same statement about or being denied our legislative continuous. But because of the statutory right that issues and one which think we obvious, it's a little hard to give that back on appeal. And the public rights was involved. The Court then say, is it possible that we could some how a couple together some sort of remedy, on appeal to restore this, the Court said is it going to give full effect to the statutory remedy to deny any remedy and tell if he want. And the answer was no.

JUDGE: Will not-- there are examples when the legislature thinks that's important announces to, to right within the statute, in the interlocutory bill of right at Chapter 51, civil practice [inaudible] this code, list the jurisdiction other thing -

MR. HUGHES: Yes.

JUDGE: - you have things like that with legislature contemplated and says, okay, in this case, we're going to give the losing part of the right to go to a federal court to challenge that. And, and in fact this is just a going to right mention that's up with the legislature ultimately did with this expert of worked cases. But in the absence of that were-- where do we find this it's adjusted in I, I is that ...

MR. HUGHES: I think it a-- are you, they said out the factors and in credential the factors were said out. But the arguments I'm raising, were raise where the same sort of thing raised in the fourth case and also in the proper case. It's in not-- it's not in addressing the analysis of can-- what kind of remedy would passion but whether the nature of the right permits post requirement to be in any kind of remedy or what so ever. And obviously, the denial of the continuance of the legislature doesn't remedy the client was left in allege, when it doesn't remedy the public would may be denied their legislature. In the proper case, the question of statutory venue which the child termination case has to be decided immediately at the beginning. And the Court said that he can't post an erroneous venue ruling until, until later because until its important interest. Taking the child out of the home and that, that, in other words, the speedy remedy is necessary to make the process worked and to allow the indications of the rights of taking the family together and, and and that's in fact ...

JUDGE: This has. If you have refer for a medical malpractice case before with the 224 patients filing suit against one doctor?

MR. HUGHES: Not anywhere.

JUDGE: You have to seen one in Texas and 150 years.

MR. HUGHES: Not. Not so.

JUDGE: Just that make this case unusual. From all of the other, one of the bill at medical malpractice cases were one patient is one doctor.

MR. HUGHES: Yes. It's almost a class action medical malpractice test.

JUDGE: Has having the difference-- has any different from a multipoint of Wallsue against Toxitorio, involving taxitorios was difference here. He got a hundred plaintiff versus one company as one defendant.

MR. HUGHES: You're all ...

JUDGE: They're significantly different than any other than the number, the parties involved.

MR. HUGHES: Well, it's different in the sense that in product liability have one product which simply manufactured on the same way in every situation so that by identifying the defect in one product, you always turn whether it's the fact that cause injury for this people.

And a medical malpractice case we're talking about different procedures done on different people under different circumstances in 220 cases.

JUDGE: Maybe. Maybe not.

MR. HUGHES: Well,

JUDGE: You wants to call about an exception for this case and not an exception for other cases like that involving different defendants.

MR. HUGHES: I'm, I'm sorry I didn't hear ...

JUDGE: You want to score about an exception for your case and not other cases involving similar type of plaintiff or number of plaintiffs in a singular defendant.

MR. HUGHES: Well, in one sense of authority was, this happened in the areas special occurrences were before it started offs saying of, well, we're never going, we're never [inaudible] that this remedy is adequately by appeal. The laws are the same that at this remedy is after by appeal which going to review the denial of special occurrence on appeal. And then along came a phase where you had a multitude of defendants, or a multitude of plaintiffs in a national statutes, the some cases.

JUDGE: Well, that this, this ...

MR. HUGHES: We can't settled it. And then there was the next case I believe is the CS case where you had an Australian company who was being party a hurricate it was grounds on jurisdiction and the phase-- as this phase for 35 000 is in the system. And then this as although care that issue exceptional on case. So I, I think the answer is, in the areas special exceptions we vow already the begin of the care about those kinds of exceptions that they can't that the sure multitude with the number multitude the number of cases can create the exception were in a class one individual takes one enough.

