This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Rory Lewis, M.D., Petitioner,
v.
Dewayne Funderburk, as next friend of Whitney Funderburk, Respondent.
No. 06-0518.

November 15, 2007

Appearances:
Andrew F. MacRae, Austin, Texas, for petitioner.
Amy C. Thomas, Mexia, Texas, for respondent.

Before:

Chief Justice Wallace 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.

CONTENTS

ORAL ARGUMENT OF ANDREW F. MACRAE ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF AMY C. THOMAS ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF ANDREW F. MACRAE ON BEHALF OF PETITIONER

CHIEF JUSTICE JEFFERSON: The court is now ready to hear argument in 06- 0518, Rory Lewis, MD, versus Dewayne Funderburk.

COURT MARSHALL: Mr. Macrae will present the argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ANDREW F. MACRAE ON BEHALF OF THE PETITIONER

MR. MACRAE: May it please the Court. Good morning, I'm Andrew MacRae with Will Barber. We represent Dr. Rory Lewis. He is seated behind us in the first row. This is a medical malpractice case arising under what I still call the new law, Chapter 74 of the Texas Civil Practice and Remedies Code. There are two main issues I think to be addressed today. The first is, did the Waco Court of Appeals have jurisdiction-- interlocutory appeal jurisdiction over the appeal that we filed after the trial court denied our second motion to dismiss. The other main issue I intend to address today is if there is jurisdiction, which we think there was, made the plaintiff cure a deficiency in an expert report by filing a new report from the new physician. There are two other issues we have briefed to the court. One is the qualifications of this second physician. The other is the sufficiency of the report by the second physician. Respectfully, from a statewide jurisprudent standpoint, I think the first two issues are the more important. So those are the issues I intend to spend much of my time on today. Excuse me. I do want to clarify what-- talking about

jurisdiction, first of all is I do not dispute that the Waco Court of Appeals did not have jurisdiction under Section 51.014(a)(10) of the Texas Civil Practice and Remedies Code. We are also not arguing about the decision by the Court of Appeals that it didn't have jurisdiction over our attempt to appeal the first trial court order. What I am arguing today is that the Court of Appeals did have jurisdiction under 51.014(a)(9). The reason I say that or the reason I want to make that clear is because I think there was some confusion perhaps in the Court of Appeals as to which statute we are proceeding under. In our motion to dismiss, we argued 74.351(b), which says that "If a report is insufficient, the case can be dismissed and attorney's fees awarded." That motion was denied. Actually -

CHIEF JUSTICE JEFFERSON: That, that-- it's a very difficult statute to parse, but as I, and as I read it, the phrase has not been served, has two different meanings. Under (b), it would mean no report was filed at all and had been filed at all, period. And in that event, the defendant to move to dismiss the trial court's denial of that motion, and then there's interlocutory review. But there's another meaning to-- has not been served, and that's when a report has been filed but there are elements missing from that report. And there, the trial court can grab the 30-day extension and the defendant may not file an interlocutory appeal. Do, do you agree with those propositions?

MR. MACRAE: I, I agree with that reading, Judge, yes I do. That is one of the reasons why we did not appeal from the very first order, because the trial court granted an extension.

CHIEF JUSTICE JEFFERSON: Then explain how there was no report filed at all given under 74.351(b) that gives you the right to -

MR. MACRAE: First time around, Judge?

CHIEF JUSTICE JEFFERSON: Well, you said that "You are appealing 351(b)?"

MR. MACRAE: Yes, Sir.

CHIEF JUSTICE JEFFERSON: Okay, and under, under my reading, that means a report has not been served at all, so is that the case here?

MR. MACRAE: I'm sorry, I'm-- I maybe misunderstood your first question. I think there are two circumstances under which a report has not been served. One is there's no report at all, and the other is there' s a report but it's deficient.

CHIEF JUSTICE JEFFERSON: Okay, now, just to get back. As I, as I read it, if there's no report filed at all, then there is an appellate remedy -

MR. MACRAE: I agree.

CHIEF JUSTICE JEFFERSON: - under the Civil Practice and Remedies Code. But if a report is filed but it's missing elements, then that gives rise to the cure-- 30-day cure period. And as I read it, the defendant can move to dismiss the claim under-- that would be under (c), 351(c) only if there's not been a good faith effort to comply.

MR. MACRAE: I, I think I'm in agreement with you, your Honor, but, but -

CHIEF JUSTICE JEFFERSON: You know, just to refocus it--

JUSTICE BRISTER: What part of, what part of (c) says, "You can dismiss anything?"

MR. MACRAE: No part of (c) says, "Anything about dismissal."

JUSTICE BRISTER: Yes. Any-- can you, can you deny or dismiss under (c) at all? I don't see anything -

MR. MACRAE: I don't believe so no Judge.

