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Supreme Court of Texas.
Miguel Hernandez, MD, Petitioner,
v.
Julious Ebrom and Richard Hunnicutt, Respondent.
No. 07-0240.

October 15, 2008.

Appearances:
Ida Cecillia Garza, Hole & Alvarez, PC, McAllen, TX, for petitioner.
Richard W. Hunnicutt, III, Wyane Wright, LLP, San Antonio, TX, for respondent.

Before:

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

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COURT ATTENDANT: Oyez! Oyez! Oyez! The Honorable, the Supreme Court of Texas, all persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention, for the Court is the now sitting. God save the State of Texas and this Honorable Court.

CHIEF JUSTICE JEFFERSON: Thank you, please be seated. Good morning. The Court has three matters on its oral submission docket and in the order of their appearance, they are: Docket No. 07-0240, Miguel Hernandez, MD versus Julious Ebrom and Richard Hunnicutt from Hidalgo County and the Thirteenth Court of Appeals District; Docket No. 07-0520 Ed Denigus and others versus American Energy Services and others from Median County and the Eleventh Court of Appeals District, and; 07-0665 In Re Morgan Stanley an original proceeding, and Justice O'Neill might not be sitting in that cause. Justice Medina is sitting in all these causes but could not be here this morning due to illness. The Court has allotted 20 minutes per side and in each of the arguments and expects to complete all of them before noon. We will take a brief recess between the arguments. These proceedings are being recorded and the link to the arguments should be posted on the Court's website by the end of the day today. The Court is now ready to hear argument in 07-0240 Miguel Hernandez versus Ebrom.

COURT ATTENDANT: May it please the Court. Ms. Garza will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

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ORAL ARGUMENT OF IDA CECILLIA GARZA ON BEHALF OF THE PETITIONER

MS. GARZA: Good morning. May it please the Court. Ida Cecillia Garza here on behalf of petitioner, Dr. Miguel Hernandez. The sole issue before this Court this morning is whether the interlocutory appeal statute Chapter 51.014, of the Civil Practice and Remedies Code is mandatory rather than permissive. In other words, are the words "may" and "shall" interchangeable. I believe they are not and I think the legislature - excuse me -- agrees. If you look to the code construction act which specifically defines, "shall" imposes a duty where as the word "may" is discretionary or permissive." This is something that the legislature has given us as instruction on how to interpret its statutes.

And also the-- this Court in Carmen versus Terrell and Garette and other cases, has told us that there is a presumption that every word of a statute has its purpose. In other words, we are to presume that the legislature says what it means and means what it says. Now, if you look at the language in Chapter 51.014, it is clearly and obviously permissive. It says, "A person *may* appeal from the interlocutory order," and then lists, in-- I believe, in eleven different instances on when an interlocutory appeal is available, not mandatory.

If you contrast that with Chapter 74.351, when the legislature re-enacted its medical malpractice scheme in 2003, it made some changes, it left somethings the same. One thing that it did, did leave the same was the mandatory language in 74.351 regarding the expert report. It says, that "A trial court *shall* award attorney's fees, and a trial court *shall* dismiss a case with prejudice when there is no report filed." In the same discussions, in the same hearings, in the same arguments the legislature also came to the conclusion that an interlocutory appeal of that review should be available. Now ...

JUSTICE BRISTER: 'cause you're, you're not really complaining about the motion to dismiss, just to dismiss 'cause that's moot.

MS. GARZA: I'm sorry, I'm-- I'm sorry I don't think I got that.

JUSTICE BRISTER: Well, I mean if you-- the trial judge didn't grant you the summary judgment but then you win, your motion for summary judgment is moot.

MS. GARZA: Exactly. But we're not ...

JUSTICE BRISTER: 'Cause you won, so you're really not complaining about the motion to dismiss -

MS. GARZA: That ...

JUSTICE BRISTER: - you're complaining about the sanction?

MS. GARZA: That's correct, that's correct. I'm not complaining about the motion to dismiss, I'm, I'm glad that you know. It, it should be dismissed in this case it was non-suited. But what is ...

JUSTICE HECHT: But just following through on that, I, I guess it would be your position that if you move to dismiss and the report, the expert report was clearly inadequate, but the trial judge denied the motion, and the plaintiff nevertheless won at the trial, would we set aside the verdict on appeal and say, "No, the case should have been dismissed and sanction should have been awarded?"