JUDGE: From your prospective, what is the primary test in this that you did lot for determining whether there is with adequate remedy beyond on appeal.

MR. HUGHES: I think because that there is a statutory system with very distinct legislative goals in mind. It's the first thing it was settled for this next, the question asked is, is anything else going to give full affected the system. The second thing is that, is that the legislator finally set there is a public health test after this. It's not just the litigants there is. There, there are harms that will occur to the public that will occur before there can ever be in an appeal.

JUDGE: If, if we do not decide decision on mandamus, you still have appeal -

MR. HUGHES: Yes.

JUDGE: - and you an still from your prospective at, at make you believe the case reading your brief is winnable on your side, still we need it on appeals so you said earlier that sometimes close pulling the remedy denies the right, how it postponing the remedy of appeal to the right of giving a dismissal under the statute if you're correct.

MR. HUGHES: Well, this was back to postponing the right to whom. There is a public issue, the public is insured because all the passer could offer on the doctors pro tell the remedy were they pro tell their services and they lived here which is what the legislature found is going on is invalid few years ago. That will never defect. The second thing of it is, which was talked about in the-- and are used the possibility that now that there's hold the reversible error of the case. That apparently that becomes the, the legend by which the other side uses to levrish on ferselents. What do you do in the in plan self had when it cost $150,000 to try each one of this cases. But then the plaintiff comes in the sense and will offer the self present the

$75,000. Well, then the insurance count near the guarantee association, what ever. Or it is because the dollars in sense the fact and then the harm that the legislator didn't want to happen which is the past the cost of nervous defending the early suits actually done, does it?

JUDGE: Are there any further questions?

MR. HUGHES: I'm sorry didn't over had a [inaudible].

JUDGE: Thank you Mr. Hughes. The Court has now ready hear argument from the [inaudible].

COURT ATTENDANT: May it please the Court, Ms. Wingate give the arguments for [inaudible].

ORAL ARGUMENT OF BRANDY W. WINGATE ON BEHALF OF THE RESPONDENT

MS. WINGATE: May it please the Court. May it please the Court.

JUDGE: Do you ever heard of a manu-- of a medical malpractice case with 224 patients and it suits one doctor?

MS. WINGATE: Well, I supposed we could have involve 220 individuals in Los Angeles.

JUDGE: That's why everybody else in the Texas does it.

MS. WINGATE: Well, they certainly cut down a little bit of cost by combining them all and one lost it.

JUDGE: Have you ever heard of a suit for 224 medical malpractice plain suit filed in one filing period, one can -

MS. WINGATE: No, I'm not.

JUDGE: Anything constant.

MS. WINGATE: No. But there is a, a big reason that this Court should not order the trial court to dismissed this case of this plenary proceedings and that is because there is a pending motion for grace period under Subdivision G of Section 1301 that the Trial Court has not yet rolled on, and that affects -

JUDGE: [inaudible] -

MS. WINGATE: - let ...

JUDGE: [inaudible] has of everything.

MS. WINGATE: I'm sorry.

JUDGE: How long has of it any.

MS. WINGATE: Since, the day of the hearing on the motion to dismissed. We timely filed the ...

JUDGE: Have motions start it all here for five years.

MS. WINGATE: Yes. Yes. But ...

JUDGE: That will have, time at-- when is the trial judge ever going to trial to trial case? And how you're been trial 224 medical malceptric, medical malpractice case -

MS. WINGATE: There are no-- there, there -

JUDGE: - nobody has any idea.

MS. WINGATE: - there are 220 plaintiffs anymore.

JUDGE: How many are there now?

MS. WINGATE: There's one.

JUDGE: One. All two hundred -

MS. WINGATE: Yeah.

JUDGE: - and 23 absent.

MS. WINGATE: Many of them dismissed. Many of them none- suited. Some of them dismissed on summary judgment and there's a settlement pending-- so there's, there's only just one.