JUSTICE BRISTER: Because that's just an extension, right?

MR. MACRAE: Right. I, I think though that the way to interpret the

statute is that if a trial court exercises its jurisdiction, excuse me, its discretion under (c) and allows an extension, then you start over. And then you go back to (a). If it-- what the plaintiff is required to do to proceed with the lawsuit is satisfying subsection (a), and if you get all the way to (c), and the court says, "I'm going to exercise my jurisdiction, excuse me, discretion, I'm going to give you thirty days." Then what the plaintiff is required to do is try again to satisfy subsection (a), so I, I think you go back and start over. And the reason I'm so sure about that is because subsection (s), it says that "until the plaintiff satisfies subsection (a), the case is stayed and no discovery or very little discovery can go forward." So in that, in-- by implication, I think what the statute says, "Is that in order to go forward, the plaintiff must satisfy subsection (a), either the first time around or the second time around."

CHIEF JUSTICE JEFFERSON: Just to refocus, you are-- you contend that the Court of Appeals has jurisdiction under 7-- under Civil Practice and Remedies code, that, 74.351(b) of the medical act?

MR. MACRAE: Yes, Judge. I think the jurisdiction is conferred by 51.014(a)(9) -

CHIEF JUSTICE JEFFERSON: Fine, right.

MR. MACRAE: Because there was denial of relief that we had requested under 74.351(b).

CHIEF JUSTICE JEFFERSON: And the basis of your denial of relief was what?

MR. MACRAE: The, the trial court denial of [inaudible]

CHIEF JUSTICE JEFFERSON: Yeah, the basis of your motion to dismiss was what?

MR. MACRAE: The, the second motion to dismiss was that the, that the expert, or excuse me, that the second physician was not permitted, that one must cure a deficiency in a report with something from the same physician. Secondly, that even if you are allowed to submit a report from the new physician, then this particular physician was not qualified, and thirdly, even if you can have a second position and even if this person qualified, the report itself was insufficient.

JUSTICE WAINWRIGHT: What language in the statute do you point to the-- the argument that-- the expert report requirement has to be satisfied by the same expert?

MR. MACRAE: The cure of the deficiency language, your Honor, in 74.351(c), it says "if an expert report has not been served because elements of the report are found deficient, the court may grant an extension to the claimant in order to cure the deficiency." In my reading of the statute, cure the deficiency means that the elements, -

JUSTICE WAINWRIGHT: Right.

MR. MACRAE: - elements of the report are deficiency.

JUSTICE WAINWRIGHT: But be sure the deficiency doesn't say anything about one, two, three, or four experts? I mean, what about cure the deficiency means the same expert has to-- the same expert serving the same expert report has to be, not only the report was found deficient, but also that expert has to provide the information and report to cure the deficiencies. What about that language says that?

MR. MACRAE: I, I, I think that language is not in there, your Honor, to, to answer your question straightforwardly. I think-- I'd point the court to the [inaudible] case out of the Court of Appeals in Houston, which says that "Had been analyzed the current statute versus the old statute." The old statute said, "You can have an extension to satisfy this Section", and the new statute says, "You can get an extension to cure the deficiency." The Court of Appeals said, "There

must be a difference." The court-- the legislature doesn't change the language to say the same thing.

JUSTICE BRISTER: But in the [inaudible] line of cases, we encouraged trial courts and defendants to bring these challenges to an expert early so that if the expert, the plaintiff's expert was not qualified, we wouldn't just toss somebody out because their lawyer picked a bad expert, but that they would have a chance to cure the problem. Your reading would be a different rule for malpractice cases.

MR. MACRAE: Not necessarily your Honor, and I think this is the issue that came up yesterday in the, the other case, [inaudible] case. Under the statute, under the case law, it is the plaintiff's burden to demonstrate the expertise of his or her expert. If this were the first report, if the second report was, in fact, the first report, and if there was some indication in that report that this person, Dr. Hughes, was indeed qualified and that he was either board certified or had substantial training or experience and was [inaudible] medical care, and it was a close call, I think, I would say, that the trial court can allow that doctor, Dr. Hughes, to expand on his qualifications, to ensure the trial court is satisfied that he is qualified. On this record though, we have a second report, so there's no chance to fix this. So if we get to the qualifications of Dr. Hughes, he has not demonstrated his qualifications and there is no chance to fix it regardless of whether he was permitted to write that report or not.

JUSTICE HECHT: But that's the plaintiff's problem, I mean, if they file one expert report and the right experts determined being not qualified and they want to try to fix that or they're worried about the qualifications, and they try to fix it, and they don't fix it, then it's going to get dismissed. But if they do fix it, why shouldn't they be entitled to do that?