MS. GARZA: I would argue yes. I would argue that that is statutory hurdle that the plaintiffs have to meet. And if it is clearly not an adequate report, if it's missing all the elements, for example, if it's

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just a medical record that a, a plaintiff provides and for some reason the trial court deems that's okay, and the case for some reason the defense-- there's a plaintiff's verdict in the case, I would think that that is definitely an issue to be raised upon appeal.

JUSTICE HECHT: I was thinking that the purpose of the report was to weed out frivolous appeals and so that you-- the defendant didn't have to go forward in a case where the-- that mu-- that much of a showing could not be made. But if the defendant doesn't mind going forward, why should anybody else care?

MS. GARZA: Well, I, I think the purpose of the statute is to reduce the frivolous case. And I, I think that we are presuming that just because a plaintiff wins doesn't mean it's not a frivolous case. And I, I guess also ...

JUSTICE HECHT: But then you can appeal on the merits.

MS. GARZA: You can appeal on the merits but I think this is also an issue on appeal. And, and another issue in, in addition to the merits would be the fact that the plaintiffs did not meet the statutory hurdle that they are required to meet.

JUSTICE WAINWRIGHT: Do you keep that same position if the defendant does not challenge on interlocutory appeal? What he may or she may believe is an erroneous ruling at the motion to dismiss stage?

MS. GARZA: I would because there's-- are several-- there-- you know, there are handful or many-- I, I don't know how many there are, but there are several strategic reasons not to file an interlocutory appeal. There are err-- there is no doubt. One of the ...

JUSTICE BRISTER: What would those be?

MS. GARZA: Okay. I'm-- I'll get there. There's no doubt that Chapter 54 stays the trial in, in a medical-- in its Chapter 74.351 instance. In some other instances it stays everything, but with regard to the health care liability, it stays the trial. There are some times where the client does not want to stay the trial. There are some times the client wants to go forward and get this resolved and get this over with. There are issues with credentialing, there are issues with reporting to the Texas Medical Board, there are issues with getting new insurance. These are all reasons why a doctor might not really understand and this interlocutory appeal, the purpose is to, to have some finality early on. But it always-- doesn't always end up that way.

I'm-- for example, you know, in, in the legislature thought four months report will decide is it good or bad. Thirty days will get a new report, interlocutory appeal, it won't take long. But in essence, we have some cases that, you know, we, we filed the motion, we finally get it for a hearing, we believe it's an erroneous denial, we take it to the court of appeals, nine months later, the court decides, no it's a good report, or if they decide in our favor, it's a bad report but we're going to remand for 30 days. And then, they get 30 more days, at this time we still have quite of-- we could have potentially a couple of years have passed on the interlocutory issue that supposed to be dealt with quickly. There are certain situations where the client just doesn't want to go, to go through that, where as opposed we have that issue, we made the argument with the trial court we preserved our error, we can always bring it up on appeal.

JUSTICE WAINWRIGHT: So that, that raises another point. You don't think a defendant would waive the right to interlocutory appeal if they wait ' till final verdict on the merits at trial?

MS. GARZA: No. I don't think so. I, I think -

JUSTICE WAINWRIGHT: A year or two or more later.

MS. GARZA: - I, I think, Justice Wainwright, that waiver is an

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intentional relinquishment. And I think this Court has held in I believe *Jurnagen v. Langly* that you really have to do something to show that you are not intending to rely on the expert, on the-- well, that was former 4590(i), on the statutory requirements. Another issue that, that may arise is a cost issue, an economic issue. Sometimes, the client-- if you-- you're raising cost, you're spending time, you're spending more money on this appeal. If you have a likelihood of success -- and we can look at some of the cases that we've brought to the Thirteenth Court of Appeals -- our, our success rate is not that great. So sometimes you may have a client saying, "Look, you know, you've brought this issue up before, they didn't rule in your favor." The Supreme Court doesn't have to take it. You know, you could be wasting more time and wasting more money. In the interim where we could really get this case back on track and get going.

JUSTICE GREEN: So, so what if a case where no report was filed at all and the defendant did not take the advantage of the statute went ahead and had a trial and won. Do you-- is it your position that you still preserve your right to say, "Wait, they never filed the report at the beginning," so in-- on appeal on-- well, at, at the end, after you've won the case you say, "Well, we're entitled to sanctions," and-- which you otherwise wouldn't be able to get.