JUDGE: There is one plaintiff for one patient -

MS. WINGATE: One -
JUDGE: - or one -
MS. WINGATE: - one -
JUDGE: - is the same.
MS. WINGATE: - one point.
JUDGE: Are you sure about that, or accept what the motion -
MS. WINGATE: I ...
JUDGE: - to paid us now.
MS. WINGATE: That's what the motion that takes out count.
JUDGE: So in fact it might have been wrong about this.
MS. WINGATE: Well, I think that the trial court has to make that decision and the [inaudible].
JUDGE: A year accepting offense.
MS. WINGATE: I'm sorry.
JUDGE: How many years is that tentative.
MS. WINGATE: You know, I can't tell you and but I, I don't clearly inter you the record and looked at the docket sheet, and looked at at the nearest motion for summary judgment, that where all the judges plate for the past five years and want to see it if there are any files filed.
JUDGE: What is the judicial registration exclusive in this case the case through on 18 months.
MS. WINGATE: Right. Then I ...
JUDGE: Which weren't -
MS. WINGATE: Am, I'm sorry.
JUDGE: - not in anytime, three or four times over. I just want to reflect, why this was done this way? I'm, I'm-- it was the argument is, you know this is, we can't be involved in but then into you know, interlocutory matters on the Trial Court. This is very unusual.
MS. WINGATE: It, it, it is. That I, I, I respectfully submit that, it's not our fault that the trial court to some on ...
JUDGE: Somebody insisted that you filed. Well, nobody insisted that you filed all 244 plaintiffs on one case.
MS. WINGATE: No. That there were, there were an, an exceptional circumstances that justify filing in that way. You were running upon limitations we had elderly patients, we had deceased patients with family members who couldn't remember when and where exactly that they received treatment and we were having trouble giving medical records. We were running out of [inaudible] limitations and the language of the requirements that caused by the [inaudible] these are the clients rights and filing suits this way. But I'd like to get back from the issue of the 1399 G motion because it affects ...
JUDGE #2: Let me just clear about one thing, it said there is one plaintiff left -
MS. WINGATE: Yes.
JUDGE #2: - that even absent the mission to a fate, there are only 11 of 12 left, even absent, is that right?
MS. WINGATE: That's right, ten.
JUDGE #2: And that's an disputable.
MS. WINGATE: And that's an disputable. The pending motion for a grace period under Subdivision G, affects both elements, the standard for granting mandamus and the reason is because when filed file a timely 14.01 the motion the trial court had no duty to dismissed the case until I'll-- determined that that motion was matter less or we credit the motion that we failed to comply with the grace period. And second, it affects where whether there are exceptional circumstances in this case and whether the legislators intend, as well as defiant by the

failure to dismissed this case at the present time. The way this works is that, a dismissal for an inadequate report is always subjects to the mandatory grace period under subdivision G and the timely held and [inaudible] for the mission is filed at the proper time. We filed a motion that they-- if they weren't and the Court taken up Mr. Hughes asked the Court to continue on hearing on that motion because he said and he was correct. And there is no reason to rule on an extension if you find that, that, that the Court are adequate. Which the Trial Court did. At the present ...

JUDGE: If we-- the Trial Court has denied the motion for expense, right?

MS. WINGATE: Right.

JUDGE: So what's [inaudible] motion for grace period, why would you need the immigration period charges not comes as to what the case is.

MS. WINGATE: That's exactly the point. That's exactly the point from the ...

JUDGE: Are you saying that the motion for grace period is pending and that should inhibit review the case why the motion for dismissal is mandatory.

MS. WINGATE: Well, well, we'll think about it. The relators are are asking this Court to issue an order directing the Trial Court at this point in the proceedings to dismissed the lawsuit with patches. And that catch up our statutory right to have our motion heard and ruled upon.

JUDGE: But there is-

MS. WINGATE: And -

JUDGE: - nothing to grant while the Trial Court grant.

MS. WINGATE: Who you write? That if, if this Court finds that the experts of Courts were inadequately, then we have the right to comeback and say who wait as I can. This was not the result of contrast and different but rather it was, it was the result of accident or mistake. And if the Trial Court in, in discretion finds that that's correct it's mandatory that he grant a 30 day grace period. Basically, ...