MR. MACRAE: I, I think the way the statute is written, Judge, and excuse me Justice, and the way the Court of Appeals, the Third Court of Appeals, has analyzed it is the plaintiff has a chance early on. The-- Austin Court of Appeals in Bogar analyzed 74.351(l) and what that means, and they said, "number one, 74.351(l), the good faith effort, is the burden of proof for-- that must be met." The other thing that 74.351(l) seems to say, according to the Bogar court, is that if a plaintiff's expert report is filed early on, let's say it's filed within 20 days of the filing of the case, then the defendant must object within 21 days. So now you're 41 days out, and if the plaintiff is concerned about the qualifications of that expert, he or she can get a hearing and get a ruling on that early on and still has the 120-day period or what's left of it to satisfy any concerns about the qualifications.

CHIEF JUSTICE JEFFERSON: But under your, your construction, if they're wrong about the qualifications of that expert, if they-- the expert said, "He's had a medical degree, doesn't have the-- it turns out he doesn't have one, they can not find a, a doctor with the requisite expertise and substitute that report in to cure the deficiency of the lack of the degree."

MR. MACRAE: If we're after the 120 days and the defendant has moved on the 74.351(b) -

CHIEF JUSTICE JEFFERSON: He's stuck with the first -

MR. MACRAE: I think he's stuck, if one ...

JUSTICE WAINWRIGHT: It was within the 120 days, under your theory, which is [inaudible] the plaintiff would be stuck with the deficient report because you can't substitute in a new expert, as I understood you to say earlier?

MR. MACRAE: I, I think you can, your Honor, because the only way the trial court is applying (c) is if the motion to dismiss is brought under (b). Those two statutes apply together. If, as the Court of Appeal said, "In the Bogar case that the defendant proceeds under (1), which is sending other than a motion to dismiss, something within the 120-day period, then it looks like it can be cured with a new expert, and that's what the [inaudible] Court of Appeals said, 'In the Hiner versus Gaspard case."' There was a new expert that came in but it was within 120 days, and so therefore, (b) and (c) really didn't apply because you can't file a motion to dismiss until 120 days have passed. Going back to the Court of Appeals' opinion, the Court, respectfully, I think the Waco Court of Appeals missed the issue, which is, is a jurisdiction under [inaudible]. It held that's no jurisdiction under (a)(10). Again, I, don't disagree with that. What the dissent says, "Is that the majority says there is no jurisdiction from, from an appeal from the denial of a second report." Respectfully, I don't think that's what the majority said, and I don't think that's what the majority meant. In a recent court case from the same Court of Appeals, the Hill, excuse me, the Reynolds versus-- Hill Regional Hospital versus Reynolds case, which is a memorandum opinion, it's a-- petition has been filed in this Court. The Court of Appeals denied jurisdiction after an appeal from the first motion to discuss citing to Funderburk. So it appears to me from that case, and applying it to this case, that the Court of Appeals has mistakenly concluded that we were proceeding under (1), and that the defendant in the Reynolds case was proceeding under (1), when in fact, we were proceeding under B. The dissent says, "That the precedential effect of the majority opinion is that there's no appeal from a second order." I agree with that in this case. That is the ultimate effect of the opinion in this case, but I don't think that's what the majority actually came out and said. And I do agree with rest of the dissent's opinion and it's parsing of Sections (a), (b) and (c). I think the, the gist of the dissent's opinion is that under subsection (c), if a, an extension is granted, you go back to (a) and (b), and the second report is an attempt to satisfy (a), and therefore, defendant can proceed under (b) and, and so forth. You just don't get to (c) [inaudible].

CHIEF JUSTICE JEFFERSON: Under (b), there has to be no report filed.

MR. MACRAE: No, your Honor, I, I think it's either-- the, the, the language of the statute is, no expert before has been served, and I think if you read (b) and (c) together, and I think as most Courts of Appeals have read them, no report served means either one, there's no report at all or a report has been given to the other side but it's insufficient.

CHIEF JUSTICE JEFFERSON: And that's what I was saying in the beginning, under (b) no report. I, I say (b) is saying no report at all, and (c) saying a report was served but it was not sufficient because that's where the cure comes in, under (c).

MR. MACRAE: I, I agree that under (c), you can not cure a [inaudible]-- I'm, I'm not sure if that's what you're asking though, I'm sorry. I see my time's up, can I -

CHIEF JUSTICE JEFFERSON: Yes.

MR. MACRAE: Have further with that?

CHIEF JUSTICE JEFFERSON: Okay, it's, it's, again, a difficult statute, but you have two readings that has not been served, and under 754.351(b), it seems to me that's the circumstance where there has not been any report. The plaintiff-- the claimant has been completely

silent. Hasn't satisfied the 120-day time period, and then the defendant can move to dismiss and a denial subject to review. (c), talks about a report that's filed but is missing one or more elements, and, and I see a distinction between those two, and under (c), then there's this opportunity to cure, and the one-time 30-day opportunity, and it seems to me that your case falls under (c) and not (b)?