MS. GARZA: I, I don't think that even if there is no report and it's not taken up as an interlocutory appeal, I don't think that you're waiving your right. I think you can still go ahead. Obviously ...

JUSTICE BRISTER: You'd have to move to dismiss.

MS. GARZA: Yes. You have to move to dismiss with it ...

JUSTICE BRISTER: Waive your right if you don't move to dismiss.

MS. GARZA: Right. You have to move to dismiss -

JUSTICE BRISTER: All right.

MS. GARZA: - and where there is a report, you have 21 days to object, you have to raise-- you have to move to dismiss. How-- if that is denied and you don't take that up on appeal, I think there are ramifications. I think that might not be very wise. I think that a defense attorney is taking a very big risk that in going forward with the trial. But I don't necessarily think that that means he's waiving or he or she is waiving their right to, to bring that issue up on appeal later.

JUSTICE WAINWRIGHT: Now you know, waiver in this context does not have to be knowing and intentional. You can waive issues on appeal without doing it knowingly-

MS. GARZA: Right.

JUSTICE WAINWRIGHT: - intentionally. You mentioned that earlier so there's a difference in this type of waiver.

MS. GARZA: Right. There is a di-- a difference that-- that's correct, when you're talking about appellate issues, waiving things for not bringing, bringing them up timely or not properly preserving error. But I mean, in this case if you're objecting to the report you're filing your motion to dismiss, you're obtaining an order on your, on your motion. I don't think any of those things would result in waiver.

JUSTICE HECHT: So do you think this works for all interlocutory orders or just this particular one because for example, as the briefs point out, there can be an appeal from the denial of a motion for summary judgment in a media libel case.

MS. GARZA: Right.

JUSTICE HECHT: So the trial judge denies the motion and, in the end, the plaintiff wins. But there's something wrong with the response to the motion and it should have been granted. I mean, just looking at

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the motion and the response, it should have been granted, but it wasn't, and later the plaintiff wins. Then do you, then can the defendant appeal and say, "Well, no but my motion should have been granted."

MS. GARZA: Well, I think so becau-- because I think the-- even though we're taking it, we're isolating the health care liability claims in this particular case, I think the statute, itself, it talks about all these different issues, it talks about this-- the, the issue you brought up, Justice Hecht. It talks about pleas to the jurisdiction, immunity. It's a very-- it's a wide variety of, of different issues that the legislature has given.

JUSTICE WILLETT: And you think all eleven of those would be appealable after final judgment?

MS. GARZA: I think so.

JUSTICE WILLETT: Each, each and everyone?

MS. GARZA: And I think it would have to be because that's the way it's written unless the-- each specific provision has a "shall" versus a "may". How can you determine one, one is mandatory and one is permissive?

JUSTICE JEFFERSON: So if, so if I were, if I were advising my client who is a doctor, I would, I would say, "Let's not file an interlocutory appeal at this point. Let's keep it in our hip pocket." The trial court erred in failing to dismiss this case so let's see what happens at trial. And, and for, especially for a doctor who's guilty, who's done the, you know, medical malpractice and has been grossly negligent, let's just wait and, and, and see because perhaps there's a little, you know, discretion in the trial court's denial of the motion to dismiss. So let's just wait and see. And then, at the end of the trial where the evidence shows, you know, horrific gross medical malpractice, then you take it up on appeal and say you know, dismiss this whole thing based on the trial court's earlier denial of the motion to dismiss. It just seems, you know, that we-- I, I would be surprised if the legislature wanted to encourage doctors to, to wait this long. I think they-- it seems to me they put the interlocutory appellate route in there for, for a purpose and that is to resolve these things early on.

MS. GARZA: And, and I agree. I agree these should be resolved early on. But I also think that the legislature did not mandate that. It provided a vehicle. It didn't say, "You have to use it." In your scenario where it's, it's like you say there's some discretion, it's iffy, we don't know if the report is good or is ba-- or it's bad. I mean, I think it's-- like I said there are ramifications for an attorney who decides to hold that in their hip pocket. There we have had cases where we have what I would consider a just blatantly bad report that doesn't even name defendants.

