

## D. Todd Smith

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**From:** Osler McCarthy [Osler.McCarthy@courts.state.tx.us]  
**Sent:** Friday, April 18, 2008 10:27 AM  
**Subject:** RESENDING Texas Supreme Court orders and opinions 4.18.08

## TEXAS SUPREME COURT ADVISORY

Contact: Osler McCarthy, staff attorney for public information  
512.463.1441 or click for [email](#)

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### ORDERS AND OPINIONS ISSUED APRIL 18, 2008

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.

NOTE: *Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.* Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). [Click here to download a free Adobe Reader.](#)

[APRIL 18 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from April 10 through Wednesday](#) (PDF)

### OPINIONS

05-0835

BIC Pen Corp. v. Janace M. Carter

from Matagorda County and the 13th District Court of Appeals, Corpus Christi/Edinburg

For petitioner: Reagan W. Simpson, Houston

For respondent: Lisa Powell, McAllen

Justice Green did not participate

REVERSED AND REMANDED, opinion by Justice Medina:

In this product-liability case involving an alleged cigarette-lighter defect, the principal issue is whether the federal Consumer Product Safety Act preempts state common-law claims. Alleging manufacturing and design defects, Carter sued BIC for injuries her 6-year-old daughter suffered when a younger brother set her clothing afire while playing with a lighter. The jury awarded \$5 million – \$2 million of that for punitive damages – but the trial court reduced the exemplary damages to \$750,000. The court of appeals affirmed, holding in part that federal law did not preempt Carter's product-defect claim.

The Supreme Court HOLDS that federal safety standards preempt state common law by implication. In this case BIC argues that Carter's claims here are impliedly preempted because they would frustrate the federal objectives of the Consumer Product Safety Commission's child-resistant lighter standards. Carter counters that conflict preemption does not apply because the Consumer Product Safety Act's saving clause specifically retains common-law actions. The question for preemption purposes is whether Carter's claim of a higher standard of child resistance at common law is compatible with federal regulation under the CPSA. Congress vested the Commission with the authority to review applications for exemption against the factors set out in its regulation. This process would serve no purpose were the states free to raise the liability bar through application of their common law. The lighter at issue in this case was properly certified according to the federal protocol and imposing a higher standard under common law would conflict with the federal regulatory scheme in this

area. But whether a manufacturing defect exists is a question apart from whether the design was faulty, contrary to BIC's argument.

- The Court also holds that the interest rate on the judgment appropriately was assessed according to previous law and not that which took effect under House Bill 2415 three weeks after judgment. Legislators passed House Bill 2415 by a two-thirds majority recorded vote of each house, but the next day the Legislature adopted Senate Resolution 66, which amended House Bill 2415 by changing its cap on the post-judgment interest rate. While the resolution was adopted without objection, the vote was not recorded, and thus under the Constitution did not qualify for expedited effect but rather took effect on September 1, 2003.

[Opinion in HTML](#)

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[Briefs](#)

06-0501

Juan Mario Villafani, M.D. v. Adela Trejo

from Cameron County and the 13th District Court of Appeals, Corpus Christi/Edinburg

For petitioner: Ida Cecelia Garza, McAllen

For respondent: Robert E. Brzezinski, San Antonio

REVERSED AND REMANDED, opinion by Justice Wainwright:

The principal issue is whether an appellate court has jurisdiction to consider an appeal from the trial court's refusal to award sanctions in a medical-malpractice lawsuit, based on an allegedly inadequate expert report, when the plaintiff later took a nonsuit dropping the action but retaining the possibility of filing another. In this case, filed under the previous medical-malpractice statute, the Medical Liability Insurance Improvement Act, the trial court granted Trejo a nonsuit without prejudice after it denied the doctor's motion for sanctions and dismissal. In a split decision, the court of appeals affirmed.

The Supreme Court HOLDS that the sanctions-motion denial was appealable after the plaintiff's nonsuit. The trial court's denial of the doctor's motion for sanctions and dismissal and Trejo's nonsuit collectively disposed of all the claims between the two parties. Under Texas law, parties have an absolute right to nonsuit their own claims for relief at any time during the litigation until they have introduced all evidence other than rebuttal evidence at trial. One unique effect of a nonsuit is that it can vitiate certain interlocutory orders, rendering them moot and unappealable. But a notable exception to this rule is that the decision to nonsuit does not control the fate of a non-moving party's independent affirmative relief claims. Texas Rule of Civil Procedure Rule 162's protection of pending claims for affirmative relief does not by negative implication permit a nonsuiting party to control another party's already decided or not-yet-made claims for affirmative relief. Rule 162 cannot be read to mean that a nonsuit prevents a non-moving party from appealing a trial court's ruling on claims for affirmative relief merely because the ruling occurred prior to the nonsuit. It would be odd to suggest that parties who follow the instruction of rule 33.1 of the Texas Rules of Appellate Procedure and obtain a ruling to preserve an appeal are then precluded from an appeal by a nonsuit because they obtained that ruling. Removing a defendant's ability to appeal a denial of a sanctions motion after a nonsuit frustrates the purpose of the medical-malpractice law at issue in this case to deter meritless lawsuits. A claimant could simply nonsuit a meritless claim and later re-file the claim with impunity.