MR. MACRAE: I think the way the trial court read it, your Honor, the way the trial court proceeded, yes, she was proceeding under (c). But I, I think that there are, there are two ways that a defendant can proceed under (b). One is if there's no report file, no report at all, nothing exists, which was the case, in our case. That's, that's one way, and I think in, in that case, (c) doesn't apply, because there is no report at all, there's nothing to find deficient. So therefore, under (b), the trial court is required to dismiss and with attorney's fees. The other way that, that a defendant can move under (b) is if there has been a "report served," excuse me, "submitted." But it hasn't-- it's not efficient, and therefore, it is considered unserved, in which case, the defendant can, can ask for dismissal. The plaintiff then can say, "I want an extension." I think under either circumstance though, that ultimately we get the right to appeal.

JUSTICE: Further questions? A report from the [inaudible], how would you characterize such as report?

MR. MACRAE: No report.

CHIEF JUSTICE JEFFERSON: Thank you, counselor. The Court is ready hear argument from the respondent.

COURT MARSHALL: May it please the Court. Ms. Thomas will present argument for the respondents.

ORAL ARGUMENT OF AMY C. THOMAS ON BEHALF OF THE RESPONDENT

MS. THOMAS: Good morning Judges, Chief Justice. My name is Amy Thomas, I'm an attorney from Mexia, Texas, and I represent Whitney Funderburk. I'd like to say it's an honor to be here this morning and to present argument for Ms. Funderburk, and this reading the statement out there that equal justice to all, and I am representing just one young lady from Groesbeck in Limestone County, but I think the importance to this case expands to many, many, many people across the state whose cases are being dismissed without their day in court and ...

JUSTICE BRISTER: Well, not exactly without their day in court.

MS. THOMAS: Well, -

JUSTICE BRISTER: The statute says, "You've got today in court." You're here in court. We want a report or else, and-- if you don't send a report, yes, like everybody else who doesn't have a case, you get kicked out.

MS. THOMAS: I agree with that if there is no report. I think many, many cases are being dismissed now on sufficiency of the report. I think that goes back to Chief Justice's question as to what section we appeal under and the appeal is allowed under (b) if there is no report, and I think when you-- better go back and look at Chapter 51.014 on the appeal from an interlocutory order, it says, "There is only an appeal if it grants relief thought by motion under 74 under (l)."

JUSTICE BRISTER: I'm, I'm having trouble finding this difficult. In (c), it says, "If an expert report has not been served within the

period specific by A because elements are found deficient." Let, let me make-- try it this way. You say, in (b) has-- a report has not been served means no report at all and that all it means. They say, but when the legislature said, "Has a certain-- expert report has not been served, as you can tell from looking in (c), they meant deficient reports too."

MS. THOMAS: And I think they meant deficient reports in the-- only to the extent that, that allows that granting that 130-day extension.

JUSTICE BRISTER: But there is no question in (c) when they say an expert report has not been served, they thought that included deficient reports.

MS. THOMAS: Okay.

JUSTICE BRISTER: Is it-- I mean, that's-- there's no way to read (c) otherwise, then that's what they thought those words meant.

MS. THOMAS: I, I respectfully disagree. I believe that replies to granting the 130-day extension -

JUSTICE BRISTER: If an expert report has not been served because elements are found deficient. They must have thought an expert report has not been served included where the elements are found deficient. That's what they thought that they wouldn't have said that, right?

MS. THOMAS: I agree with that.

JUSTICE BRISTER: So how can we-- if that's what they thought those words meant in (c), how can we say, but they must have thought the words meant something else in (b)?

MS. THOMAS: Well, when you, when you go down to (l) though, when it specifically says, "Court shall grant a motion to-- challenging the adequacy of the court only if it appears that the Court, after hearing, it does not represent a good faith effort." In that section, the legislature goes and specifically speaks about the adequacy of the report. The first report, second report, or however combined, and then the legislature specifically said that "There is only interlocutory appeal if that motion is granted, meaning-- I believe there's two rights for an interlocutory appeal." One, if the defendant's motion to dismiss is denied, because there's no report, and two if a plaintiff's-- if the defendant's motion to dismiss is granted based on the inadequacy of the report. So I think when you have-- you can stop at (c) and say, "Well, there the legislature was backing up and allowing the positions to always have an interlocutory appeal on any determination of the expert report." And I think it clearly conflicts with that, when it says "But we're not going to do it when you're talking about the adequacy."