And we've had them-- that case be-- go on for a couple of years. We finally get our summary judgment, we take it up and the court of appeals says, "Ah, yeah, it's good." There's a question, "Are they saying it's a good report or are they saying do you care whether it's a good report?" You've got your summary judgment, you got what you want and this is 04590(i) case. We're really not going to deal with that issue. And I think there-- it is-- it's not a slam dunk. Just if you think that the report is bad, the court of appeals might agree with you, this Court might disagree with you, this Court might not even take it. So if, if a defendant decides not to take advantage of the interlocutory appeal, they're doing it at their peril, but they're not waiving it.

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JUSTICE O'NEILL: But if the purpose is to weed these out early, to weed out frivolous claims, then I don't see why a doctor couldn't just waive it if they don't file it because if the purpose is to weed it out early and you decide, "I don't want to weed it out early, I'll go ahead and see what happens." Then, the purpose is not served by waiting until the end.

MS. GARZA: Well, it-- I, I agree with you and I disagree with you in the fact-- in the fact that like I said earlier this-- the interlocutory appeal, the fact that it, it may occur early doesn't mean that you're going to get a decision early. Sometimes it takes longer. We've had cases ...

JUSTICE BRISTER: Well, make it quick-- get rid of it quicker then -

MS. GARZA: Exactly. I mean we've had cases -

JUSTICE BRISTER: - interlocutory appeal.

MS. GARZA: - where -- I'm sorry, I didn't mean to -

JUSTICE BRISTER: No.

MS. GARZA: - to talk over you. We've had cases where we are set for trial two or three times and our trial date comes and goes because the issue is still pending on appeal. So if you have a, a client who wants to get this over with, knows they didn't do anything wrong, but really just doesn't want this pending over them and they want it-- sometimes you can get this case resolved quicker by trial than waiting on an appellate court. There are issues where we have a report, we have an expert report ...

JUSTICE O'NEILL: But then, but then you forego the remedy of weeding out a frivolous claim on appeal. You decide to-- that the way to expedite it is to try it. So I mean, you've got two avenues you can take, whichever one is going to be quicker.

MS. GARZA: Well, I don't think you're forgoing it. I, I think you're just keeping it as an, as an issue on appeal.

JUSTICE O'NEILL: I don't think-- I don't understand how if something is in intended to weed out frivolous claims, opting to try it on the merits defeats the purpose of weeding out a frivolous claim.

MS. GARZA: Well, it's-- that kind of goes to the fact that it's supposed to weed out frivolous claims and we're assuming that it does. Because a case goes to trial doesn't mean it has merit, it could still be frivolous. It's just an avenue that we've decided is quicker, is more cost effective, is more economical.

JUSTICE BRISTER: If it, if it goes to trial and you win, you don't get your cost, right?

MS. GARZA: You should-- there's nothing that says you shouldn't.

JUSTICE BRISTER: Nor-- normally that's the American Rule.

MS. GARZA: Well, ...

JUSTICE BRISTER: - Winner doesn't get their cost. On the other hand, you could still ask for your cost if the motion to dismiss issue survives, -

MS. GARZA: Right. And that's ...

JUSTICE BRISTER: - so it would give you something.

MS. GARZA: And I was confusing your question but that's correct. If you have your, your motion that the legislature mandates that you get your costs and your attorney's fees if this is a, a bad report or no report at all. So in that case ...

CHIEF JUSTICE JEFFERSON: Why wouldn't you, why wouldn't you get your cost even if you win. And because the trial court erroneously denied the motion to dismiss under your argument?

MS. GARZA: Well, I would think that if, if a trial court

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erroneously dis-- erroneously denies our argument and we win at trial, we're not entitled to cost unless we get a court-- an appellate court, to say that the report was bad and it should have been dismissed, and this way you're entitled to your cost.

CHIEF JUSTICE JEFFERSON: Right. So you get a take nothing judgment and then you get your, your sanctions under the statute?

MS. GARZA: Right, exactly.

CHIEF JUSTICE JEFFERSON: Okay.

JUSTICE WAINWRIGHT: But the costs and fees should get her up to the motion to dismiss stage or are you arguing for the entire trial?

MS. GARZA: I'm arguing up to the point where the case is actually dismissed, not up unto the point where the case was dismissed. I mean, not where the case should have been dismissed but to where the ca-- the point, the point that the case was finally dismissed.

JUSTICE WAINWRIGHT: So you're bringing up a tactical strategic reason why defendants could forego an interlocutory appeal and that is they would not get costs and fees through the time of the motion to dismiss, but you're saying that they should be able to get them through the time of the end of trial.