JUDGE: [inaudible] but it is okay. Of course, okay.

MS. WINGATE: Exactly. Exactly -

JUDGE: [inaudible] prove.

MS. WINGATES: - he premetest, it replenishes the plaintiff when the Trail Court agrees that of expert report is adequate because that the Trial Court he come later in adequate it would have proceeded to the determine our motion to extend time.

JUDGE: Would you make the same argument if a, if there was a motion for continuance on the summary judgment ruling that you lost? You can any repanel for dismissing the case because when you only go back down to the Trial Court and get and get what ever it is. We have our motion for continuance pending.

MS. WINGAT: Well, if be ...

JUDGE: In that, in that argument take a look to last [inaudible] conclusion is everybody had a right to a second by it had.

MS. WINGATE: Well, it's a statutorily created right to affect part of the [inaudible]. I think that, that the legislators purpose was to dismissed purpose massive, not to dismissed the mandatory loss in the technicality that's why they gave in it-- the right to a grace period and, and I think in your hypothetical. I think what your saying is, when the person was filed for the measure for summary judgment, uses for the continuance and be settled that it was denied -

JUDGE: And held the motion for summary judgment was granted.

MS. WINGATE: - and the motion for summary judgment was grateful became that's not like our facts here because the motion for the a-- the motion to dismissed was not granted.

JUDGE: This is when the I-- that's not grant with the statute that was signed right under Subsection G in the statute that now allows an interlocutory appeal.

MS. WINGATE: It absolutely is.

JUDGE: So if your argument is correct in under the current statute, you can have an interlocutory appeal as the legislature says and if it comes up and determine-- we determine that point did the Court of Appeals and this Court that the, that the expert will fall as varieds and we sent the fact down and then the trial gets to looked and granted the extension and we start all over again -

MS. WINGATE: Well,

JUDGE: - because we grant a new extension they contest the report and then we come right up by cope and if, if is that in I missed the Court what am I missed [inaudible] ...

MS. WINGATE: Well, I think it's addressed by the second part of the provision they grant in the interlocutory appeal which states that the interlocutory appeal will not right when the Court granted an extension at that time.

JUDGE: [inaudible] but we-- we're not granting one now.

MS. WINGATE: Why? So ...

JUDGE: Under the, under the new statute what ...

MS. WINGATE: What I think that, I think it didn't vision is expert report files motion to dismissed files and before the machine is heard is there submission to extend time then the Court proceeds to the hearing if the Court determines that the case should not be dismissed because even though the expert report is adequate but there is a grounds for the extension the Courts grant the extension, you only get one so it by the end of that extension you have to filed to a statute and order finally dismissing should be inner and if it's not an interlocutory ...

JUDGE: Let's go back to my question in the Carpenter, the new statute and I know was not in this case.

MS. WINGATE: What?

JUDGE: If there is in the interlocutory appeal comes always to the Supreme Court and we determine that into what ever for go back to the trial court. There's a trial court under the new statute under [inaudible] is your argument now in this case the trial court then can't grant the extension get a new court file and then, we if it's determine if trial court uses and we have the interlocutory processed again -

MS. WINGATE: No. Well, ...

JUDGE: There is something that will not let to function like that.

MS. WINGATE: Well, yes. The motion have to filed before the hear-- the motion for a claim ...

JUDGE: If you would question and one to exist -

MS. WINGATE: I'm not well.

JUDGE: - after those back then the trial court under your theory get's the chance to give on an extension.

MS. WINGATE: That the motion to grant adverse it has to be filed before the hearing on the motions to dismissed of the trial courts on motion whether he can grant an extension and if no motion remarkably files there is no extension. We don't get it.

JUDGE: We would not, we would not what in -

MS. WINGATE: So -

JUDGE: - someone had for always filed the motion will they all filed or will they not filed the motion. If there is a motion to dismissed.

MS. WINGATE: Well, I think there now a legal obligation not to file a motion that's not properly supported.