JUSTICE BRISTER: You think you'd agree with me if, down at the-- somewhere in the statute, the legislature said, "The words has not been served" as used in this section, means no report and deficient reports. Then in that case, the defendant would be here appealing under-- an interlocutory appeal under (b).

MS. THOMAS: I, I don't know, I've read this so many times, I really don't know where it has said "not been served" other than in subsection (c).

JUSTICE BRISTER: Lets-- let me break it down.

MS. THOMAS: Okay.

JUSTICE BRISTER: If they can appeal under (b), they can have an interlocutory appeal.

MS. THOMAS: Correct.

JUSTICE BRISTER: And if the legislature said, "has not been served," when we use "has not been served" in (b) we mean no report and deficient reports, then they would have an interlocutory appeal in this

case.

MS. THOMAS: I believe with your reading, if you stop at subsection (c) that's a possibility. But I think when you have to read the statute as a whole and determine why else would they put subsection (l) in there, and put, under Chapter 51.014, subsection 10, that it only says, "Grants relief, so they could have easily said-- denies or grants relief under subsection 10 of Chapter 51, as they did in number nine," and I think it's, you know, the whole statutory construction, you have to read it as a whole ...

JUSTICE BRISTER: But if they, but if they define a term, this is what we mean, we've got to go with that.

MS. THOMAS: I don't know that, that's defined. I, I really don't. I think that's only defined when it's -

JUSTICE BRISTER: I'm not, I'm not trying to get you to mend away your case.

MS. THOMAS: Right.

JUSTICE BRISTER: If the legislature defines a term, this is what we mean by these words. The Court's got to go by that when you're construing a statute. We have no choice.

MS. THOMAS: I totally agree with that. I disagree that that term has been defined in this, in this statute, and I believe that there has been conflicting provisions on there. And I-- in the purpose of Chapter 74 was really to shield doctors from frivolous cases and I'm not ...

JUSTICE HECHT: But not -

JUSTICE HECHT: How is that purpose served if the plaintiff files a report that's wholly deficient, and you can't appeal from?

MS. THOMAS: Well, I think it goes to what your question was to the petitioner in the first. That's if later on in the trial of the merits, if I don't continue to rely upon an expert, I think, as long as it's a good faith effort to comply, which in this case in believe it is, and then -

JUSTICE HECHT: I, I'm misunderstanding you, I thought you thought that under (b), you could appeal only if no report is served at all?

MS. THOMAS: I agree, under (b), for a defendant. Only no report served at all.

JUSTICE HECHT: And I'm-- so my question is, how does that-- you said that "The purpose of this is to keep frivolous claims out, and if you were trying to keep them out, why wouldn't you allow an appeal from a report that was just completely deficient?"

MS. THOMAS: Because under Chapter 51.014, it says, "We're not going to allow interlocutory appeals on deficiency reports."

JUSTICE HECHT: But you-- but surely that undermines the purpose of the statute?

MS. THOMAS: No, I think it, it-- the purposes is served because-- but the purpose of the statute deals with the trial on the merits, Chapter 74. The whole, the whole case, from beginning to end, and Chapter 51 just deals with interlocutory appeals. But when you look at Chapter 74, it also says, and I have to get to this, you know, subject to subsection (t), an expert report under this section is not admissible in evidence, not to be used in deposition and trials, and shall not be referred to by any party. So obviously, the court-- the legislature was contemplating that a plaintiff may serve a expert report in the beginning -

JUSTICE BRISTER: Well, in this case -

MS. THOMAS: But in later-- provide-- we totally on a total-- other expert.

JUSTICE BRISTER: Your expert report was the letter by Dr. Roten?

MS. THOMAS: That is the expert report but the initial one that was not appealed.0

JUSTICE BRISTER: Right, that's, that's the one you filed to meet the statute?

MS. THOMAS: That was the one. Yes, Sir.

JUSTICE BRISTER: And it doesn't say I can't find anything in it, where he says, "Anybody did anything wrong."

MS. THOMAS: And then at that point, we're going back in opening the order -

JUSTICE BRISTER: It's-- there's nothing in there that says, "Anybody did anything wrong."

MS. THOMAS: I don't have that-- I don't have that in front of me, I know that it -

JUSTICE BRISTER: [inaudible]Take my word for it, there's nothing in there that says, "Anything, anything wrong."

MS. THOMAS: And I've read Justice -

JUSTICE BRISTER: So could you just, what if he just filed the front page in the [inaudible] newspaper? Would that be counted as a report?

MS. THOMAS: No, Sir.

JUSTICE BRISTER: Okay. So what's your definition of no report? It doesn't include a newspaper, but it does include something that doesn't even say anybody did anything wrong. So what's the line between them?

MS. THOMAS: That report refers to the, the ultimate injury that the plaintiff served.