MS. GARZA: I, I, I-- That's what I'm saying. I think it is a tactical approach that I don't think a defense attorney would normally want to use. We've had-- I, I don't have a little light here but I see just ...

CHIEF JUSTICE JEFFERSON: If you could just complete your thought.

MS. GARZA: Okay. Thank you. I'm sorry. We've had instances-- well, let me go back. You're not-- you're taking the risk that you're going to get something just because you went all the way through a trial and just because your attorney's fees are $100,000 versus $10,000, you-- you're taking a risk you might not get that. We had one case that ...

CHIEF JUSTICE JEFFERSON: Okay. I think, I think -

MS. GARZA: Okay.

CHIEF JUSTICE JEFFERSON: - that answered the question.

MS. GARZA: All right.

CHIEF JUSTICE JEFFERSON: Thank you very much Counselor. We'll hear you on rebuttal. The Court is now ready to hear argument from the respondents.

COURT ATTENDANT: May it please the Court. Mr. Hunnicutt will present argument for the respondents.

ORAL ARGUMENT OF RICHARD W. HUNNICUTT, III ON BEHALF OF THE RESPONDENT

MR. HUNNICUTT: Good morning. There's been a lot of talk about frivolous lawsuits on the-- in the medical malpractice arena, health care liability. And, and let me address some of the facts in this case relating to the policy concerns that Counsel is trying to raise. This is a case involving one knee surgery, one doctor doing the surgery. Our expert report from Dr. Pontius identified what he complained of for that surgery. He did not name the specific name of the doctor. But in terms of fair notice, the court of appeals agreed with us, the trial court up -- I'm sorry -- the court of appeals said there's no jurisdiction. The trial court agreed with us and said for this doctor this is fair notice. It's got causation, it's got injury and in fact, he spells out what his problem is. They ...

JUSTICE HECHT: Why, why wouldn't the name be in a report like

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that?

MR. HUNNICUTT: I, I beg your pardon.

JUSTICE HECHT: Why wouldn't the name of the physician be in a report like that?

MR. HUNNICUTT: Well, your, your Honor, I would have liked for it to have been, but the issue that we presented to the trial court was fair notice. In this situation where there's only one doctor, the surgery is specifically identified, there can only be one possible person. It, the trial court believed that that provided fair notice.

JUSTICE HECHT: Can't you tell your expert to put his name in there.

MR. HUNNICUTT: Well, and that, that brings me to the next policy concern-- ...

JUSTICE WAINWRIGHT: But what's the down side of putting the doctors name in?

MR. HUNNICUTT: There, there is no down side. And, and that brings me to the next policy concern the dovetails with this. I start with that because I don't believe this was a frivolous case. But what we're dealing with here is procedural questions and the plaintiff's right to a nonsuit. Now, a plaintiff-- one of the main reasons why plaintiffs will nonsuit a case is not necessarily because it's frivolous, although that can certainly happen, I mean occasionally, we, we have our client say they had the green light and seven nuns appear and said that it was red, you know, and we got a nonsuit. But this is a case where we couldn't make the economics work under the new statute and we reached a point. Dr. Pontius said he wasn't going to testify anymore and he backed out when asked for an amended report. And we were faced with an economic situation, talked to our client and decided that the best way out of this situation was to nonsuit.

Now, the question presented before this Court is one of procedure. There are lots of statutes that are mandatory and there's lot of statutes that are permissive, and people can make choices. But they're all governed by certain rules. You have to do this in a certain order. X has to come before Y, it comes before Z. And that's what we're talking about here. In this specific instance, the plaintiff-- the, the trial court denied the petition for a motion for dismissal and sanctions on, on July 6, 2005 with respect to Dr. Hernandez. The plaintiff filed their nonsuit on December 23rd and an agreed, an agreed order of nonsuit was entered January 4, 2006.

They had the right to an interlocutory appeal. Now, sometimes, you know, when I read a case something just kind of crystallizes for me, the issues involved here. And there's a couple of things that the justices in lower courts have said. Justice Simmons in the Regent Care Case, *San Antonio v. Hargrave*, she made a, a specific point of noting that the remedy would be an interlocutory appeal before the non-suit.

JUSTICE BRISTER: That's a remedy. Why is it the exclusive remedy?