JUDGE: And then the summary judgment case where there is the interlocutory appeal like communities you'd always filed a motion for continuance just in case so that if the judges is wrong and in denying the summary judgment to dismissed the cased it goes to one appeal judge got the motion to continue the pending motion and also it could have another by at that.

MS. WINGATE: Well, you don't have a statutory right to a continuance in the discretionary there is a statutory rights by the statute says the Court shall grant the grace period.

JUDGE: We provide for continuances for summary judgments rules on the procedure which are un able to sentence -

MS. WINGATE: Right. But it is not mandatory.

JUDGE: - but it's not meant to procedure in the sentence in our Courts.

MS. WINGATE: It's not mandatory.

JUDGE: Mr. Hudges said, this case is different because your looking it at society interest that there was medical malpractice for instance doctors of [inaudible] areas of the state because we didn't right and because of that among other factors this is the case that is prime for mandamus review which were response.

MS. WINGATE: My responses that there is no guarantee that this lawsuit cannot be dismissed in the feature. Permissibly, if this case really is purpose we are not going to be able to find an expert can comply with the statute at the end of the grace period. And at that point the trial court should dismissed the case -

JUDGE: [inaudible].

MS. WINGATE: There's still the possibility it could get dismissed.

JUDGE: Do you think Dr. Brown satisfies the purpose.

MS. WINGATE: I think she does.

JUDGE: And why look for anybody else?

MS. WINGATE: Well, that's, that's the point. We, we the trial court agrees with that.

JUDGE: Right.

MS. WINGATE: So though, though we, we would it for, for in-- for entitled to the grace period. So the ...

JUDGE: [inaudible] just excuse me go on offer five years of the current letters of [inaudible] of extra six years ago.

MS. WINGATE: Right.

JUDGE: You have-- you have it pleading in back up plan over the six years does it rather stuff?

MS. WINGATE: Well, it's not in the record that we have had at the doctors review and stressed that the, the only remaining claimant were filed and we do think that there's any advanced in this record that we class worthless.

JUDGE: Who gains if the Court has been along for a hundred years you haven't have an expert has medical malpractice case if you don't you loss. Who gains if we go all the way to expected verdict and there is it turns out nothing but there is [inaudible] start to come down and we better off going out now.

MS. WINGATE: Well, I think that, that that presumes that this expert and this claims ferredless and I think that the legislature did intended to dismissed for those claims to induced the [inaudible] on

the public that they also recognized that in some instances counsel may have mistake opposing counsel may caused the mistake, may caused that the party to be an-- unable to file an adequate report and in most case the mandatorious plan get dismissed.

JUDGE: At title, I'm not trying -

MS. WINGATE: I'm not try -

JUDGE: - to get with my previous questions. There do seem to be a remarkable and unusual number of cases with hundreds of plaintiffs in one suit in south Texas. There some doubt about whether in some is concern those cases were really intended to go trial or intended to pressure a self put, which in case you don't need a trial and you don't want it may not even want the trial the longer you get keep the case go in the more expensive is with the defendant laying matters of set. Saying that's your case, but we shouldn't that-- shouldn't the Court's be concerned about that. When looking at whether have remedy have-- there is an adequate appeal remedies appeals on adequate remedy if in fact there is some reason to suspect going to trial going to an appeal is not even contemplated.

MS. WINGATE: Well, maybe if at the point that the Court was ruling there is still possibility that 200 somewhat plaintiffs could actually go to trial. There's only one plaintiff could possibly go to trial here and the rest of-- the rest of the circuit has been dismissed that.

JUDGE: Let me -

MS. WINGATE: I mean ...

JUDGE: - let me asked you about that, we know now the legislature wants over the appeal. They grant, they say get an electrobill in every case, right?

MS. WINGATE: Right.

JUDGE: So isn't that a legislative finding that in fact never in this case, on this issue is appeal on adequate remedy.