JUSTICE BRISTER: It definitely has the plaintiff's name, and it's about her. But it doesn't say any doctor or anybody did anything wrong. But that is report, so we can't dismiss under (b), because you did serve something.

MS. THOMAS: And we can't dismiss under (b) now because I, I wholeheartedly agree that had the court-- they probably-- if they would have exercised their right of appeal in '04, that more than likely, this case probably would have been dismissed.

CHIEF JUSTICE JEFFERSON: The trial court -

MS. THOMAS: If they did-- if the trial court had not afforded me -

CHIEF JUSTICE JEFFERSON: The trial court could and should have dismissed that report under (l), right? Because it doesn't represent a good faith effort if it doesn't say anyone did anything wrong.

MS. THOMAS: I think then, you're-- it's going back to whether or not, and it's no report.

CHIEF JUSTICE JEFFERSON: Well, the definitive move to dismiss a claim when elements like those Justice Brister was talking about are missing, if the report does not represent a good faith effort under Chapter 11. The problem with that is if the trial court doesn't dismiss, then we're in Justice Hecht's scenario that a grossly deficient report doesn't result in the right to an interlocutory appeal when the trial court denies a motion to dismiss, and there seems to be something wrong. It's either something missing in the statute, they just didn't think about it, or perhaps, your reading of the statute is wrong.

MS. THOMAS: Well, I believe at that point it should have been a determination as to whether or not that was any report at all should have been appealed at that time, and it's clear that the second report is some type of report.

JUSTICE: Counsel -

JUSTICE HECHT: No matter how deficient it is, the second report you can't appeal? That's your position, I think.

MS. THOMAS: I'll be challenging the adequacy of the report. I think you can only look at the good faith effort so -

JUSTICE HECHT: I was just saying, no matter how inadequate it is, you can't appeal from the second report.

MS. THOMAS: I agree, under, under the way the law was written and (l)-- can appeal under an interlocutory order.

JUSTICE JOHNSON: Which means, which means if you file a report that has no qualifications or, or insufficient qualifications in it or insufficient plausible relationship, the trial court gives you a 30-day extension, you change two lines in the report, and file that as your next report, you have the same problem in the same report, just refiled first time around, you could appeal it if the trial-- you, you, you got the same report, but you can't do anything about it then. Very same report filed for-- under the 30-day extension, but you can't do anything about that under, under your construction.

MS. THOMAS: I agree -

JUSTICE JOHNSON: So now there is -

MS. THOMAS: But somehow I can read the statute -

JUSTICE JOHNSON: There's another part of the statutory construction-- our, our rule of statutory construction, that say that we follow the definitions given us and that we read the language plainly as it is, but that we tried to avoid absurd results. It seems as though that if you have the same report that is deficient and refile that as your report in the 30-day extension, but that deficient report still doesn't tell the defendant anything about the case that that might be approaching an absurd result, forced to interpret the statute that way. And -

MS. THOMAS: I think that's probably reading the language too literally because I believe just a good faith effort means you identify the standard of care, how it was breached, and the causation -

JUSTICE JOHNSON: But we've already had the trial court determine that it's a deficient report. It doesn't meet the standards, and you file the same report again, and the trial court says, "It still doesn't meet the standards ...

MS. THOMAS: Well, I think at that point, I think at that point, then you haven't complied with serving an expert report. I think if the court says, "One time it's not sufficient and you, and you submit the same report and it says, 'It's not sufficient, the, the defendant's entitled to dismiss the case."'

CHIEF JUSTICE JEFFERSON: And if the trial court doesn't, the defendant doesn't have the right to an interlocutory appeal, that's the, that's the issue we're facing.

MS. THOMAS: It's confusing. So -

JUSTICE WAINWRIGHT: So under your construct-- you could have a circumstance where a [inaudible] report is, as you see it, as sufficient to satisfy the expert report requirement, you can get there.

MS. THOMAS: No. I don't believe that especially when you look under the qualifications of the expertly, yes.

JUSTICE WAINWRIGHT: Well, if the-- get the-- a [inaudible] report is filed, and you get a continuance, then you change a couple of sentences in the report, there's no interlocutory appeal?

MS. THOMAS: But would still not have an expert report as it defined under the statute.

JUSTICE WAINWRIGHT: There's no interlocutory appeal?

MS. THOMAS: I believe there's no interlocutory appeal on the sufficiency of the report.

JUSTICE WAINWRIGHT: So under your construct you can get to trial

on a [inaudible] report?

MS. THOMAS: I don't think we'd get very far with that, and obviously the court-- I mean the legislators contemplating this report is just a bare-bones attempt to just show there's good faith in the lawsuit.

CHIEF JUSTICE JEFFERSON: Maybe you part with happening is the legislature is-- has a certain amount of confidence that the trial court will follow their, their obligation under the statute to dismiss grossly deficient report.