MR. HUNNICUTT: It-- it's not, it's not the exclusive remedy. But if you're faced with a situation where you going to agree to a nonsuit, and remember we have two problems here: a waiver issue ...

JUSTICE BRISTER: Well, but you may as well agree to a nonsuit 'cause you can't oppose one.

MR. HUNNICUTT: Well ... ...

JUSTICE BRISTER: People, people can nonsuit their own claims -

MR. HUNNICUTT: Well, actually -

JUSTICE BRISTER: - anytime they want.

MR. HUNNICUTT: - well, actually I've-- I have not agreed to sign a nonsuit and specifically addressed with the trial court that I wanted--

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that, that there was some claims that are pending.

JUSTICE BRISTER: Lot of-- there's lot of-- Well, that's-- and I understand that. But there's a lot of trial judges that won't sign any order unless they're going to have a hearing unless, and attorney's going to have to come in, we're going to seat there through law day docket all day, unless both sides sign off on the order. So you sign off, it's just dismissing your claim, it's not dismissing mine or my chance for-- I mean, they, they didn't agree to drop their claim for sanctions, did they? When they agreed to this order?

MR. HUNNICUTT: We believe that they did by, by ...

JUSTICE BRISTER: What language in the order says they dropped their claim for sanctions?

MR. HUNNICUTT: Because, because it non-suits the, the, the-- Well, first of all, let me back up. Their, they didn't raise the issue of a claim for sanctions. They specifically contested the ruling on -

JUSTICE BRISTER: [inaudible] says you can raise that afterwards -

MR. HUNNICUTT: - on the, on the ...

JUSTICE BRISTER: - after the case is over, you can raise that. And you can-- that's-- I mean, that's the true rule generally. You can file a sanctions claim within 30 days after the case ends.

MR. HUNNICUTT: But in this instance, the trial court had already denied that. And so when a nonsuit is filed there that was not pending. And that's the case law that, that we cited the *Bayoud* (797 S.W.2d 304) case. That's why it amounts to a waiver in this situation. Now, that there's, there's lot of examples where you can go all the way through trial.

JUSTICE BRISTER: Now *Bayoud*, That was a temporary injunction, wasn't it?

MR. HUNNICUTT: Yes, your Honor.

JUSTICE BRISTER: And of course temporary injunction is like the pumpkin in Cinderella's tale. It vanishes on a final judgment, that's because temporary injunctions as a matter of law only exist 'till there's a final judgment. But your right to recover fees for a frivolous case, I mean, that we held in *Villafani* that can-- that exists after a final judgment, right?

MR. HUNNICUTT: But in this case they, they should have done something before they agreed to the non-suit because the trial court had already denied it. They had to do something to, to preserve that point, is our position.

JUSTICE BRISTER: And why, why doesn't the statute say you must appeal from the interlocutory order.

MR. HUNNICUTT: Well, because there may be tactical reasons not to, but if you're going to-- if, if you want to pursue that sanctions, you don't agree to a non-suit. You do something to, to, to revive that issue since the trial court has already denied it.

JUSTICE BRISTER: Well, I'm just concerned. You know, we've had two dozen of these in the last couple of years. That's apparently all medical malpractice lawyers do anymore is fight about these expert reports. And if we make a rule that you waive everything unless you take the interlocutory report, do you think we'll get more or less?

MR. HUNNICUTT: That's an interesting question, your Honor.

JUSTICE BRISTER: That's not a hard question. The answer is we'll get them in every case, won't we?

MR. HUNNICUTT: Well, ...

JUSTICE BRISTER: The discretion will go out of it.

MR. HUNNICUTT: Well, the reason I smiled, your Honor, is, is my, my first reaction is most people are, are not filing these anymore-- I

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mean, they're, they're going down. So ...

JUSTICE HECHT: I didn't understand that. They're what now?

MR. HUNNICUTT: That the effect of the statute has been in, in my experience, that more and more attor-- plaintiff's attorneys are for-- plain-- are plain not filing these things anymore because we can't make the economics work. So I think that the statute is having the effect that the doctors and the medical insurance companies wanted it to have.

JUSTICE HECHT: But if you have to appeal to preserve it, won't you appeal in most instances, and that just further delays the plaintiff's claims, it looks like to me.