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The following two per curiam decisions decide cases on the basis of the *Villafani* holding:

05-0928

Richardo Barrera, M.D. v. Isela Rico and Manuel Rico

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

REVERSED AND REMANDED, per curiam opinion:

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06-0717

Regent Care Center of San Antonio II v. Barbara Hargrave  
from Bexar County and the Fourth District Court of Appeals, San Antonio  
REVERSED AND REMANDED, per curiam opinion:

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07-0424

University of Texas-Pan American v. Tony Aguilar and Kay Marie Aguilar  
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg  
REVERSED AND JUDGMENT RENDERED, per curiam opinion:

The issue is whether a workplace safety manual's danger warning of obstructing office walkways with exposed electrical cords is evidence of actual knowledge that a water hose lying across a sidewalk was an unreasonably dangerous condition. The court of appeals concluded that the safety manual was sufficient to create a fact issue about whether the university had actual knowledge that the water hose presented an unreasonable risk of harm in an accident in which a student tripped on a water hose and broke his knee. The Supreme Court HOLDS the safety manual did not identify the specific risk in this accident and was not evidence that the university had actual knowledge of an unreasonable risk of harm. The safety manual generally discusses keeping floors, corridors and means of egress clear, mentioning that flexible cords should not cross paths of travel. But it does not mention outdoor safety precautions or the use of lawn maintenance equipment and nothing in it remotely suggests that a water hose can present an unreasonable risk of harm.

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07-1068In the Interest of K.C.B

from Collingsworth County and the Seventh District Court of Appeals, Amarillo  
REVERSED AND REMANDED, per curiam opinion:

The issue in this parental rights-termination appeal is whether the court of appeals erred by dismissing the case because a statement of appellate points properly filed by petitioner and designated was not included in the record. The Supreme Court HOLDS the petitioner complied with the statutory requirements for appeal and that the court of appeals erred in denying her request to supplement the record on rehearing.

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## **ISSUES SUMMARIES FOR PETITIONS GRANTED ORAL ARGUMENT IN TODAY'S ORDERS**

05-0801

S. Murthy Badiga, M.D. v. Maricruz Lopez  
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg  
Oral argument date pending

The issue is whether in a medical-malpractice case a trial court's refusal to dismiss for failure to file a timely expert report can be subject to an interlocutory appeal. In this case the expert report was served three and a half months after the 120-day deadline, after the trial court granted two motions to extend time.

[Briefs](#)

[Court of appeals opinion](#)

07-0123

Dennis L. Miga v. Ronald L. Jensen  
from Tarrant County and the Second District Court of Appeals, Fort Worth  
Oral argument date pending

The issue is whether restitution is appropriate when a party tenders payment under a Rule 11 agreement and the judgment leading to the agreement is later reversed on appeal.

[Briefs](#)

[Court of appeals opinion](#)

07-0131

John Christopher Franka, M.D., et al. v. Stacey Velasquez and Saragosa Alaniz  
from Bexar County and the Fourth District Court of Appeals, San Antonio  
Oral argument date pending

The issue in this medical-malpractice case against two doctors at the University of Texas Health Science Center in San Antonio is whether they should be dismissed from the suit because it “could have been brought” against the Health Sciences Center.

[Briefs](#)

[Court of appeals opinion](#)

07-0520

Ed Vanegas, et al. v. American Energy Services, et al.  
from Midland County and the 11th District Court of Appeals, Eastland  
Oral argument date pending

The issue is whether an alleged oral promise to share proceeds from a merger, conditioned on employees remaining with a young company, was illusory because the employees worked at-will.

[Briefs](#)

[Court of appeals opinion](#)

07-0655

City of Lubbock v. Grace Nunez and Juan Nunez  
from Lubbock County and the Seventh District Court of Appeals, Amarillo  
Oral argument date pending

The principal issue in this wrongful-death case against the city involving a police officer who shot a man several times with a Taser gun is whether the claims arise out of an intentional tort to preclude jurisdiction under the Texas Tort Claims Act.

[Briefs](#)

[Court of appeals opinion](#)