MS. THOMAS: Afraid so and then if they do, then the plaintiff has the right to appeal it.

CHIEF JUSTICE JEFFERSON: Yes.

MS. THOMAS: Right.

JUSTICE BRISTER: And the, and the reason they took the extraordinary step of allowing interlocutory appeals is because they were so confident trial judges would do this all the time. Doesn't the fact that they made this an interlocutory appeal indicate they did not have much confidence, trial judges would do this all the time?

MS. THOMAS: I don't think it was any -

JUSTICE BRISTER: The whole, the whole -

MS. THOMAS: Reflection on the trial judge's -

JUSTICE BRISTER: Well, I mean, well, House Bill 4 was a reflection on-- they didn't think our system was working?

MS. THOMAS: I think if -

JUSTICE BRISTER: Right? And the whole reason for all of this was because I mean, it's been the law in Texas for 100 years. You can't sue a doctor without having a doctor there that's going to establish standard of care. But apparently, a lot of places, cases were just rattling around for years with no expert, and no hope of ever getting one, and that's the whole reason they did all this, was because they weren't confident the trial judges were making plaintiff's and medical malpractice case, get an expert. Wouldn't you agree with that? That's why they did all this?

MS. THOMAS: I think they agree. They did all this as part of the medical liability improvement act that was intended to get rid of frivolous cases. And I think if you still don't have that report and the trial court doesn't do that, those defendants still have their motion for summary judgments that would allow them to dismiss a case, and surely if the plaintiff didn't have an expert, the trial court would grant it.

JUSTICE BRISTER: But a lot more-- you may not have been practice [inaudible] -

MS. THOMAS: I probably wasn't. I do know that it just-- it seems at this point that this law, when it's getting construed, it's, it's such where the, the, the, the claimant is out to litigate their merits on a report when clearly, when you look at the statute, it says, "You may not ever use that report again." But we're going to dismiss your case on that report, and I think that's-- there in lies the problem. You know, the appellate court didn't ever supposed to be sitting as [inaudible], but now the medical malpractice plaintiffs are not ever-- it's the appellate courts and the trial courts are getting [inaudible] and, and these cases -

JUSTICE BRISTER: At risk, they say even your second report's inadequate because he's a family practitioner, and not an orthopedist.

MS. THOMAS: But even as a family practitioner, he states in his report that he treats fractures, he diagnoses fractures, and sometimes refers them out. But he still, in his report, says, "As a family

practitioner, he treats wrist fracture," which is the exact same, same injury in this case ...

JUSTICE BRISTER: Certainly not the same school of practice.

MS. THOMAS: Well, I would agree. If there's any practice an orthopedics are not the same school, but the, the law allows for them to overlap in a perrier exception where there just a general area. But I think in this case as a family medical practitioner he treats orthopedic problems as well as ma-- treat diabetes problem.

JUSTICE BRISTER: You say he sets bones and fractures?

MS. THOMAS: I have to get the report right in front of me. I know you put-- treats, if he-- and I don't know how, I mean that would be, to me, I think he said, "The proper way to treat it would be to put it in a hard cast, immobilize it, and x-ray it at regular intervals, which was not done at anytime in this case." So he's putting a soft cast, then put in a hard cast with no x-rays and never x-rayed during the whole six weeks. An arm is taken out of the cast, and still not x-rayed. So I think Dr. Hughes' report clearly says "I do these things and in these, in these cases this is what I do, and this-- and what I do is backed up with authority," which he cites therein.

CHIEF JUSTICE JEFFERSON: Any further questions? Do you want to conclude? I'm sorry.

MS. THOMAS: Well, I was just-- I was here at the last time on uninsured, underinsured, and it always seems I get the ones with really complex issues, and I respectfully - I'm very honored to be here today, and I know that there is a conflict, conflicting among the appellate courts, but I believe in this situation and in the facts in this case with the second report that this is not a case that the legislature intended to be dismissed, and it's not a case where the legislature intended for there to be an interlocutory appeal. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. Rebuttal?

REBUTTAL ARGUMENT OF ANDREW F. MACRAE ON BEHALF OF PETITIONER

MR. MACRAE: May it please the Court. I'd like to pick up where the respondent left off, and talk about the facts of this case and talk about why those facts are, I think, almost the exact situation the legislature had envisioned when they talked about an interlocutory appeal. What we have here, in response to your question, Justice Wainwright, is we don't even have a report from the [inaudible]. We have something that has been plucked out of the medical records that doesn't address even-- doesn't even address Dr. Lewis. It doesn't say anything about the standard of care, or breach, or damages -

JUSTICE JOHNSON: But that's-- but that wasn't appeal, was it? That's not, that's not what we're here about today, is it?

MR. MACRAE: It was not appealed, Justice Johnson?