MS. WINGATE: No. [inaudible]

JUDGE: One of the-- past the statute that everyone ever can be appeal interlocutory. If they thought appeal was ever and had driven.

MS. WINGATE: Well, as I said earlier that, that the legislators certainly knows how they find statutes retroactively and actually to apply this particular statutes that interlocutory appeals statute the cases are at pending on the along denied -

JUDGE: [inaudible] constitutional ascern the change -

MS. WINGATE: - have it plot our case.

JUDGE: - I just can't that plot everything retroactive caused you want it. Discussed to constitutional rights that there involved that they plot when the change the law on people that now verified suits. So in my opinion concern something like that have this test that there is no question when the say everyone has the excessive rights to their right for the appeal. There's no question they believed that from this then effective date forward, appeal has never an adequate remedy of this issue, otherwise they wouldn't passed the statute.

MS. WINGATE: Why I don't think that you can necessarily infer that because -

JUDGE: Which exceptions that they make to?

MS. WINGATE: I'm sorry.

JUDGE: That they, they made no exception to it?

MS. WINGATE: No. It, it-- well, there is, there is a exception that if there an -

JUDGE: May not to this statute. You don't even need to a clear views of discretion that judge can be exactly right. That the reports perfectly adequate and you still get an interlocutory appeal and talked

the case with that long, don't you? They would say if only clear views of -

MS. WINGATE: Well, nothing [inaudible] for that.

JUDGE: - discretion.

MS. WINGATE: I'm sorry.

JUDGE: They don't say you get in revite the appeal if there's been a clear views of discretion.

MS. WINGATE: Well, ...

JUDGE: They say everybody gets an interlocutory appeal.

MS. WINGATE: That, that's the car, the car before the horse that, that makes you decide whether the trial court abused his discretion before he the appeal.

JUDGE: Well, that-- that's what -

MS. WINGATE: [inaudible] anywhere.

JUDGE: That-- that's what we do on mandamus.

MS. WINGATE: Why that, that -

JUDGE: We don't know fool around with the mandamus appointing looked at it cite this is closer, this is easy, we don't have to do it. But now the the legislature said you got to do all of.

MS. WINGATE: With the legislature this is also a comeback in, in other cases like, like what Mr. Hudges pointed out with the family code. The legislatures come back after a case submitted when the case has submitted and it was available to remedy thus the legislature has come back in clarified that. They didn't-- only about to run out of time I see, if they didn't in-- and the Family Code Section 263.304 for the exact provision that he was referring to after-- in right call in then after it -- I think there was in right bishop where the Courts have going to grant mandamus for this. Because we want the trial court to proceed with the judgment. It was then the timing that plans the legislature come back until, we're going to right mandamus for this because we thin that's right. And they didn't do that at here.

JUDGE: Prove it's one gait. Do you think there are any situation were the trials court, the denial of the motions is dismissed some grants of 45 (D)(I) should be mandamusable.

MS. WINGATE: You know, I, I think that given that many of this cases-- there are, there are many cases that are left -

JUDGE: They were just looked at the cases similar to pipelines ...

MS. WINGATE: - this is all lot you know that this is an -

JUDGE: We need situation -

MS. WINGATE: - old case and I just talked to this issue coming out and at you know, I think that, that mandamus should be preserved for extraordinary circumstances and given the fact that this case if it's decided in relators statement of relief can have that which affects in the future I think not. Take note, it shouldn't be right us.

JUDGE: So you think there are no situations were right matters should be heard on mandamus.

MS. WINGATE: No.

JUDGE: Ms. Wingate way back in change the direction were just a moment, just in cast in you respondent, I think that in grounds-- adopted grounds qualifications.

MS. WINGATE: Yes.

JUDGE: 'Cause I understand from the record her experiences have been an absorbing they used different types of surgeries she's never perform one or had independent training in had a performance is I'm correct.

MS. WINGATE: That's right.

JUDGE: What's differences between -

MS. WINGATE: Just like a doctor whose actually performing -

JUDGE: Yeah. Well, what's different between her situation and a nurse practitioner or an operator nurse can caused watch this sayings go on have a hundred of times. Is she differently situated from such, from such nurse and says I've saying it. So I can tell when the trial or not.

