Opinion issued October 23, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00469-CV

JOHN M. LIM, M.D., Appellant

V.

RALPH WEST, Appellee

On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 2007-77966

MEMORANDUM OPINION

The issue in this interlocutory appeal is whether the trial court abused its discretion by denying a doctor's motion to dismiss a health care liability case when

the case had been abated "in accordance with Chapter 74 of the Texas Civil Practice and Remedies Code." We affirm.

Appellant John M. Lim, M.D. moved to dismiss appellee Ralph L. West's medical malpractice lawsuit on the grounds that West did not timely serve an expert report.[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a), (b) (Vernon Supp. 2008) (stating that expert report shall be served not later than 120 days after date original petition filed). Lim had previously drafted an agreed order, which was signed by Lim, West, and the trial court, to abate the case "in accordance with Chapter 74 of the Texas Civil Practice and Remedies Code."

At the hearing on Lim's motion to dismiss, Lim argued that the agreed abatement applied only to abate further proceedings against him under Civil Practices and Remedies Code section 74.052(a), but did not serve as a written agreement of the parties to extend the time to serve the expert report under section 74.351(a).[2] *See* TEX.

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[1] West filed his original petition pro se on December 28, 2007. West did not give Lim at least 60 days notice of West's claim as required by Civil Practice and Remedies Code section 75.051(a), and West did not give Lim medical authorizations as required by Civil Practice and Remedies Code section 75.052(a). *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.051(a), .052(a) (Vernon 2005). Absent an agreed extension, the expert report was due no later than April 28, 2008. The trial court signed an agreed abatement order on April 17, 2008.

[2] West's response to the motion to dismiss was accompanied by an affidavit from West's newly retained lawyer. In the affidavit, the lawyer stated that he spoke with Lim's lawyer on April 9, 2008 and told her he was preparing for trial in

CIV. PRAC. & REM. CODE ANN. § 74.052(a) (Vernon 2005), § 74.351(a) (Vernon Supp. 2008). The trial court denied the motion to dismiss the appeal.

West states in his appellant's brief that the hearing was evidentiary, and Lim does not refute West's contention. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 783 (Tex. 2005) (stating that party's appellate brief may show that evidentiary hearing took place in open court). Lim did not request findings of fact, and there is no reporter's record of the hearing.

Lim's single issue on appeal is that the trial court abused its discretion in denying the motion to dismiss because West did not timely serve his expert report. *See Am. Transitional Care Ctrs., Inc. v. Palacios*, 46 S.W.3d 873, 877 (Tex. 2001) (holding that abuse of discretion is proper standard for reviewing trial court's order on challenge to expert report). Accordingly, we are asked to determine the legal significance of the agreed order that abated the case "in accordance with Chapter 74 of the Texas Civil Practice and Remedies Code."

Lim contends that, as a matter or law, an abatement does not extend the time for serving an expert report. *See Emeritus Corp. v. Highsmith*, 211 S.W.3d 321,

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another case and "would prefer having [West's] case abated as opposed to trying to comply with the terms of the statute prior to or during trial." Lim filed a reply, which was accompanied by an affidavit from Lim's lawyer stating, "No discussion was had about why he agreed to this abatement and I was unaware that he was preparing for trial. No discussion was had about the Chapter 74 deadline in this case or any extension thereof."

328–330 (Tex. App.—San Antonio 2006, pet. denied) (holding order merely stating "this case is abated until 60 days from the date Defendants receive notice of a health care claim" with no evidence of what lawyers or trial court intended by that order does not extend deadline to serve expert report); *Estate of Regis ex rel. McWashington v. Harris County Hosp. Dist.*, 208 S.W.3d 64, 69 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (abatement of case under Civil Practice and Remedies Code section 74.052(a) does not toll or extend 120-day period for filing expert report); *Hagedorn v. Tisdale*, 73 S.W.3d 341, 347–49 (Tex. App.—Amarillo 2002, no. pet.) (without agreement to extend time to serve expert report, agreed abatement based on plaintiff's failure to give 60 days written notice of claim did not affect deadline to serve expert report). The courts of appeals that have considered this issue have held that an abatement based solely on Civil Practice and Remedies Code section 74.052(a) does not affect the deadline to file an expert report under section 74.351(a).[3] This appeal,

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[3] Section 74.052(a) states:

> Notice of a health care claim under Section 74.051 must be accompanied by a medical authorization in the form specified by this section. Failure to provide this authorization along with the notice of health care claim shall abate all further proceedings against the physician or health care provider receiving the notice until 60 days following receipt by the physician or health care provider of the required authorization.

TEX. CIV. PRAC. & REM. CODE ANN. § 74.052(a) (Vernon 2005). We note that

however, differs from those cases because a fact question exists concerning the basis for the abatement.

The trial court abated the case "in accordance with Chapter 74 of the Texas Civil Practice and Remedies Code." Accordingly, that abatement order could refer to the section 74.052(a) abatement, the section 74.351(a) agreed extension of time, or both. The trial court conducted a hearing on the motion to dismiss, the trial court denied the motion, and there is no reporter's record, findings of fact, or statement in the record that no evidence was adduced at the hearing.

Absent a sufficient record, we cannot dispense with the presumption that the trial court found all facts necessary to support its ruling. *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002) (when trial court does not issue findings of fact with special appearance ruling, all facts necessary to support ruling and supported by evidence are implied); *see also Michiana*, 168 S.W.3d at 783 (complaining party must present record of evidentiary hearing to establish error). We

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this statute appears to abate the proceedings without the necessity of an order from the trial court ("*Failure* to provide this authorization . . . *shall abate* all further proceedings against the physician or health care provider receiving the notice"). *Cf.* TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 2002) (requiring 60 days notice of DTPA claim and providing for abatement by trial court or automatic abatement without court order).

are therefore unable to conclude that the trial court abused its discretion in denying the motion to dismiss, and we overrule Lim's single issue.

We affirm the trial court's order denying the Lim's motion to dismiss. The Clerk of this Court is directed to issue the mandate immediately to allow further proceedings in the trial court. *See* TEX. R. APP. P. 18.6 (expediting issuance of mandate in accelerated appeals).

Sam Nuchia
Justice

Panel consists of Chief Justice Radack and Justices Nuchia and Higley.