JUSTICE JOHNSON: I mean, that, that-- yeah, we're, we're at-- we're clearly under the exception because that's not here. That's what I understood.

MR. MACRAE: Well, I'm not appealing, your Honor from the first court's order. That's what I was trying to -

JUSTICE JOHNSON: The termination that was a report?

MR. MACRAE: Right, I don't think I have the right of appeal. There is some confusion I think among the courts of appeals whether is that really no report, in which case [inaudible], in which case I could

appeal. But what I'm, what I'm trying to get at is in, in, in response to your comment about an observer's [inaudible]. We have, we have a non-report. I don't think anybody really thinks that was a report. It's a letter from a doctor. We then have--and, and, and I want to talk about the timeline a little bit as well, because the legislature squeezed it from 180 days to 120. Suits filed in December, there's no report in April, I waited until June, because I wanted to be able to say I waited 180 days just to be sure. We don't get a hearing until September, this second report is not filed, so the end of October. We're now 10 months, 300 days after suit is filed. When we get the second report, which is a report from someone who's obviously unqualified. So we have a non-report, an extension granted, a second report from somebody obviously unqualified, and the Waco Court says, "Sorry you don't have the right to an [inaudible] appeal." Eventhough the legislator express the amended, the civil practice and remedies code to provide for an [inaudible] appeal in metmal cases. That's I think an observe result. And in response to your question or your comment just to express you about, what is the term "has not been served is define of the statute?" I think it is. I think right there and see. That is the definition has not been serve. So I, I think if, if, if frustrates the, the intent of the legislator and the purpose of the statute, if there is no right to [inaudible] appeal here, I think the way the statute reads the plaintiff has to go back to sub section A and therefore, we can move to dismiss under B. I think the statute sets up well for what I'm saying, it does that we get into [inaudible] appeals.

JUSTICE JOHNSON: Let me ask one question. You-- your first point when you stood up, you said, "You can't use a second expert to cure a deficient report?"

MR. MACRAE: Yes, your Honor.

JUSTICE JOHNSON: It seems like if you're talking about the purpose of the statute, the whole idea being we want to get rid of non-meritorious claims, what difference does it make whether it's the same expert or another expert if the, the fact of the matter is, we have an affidavit showing a meritorious claim.

MR. MACRAE: I think, your Honor, in this case, we don't have anything -

JUSTICE JOHNSON: No I'm just, I'm just going through one or more experts. You could file three or four affidavits before the 120 days trying to show a meritorious claim. So if, if we're trying-- if the legislature's purpose was to get rid of the non-meritorious claims, what really-- difference-- I'm wondering, what harm does it do if the-- if, if an affidavit showing a meritorious claim is filed during that 30-day extension or before or, or still seeking to get rid of non-meritorious claims, let the meritorious claims go forward. So what harm if they use an expert or another expert?

MR. MACRAE: I think that the, the legislature's purpose was in part to get rid of meritorious claims -

JUSTICE JOHNSON: Well, get rid of -

MR. MACRAE: Get rid of unmeritorious claims, excuse me. And in addition, if the legislature is putting a burden on the plaintiff by squeezing that amount of time to 120 days, I think it was put in the burden on the plaintiff to prepare its case, or his case, and that's where 74.351(l) comes in -

JUSTICE JOHNSON: The legislature also gave 30 days.

MR. MACRAE: Yes, your Honor.

JUSTICE JOHNSON: They had the trial court to do 30 days.

MR. MACRAE: Yes, and what I-- as I was mentioning earlier under 74.351(l), there are various things that the defendant or the plaintiff can do within the first 120 days, under Hiner versus Gaspard you can cure with a new expert within 120 days. What I'm arguing is that once you get to that 120 days, you as a plaintiff had better be sure about your expert and your report.

JUSTICE JOHNSON: And, and my question is, what harm does-- what harm, if they bring in a new expert in 30 days and show a meritorious claim? Have we damaged anyone?

MR. MACRAE: I'm not sure there's a harm your Honor, I don't think there is a harm, other than I don't think it's consistent with the statute, with the language of the statute because it changed from the old version to the new, and as the [inaudible] court said that "indicates an intent by the legislature that you could cure it with the same person."

JUSTICE JOHNSON: Well, does that offend the plain language of this statute as it's written right now if we don't go back and compare it, we just read this statute? Do you think that offends the plain language of this statute?

MR. MACRAE: I think it does, your Honor, because under (c), the languages cure the deficiency in the report. The report itself, the elements of the report are standard of care, breach, and causation. Whether or not someone is an expert or not, I think is, is separate and apart from whether the report is sufficient. So when you're curing it, you have to go back to the report with the same person.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Mr. MacRae. The cause is submitted and the Court will take a brief recess.