MS. WINGATE: Well, many of the statements in for expert reports have been all imposed operative chaired and the respective.

JUDGE: Okay, believe let's go simply to the operation not to post-offer care. That-- Is she need any different situation that an nurses absorbed hundred of this surgeries being done. And so far as far as the bill or qualifications in your view to be an expert witness whether stand right or wrong.

MS. WINGATE: Well, I think that ...

JUDGE: Standard of the care in where ...

MS. WINGATE: I mean-- I think the statutes requires when in testifying against the position at the expert bills petition so yes.

JUDGE: So I'm going to -

MS. WINGATE: You see the difference?

JUDGE: - recall is she's in the position, no question about that. Like for qualifications tested by, if it's [inaudible] be correct at incorrect. Is she better situated then nourished by saying it done over and over again. Qualifications lies in your view.

MS. WINGATE: Yes. Well, she, she is a medical doctor and she is been trained to recognize a sentence and also been trained that, that primary [inaudible] of care and some of [inaudible].

JUDGE: But the surgery it self she's not have the training.

MS. WINGATE: That's right.

JUDGE: Okay and so let's go to post-off care and ask under the same question in. She has the position, is she better situated on this particular ta-- places captured reason. The court order says is she better qualified in your opinion he knows she has an specific training that have an and than a nurse to simply absorb that care over and over again.

MS. WINGATE: That's I believe so. I believe so.

JUDGE: Of all phases.

MS. WINGATE: Because she has trained the diagnosis of an indications for-- adopt her and trained to recognized symptoms. [inaudible].

JUDGE: And so I just want -

MS. WINGATE: To take consults for their patients.

JUDGE: That a nurse [inaudible].

MS. WINGATE: That, that counsel being positive, there's still involved with the treatment and I've nourished like the [inaudible] were involved.

JUDGE: That it say [inaudible] for the briefs could else called this business in general medicine those who invoked that Dr. Brown was involved and after 2002 or from 2002 hold.

MS. WINGATE: Well, I think it could, it can be assumed and should, should be treated all the way if it has chance. Since you visited them at home that's, that's exactly the type of clarification for both the plan and she must submitted his patients for other way.

JUDGE: So that's, that's what she was called a house-called business in general medicine?

MS. WINGATE: Yes.

JUDGE: It, it-- in what way maybe it was in the brief are listed at at-- what ways is it that a medical the standard violate the law by

hiring like the mountain is I understand your claim that it rallied on it's by-laws and it's un determined claims. But have it rallied, can law by the hiring yet. That's stated on the brief, I didn't see the information for have that occured.

MS. WINGATE: Are you-- are, are on address all test any what sure and in detect that and that's in minors stand them is that, that possible, I think that prohibit from hiring doctors and it's employees by law and I'm not sure that's because that's right.

JUDGE #2: Is that so. I can open the right that we often divide it if you like.

JUDGE: I believed that that's enough in the record. Are there any else comes in mind? Any other questions?

MS. WINGATE: Thank you.

JUDGE: Mr. Hughes, what what is this or duty is this Court had if any speculating what the attempt of one plaintiff or 224 plaintiffs filing a lawsuit in south Texas, east Texas, north Texas, wecks-- west Texas or any part of this state of business it is of this Court to speculate what the intend of this parties is.

REBUTTAL ARGUMENT OF ROGER W. HUGHES ON BEHALF OF PETITIONER

MR. HUGHES: If becomes the business of the Court's when a legislative from a providing expert report is violated because at that point the legislature says the case is miracles and it should be apt. And at that point, once they have paid off the or fulfill the statutory requirements to show their cases here. And it is the Court's business to remove if there're attempt to be presume that would -

JUDGE: [inaudible] well, there I can't the legislature just right a statutes that there is no right of appeal to go directly to mandamus proceeding. Is that in the statutes?