MR. HUNNICUTT: Well, your Honor, the-- right now, the doctors have a lot of procedural vehicles, a lot of defenses available to them. And frankly, my experience has been that they use every single one of them. I, I totally disagree, respectfully, with the arguments presented about why a doctor would not file an interlocutory appeal on these, on these motions to dismiss.

CHIEF JUSTICE JEFFERSON: But if there, if there are, you know, many appeals filed then the law is going to be clarified and you know, then the trial courts are not going to know what to do when these motions are presented to them, wouldn't, wouldn't they? I mean, if we decide this case, the trial court's going to know what to do on this, on these matters and, and, and the contours of expert reports-- I mean, I'm not sure it's, it's a bad thing for there to be an appeal early on. The law becomes predictable, lawyers know whether this report will satisfy the statute or not and the case can proceed or be dismissed.

MR. HUNNICUTT: Well, I think that's exactly right. As a plaintiff's lawyer, I'd like to be put out of my misery if the court's going to disagree with me and so that I stop my fees and expenses on the case. But ...

JUSTICE BRISTER: Well, you know, that's, that's the odd thing 'cause we've had some reports that not all plaintiff's attorneys are like you. That in some parts of the State, the game is to keep the ball in the air and never go to trial because it gets expensive and eventually, people settle. You've probably seen some of that.

MR. HUNNICUTT: Well, that certainly does happen. It doesn't happen that much anymore in this area because the-- it just-- once again, in my experience and in talking to my colleagues in the medical malpractice health care liability arena, the medical insurance companies are, are not offering much money to settle on just about anything.

JUSTICE BRISTER: 'Cause of the caps?

MR. HUNNICUTT: Because of the caps, because of the way it structured, the defenses, but mainly the caps. It, it, it quite frankly, it takes a $100,000 of expenses aloe to take a medical malpractice case all the way to a verdict. We can't make the economics work. I, I have to turn away clients from my office that, that you know, probably have, in my opinion, a legitimate claim to make. But I can't make the economics work.

JUSTICE BRISTER: But the interlocutory appeal's are going to add that's-- that adds expense. Can add expense, not every time.

MR. HUNNICUTT: It-- Yes and no. It, it can. But it's-- what I'm here to present from a policy perspective to the Court because the procedures I, I, I know that, that, that the Court is, is fully aware of all the appellate procedures and the case law, but from a policy perspective if that comes into play, right now, the, the plaintiff's only window for a plaintiff who wants to legitimately decide to nonsuit a case is a nonsuit. And if the court doesn't allow a plaintiff to

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nonsuit, basically, a ruling adverse to us in this case is giving a signal that anytime you file a medical malpractice-type case, you're stuck, you can't ever nonsuit. You're not going to get out of it because no matter what they do they-they're aren't going to waive anything and they can go out for that reason if, you know, the insurance company can hound you forever. You try to get there ...

JUSTICE JOHNSON: You'll have to find-- have a finding that it was of-- that your report was bad and not even think if ...

MR. HUNNICUTT: Certainly, your Honor. And, and right there ...

JUSTICE JOHNSON: So you're, so you still protected, but I mean whatever your report is, it is. I mean, if you have a good report and you say you had a good report, you're still protected, you just have to fight the battle a little longer.

MR. HUNNICUTT: Right. And, and if the Court disagrees with us on the jurisdictional waiver issues, I guess we'll be back at the 13th Court of Appeals to, to argue the merits of the report. And, and that's certainly true, but in a, in a situation where, where the situation we found ourselves in, where we thought we had a, a legitimate report. It-- it could have been better. I certainly wish that the name had been in there, but we still feel that it's a good report. We also felt it was a good claim, but we couldn't make the economics work. And there's no way for a plaintiff out.

JUSTICE HECHT: Section 51.014 lists a number of interlocutory orders that can be appealed. And in some of them clearly, you don't have to take an appeal to raise the issue after final judgment. An obvious one is immunity. You can still raise that after the final judgment even if the government doesn't raise it by a plea to the jurisdiction, take an appeal- well they have to raise it, but they, but they don't have to take an interlocutory appeal. And class certification, I'm not sure we've got a Texas case on that, but their federal jurisprudence is pretty clear that you can complain about class certification after a final judgment is rendered. So what makes the denial of the motion to dismiss here and the interlocutory appeal different from the ones, from those two and others in Section 51.014?