MR. HUGHES: That was not in the old statute. There was only two ports on the appeal that determined the mandamus list had appropriate remedy when it change to statute. When they change the statute they did a violation in mandamus. They didn't have it, they just left it as it was.

JUDGE #2: Let me, further had the medical buying -

MR. HUGHES: Sure.

JUDGE #2: There is side of the trial court of this case instead of sitting on the mentioned for grace period have gone and even granted for grace period. And I'm in agree and in the direct that they have been filed and this still fall symathically. Or let's say it, it could be [inaudible] that the, the granting of the grace period was erroneous, clearly erroneous. That would not be the amendments, correct?

MR. HUGHES: I-- if my, my memories serves me correct. The Courts of Appeal had the sorts of split on that question. The one who have reach some that says it no adequate remedy but then the generally ignored and have them find no appeals on the discretion. In other words, those that were find that mandamus is available generally go haven't review that under this discretion test and usually, you know titled, in other words had unusual there is any pending report then the trial court will win. And in most cases the trial court wins because the motion is being inadequate [inaudible].

JUDGE #2: Who are for you, were of any, any case law that have

said anything about that, that even simply denied mandamus and that's irrelevantly speculated on your rights.

MR. HUGHES: I've, I've recalled that, that someone that are addressed that, that in, that's why said that they, they, they addressed under the abusive discretions standard rather than denied that under the abusive discretions standard rather than denied it under the abusive discretion from the record.

JUDGE #2: That, that the Court have said that it is mandamusable?

MR. HUGHES: I'd like this medapost submittion brief rather than refund at of this one. But I would say that this case there would be a review of discretion and I ask the Court to take a look at their motion. Their motion all it was, first it was a conditional motion. It was only if you don't, if you going to grant there a motion then grant this one. That the point of it is it only gave two grounds. The first one is it, some of this people we have adopted the medical record yet. When you look at the record at the hearing, now one of those people are still around.

JUDGE #2: But [inaudible] in this special [inaudible] your time is limited. Do you think there should be two different standards or granting of the grace period of review versus an interlocutory appeal.

MR. HUGHES: There's not two different standards. The questions if there is reviews of discretion I,I their not think their going to drop back to see whether or not they have any adequate remedy for appeal.

JUDGE #2: Let me just, let me raised my question that adequate question will be the same whether in need their instance.

MR. HUGHES: Yes.

JUDGE #2: Okay. So you think that the denial of the grace period will be revealed only in this as well.

MR. HUGHES: Yes. And in this case, I think it's particularly telling that it's going on for 4 years. They have an enough opportunity during the period to seek this and they didn't. We had a writing should it on the wall, and this Court granted the petition previously to file the petition to go back to the trial court and said there's a problem and maybe we should get this granted so the rule raise on. What is now exactly what the tri-- with the legislature should said should let it happened, is going to happen will be five, six years out and there's still what happen with the report. And now, we are [inaudible] to left.

JUDGE: Mr. Hughes, tell me just a moment that even 200 summary judgment in this case, is that correct?

MR. HUGHES: Yes.

JUDGE: While we hear on mandamus five years later when you go out, when your take in the time with 200 summary judgment just [inaudible] we do have, we do have a question on mandamus plain angent prior for seeing here in.

MR. HUGHES: Well, you are in off five seconds. Some mend to supplemental record we did go back to trial court there is non saying, please [inaudible] by the motion to dismissed. And we could get it all. And at that point, we had a problem, that we had the trial get to was rained to summary judgments and that was most of the case on summary judgment.

JUDGE: Was that a problem for you?

MR. HUGHES: It's not problem but it becomes a problem involved the sentenced decided the mandamus to trial court the rule on a pending motion.

JUDGE: You mean.

MR. HUGHES: Sub-state when the judges is ruling the right you know-- it's not a good practice to hear it with the mandamus, less

[inaudible] absolutely necessary.

JUDGE: Any further questions? Thank you, counsel. The files have been submitted the Court will take a brief recess.

COURT ATTENDANT: All rise.

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