MR. HUNNICUTT: Well, -- with respect to immunity, there's, there's some specific case law that, that talks about that not being waived. And, and there's not a similar situation for, for this statute. So that, that distinction leaps out to my mind right off the bat. On the class action situation in all honesty, I haven't really gotten into understanding that situation to see what the distinctions would be. But what I have researched and, and what we have before us is, is what in my mind is a clear indication of waiver and a lack of jurisdiction because of the agreed non-suit happening six months after the denial of the motion for sanctions. If there are no other questions, I, I believe that I can stand on my briefs.

CHIEF JUSTICE JEFFERSON: It appears there are no further questions. Thank you very much, Mr. Hunnicutt.

REBUTTAL ARGUMENT OF IDA CECILLIA GARZA ON BEHALF OF PETITIONER

MS. GARZA: As quickly as I can, I'll try to address some of Mr. Hunnicutt's issues. First of all, Mr. Hunnicutt kept bringing up the issue of the nonsuit which this Court has already addressed in, in the *Villafani* (2005 WL 2461821) matter, and decided that yes, the, the

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motion-- the denial of the motion for sanctions survives the nonsuit. In-- interestingly, Justice Wainwright, in the *Villafani* (2005 WL 2461821) case, you noted that -- and I'm going to read it, I don't want to misquote you -- "Under the current version of the MLIIA and the Civil Practice and Remedies Code, a claimant may take an interlocutory appeal."

Now, he used the word "may" whether he intended it to be permissive or he was just tracking the language of the statute, I think doesn't really matter because he was tracking the language of the statute and the statute is permissive and says "may." Justice Hecht, you brought up the different types of interlocutory appeals that are available and several courts of appeals have addressed the special appearance and the plea to jurisdiction. The El Paso Court of Appeals, the Fourth Court of Appeals and the Austin Court of Appeals very recently in March of this year, has specifically addressed the fact that in these cases you do not waive your right to appeal just because you didn't take the interlocutory appeal. These three cases go back and they look at the statutory construction, they cite the code construction act and they, they look at, at the language. And they're not looking at the language of 51.014(a)(7) or (a)(4), they're looking at the language of 51.014(a) which says, "may."

And there are two courts of appeals, the *Bayoud* (797 S.W.2d 304) case, which Mr. Hunnicutt cited, the Dallas Court of Appeals and the Waco Court of Appeals which say, "no." You have an exclusive right, that's it, that's all you have. They don't really expand on it, the only thing they cite is the Texas Rules of Appellate Procedures which say, "You have 20 days, you didn't file your notice of appeal, it's gone." The Austin Court of Appeals in a G-- JGP Inc. case specifically declined to follow Waco. They acknowledged what the Waco decision was in the Golden case, *Madis v. Golden* and they disagree with it and they said, "This is why because we have to look at the statute."

Now, the legislature could have amended Section 74 to add the interlocutory appeal there and they could have said, "A denial under the 70 or a denial or a granting under 74.351 is-- has to be taken." You have to take an interlocket appeal-- interlocutory appeal, it has to be, it's mandatory. They did not do that, they added it to Chapter 51, which is clearly permissive, clearly discretionary.

I think Judge-- Justice Brister, I've, I've couldn't see back here, but I think you made the point that all this is going to do is if you have a mandatory appeal, everyone's going to take it because you have no choice. And this wouldn't just be isolated in the health care liability claim because this is Chapter 51.014. We're talking about all interlocutory appeal. In some cases, we don't need to take one. In, in some cases you do, but if you're making it mandatory and the-- and attorneys have to file these interlocutory appeals, that's just clogging up the appellate court. That's making things-- that's causing a delay, that's causing a, a raise in expenses.

Finally, I'd just like to say it's not the role of the judiciary to rewrite the statute, but to interpret the statute as writ-- as written. And the legislature wrote the word "may," it did not write "shall." We must presume that there is a reason for that and we would ask that this Court to please reverse the opinion of the Thirteenth Court of Appeals, send this case back down to Corpus Christi and with instructions that they reach the merits of the expert report. If there are no further questions?

CHIEF JUSTICE JEFFERSON: There are no questions. Thank you very much.

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MS. GARZA: Thank you for your time.

CHIEF JUSTICE JEFFERSON: The cause, cause is submitted and the Court will take a brief recess. Thank you.

COURT ATTENDANT: All rise.

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