From: Osler McCarthy
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Texas Supreme Court advisory

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ORDERS AND OPINIONS ISSUED APRIL 11, 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 11 ORDERS (in HTML)
Decisions in cases (motions, requests, etc.) from April 3 through Wednesday (PDF)

OPINIONS

06-0005
In the Matter of H.V.
from Tarrant County and the Second District Court of Appeals, Fort Worth
For petitioner Tarrant County District Attorney: David M. Curl, Fort Worth
For respondent: Michael Shawn Matlock, Fort Worth
AFFIRMED IN PART, REVERSED IN PART AND REMANDED, opinion by Justice Brister:

The issues in this murder case against a juvenile are (1) whether the boy's request to call his mother to seek an attorney was an unambiguous request for counsel and (2) whether a gun found based on information in a suppressed statement was properly excluded as the "fruit of the poisonous

tree." In this case police arrested H.V., a 16-year-old Bosnian immigrant who had been in the United States four years, as he tried to carry a bloody carpet from his house while police had the home sealed awaiting a search warrant. While the boy was in custody, a magistrate read his rights to have an attorney present for questioning. He responded that he wanted to call his mother so she could call an attorney, but the magistrate told him his only options were to ask for an attorney, make a statement to police or not make one. H.V. told the magistrate he was "only 16." The magistrate assured him that he could ask for an attorney if he wanted an attorney. H.V. then consented to talk with investigators. The trial court ruled that his request to call his mother was an unequivocal request for counsel and ordered his statement suppressed and the gun police found as a result of the statement was inadmissible as evidence. The court of appeals affirmed, holding that the gun was inadmissible because it was obtained as a result of police failure to honor his request for an attorney, not a mere failure to warn him of his rights.

The Supreme Court HOLDS that the boy's expression that he wanted his mother to ask for an attorney was an unambiguous request for counsel but that the gun was improperly excluded fro m evidence. This is not a case in which H.V. simply wanted to see his mother: Getting him an attorney was the only reason he said he wanted her. If he wanted private counsel, his request would have been technically correct, as his age at least hindered if it did not prevent him from doing so himself. But the Court determines that it need not decide whether the appeals court erred by considering the boy's age in its analysis on whether he invoked his right to counsel, finding no cases on the point for invoking the right as opposed to waiving *Miranda* rights. On the issue of whether the gun was improperly excluded as evidence, the Court reasons, based on the U.S. Supreme Court's rationale, that the Fifth Amendment's right against self-incrimination goes to compelled testimony. Physical evidence that does not compel a defendant to testify against himself cannot be a violation of the Fifth Amendment rights that *Miranda* protects.

● *Jurisdiction*. The Court reached the issue as a conflict, first noting that it was a first-impression question dealing with a suppression order in a juvenile case. The Court decides it has jurisdiction if the court of appeals held differently from a prior decision of another court of appeals on an issue that should be clarified to remove uncertainty or unfairness. In suppressing the alleged murder weapon for a *Miranda* violation, the appeals court in this case held differently from other courts of appeals that have followed *Baker v. State*, an opinion by the Court of Criminal Appeals. "But the unique

circumstances of juvenile proceedings — 'an unlikely and sometimes perplexing hybrid of civil and criminal law' — convince us that the conflicts involved here must be clarified 'to remove unnecessary uncertainty in the law and unfairness to litigants.'"

Opinion in HTML

Opinion in PDF

Briefs

Chief Justice Jefferson CONCURRING AND DISSENTING,
joined by Justices Wainwright and Green and in part by Justice Hecht:

In light of precedent, H.V.'s statement that he wanted to call his mother to get an attorney was ambiguous and the magistrate properly attempted to clarify H.V.'s wishes. Once she did so, H.V. clearly showed he declined counsel and by the end of the magistrate's clarifying questioning made clear that he wanted to speak to law enforcement officers. The Court, however, sidesteps the issue of whether age should be a factor in analyzing whether he invoked his right to counsel and does a disservice both to H.V. and to future litigants: The Court does not explain why taking H.V.'s age into account would apparently not affect the outcome here.

Jefferson concurrence/dissent in HTML

Jefferson concurrence/dissent in PDF

06-0518
Rory Lewis, M.D. v. Dewayne Funderburk
from Limestone County and the 10th District Court of Appeals, Waco
For petitioner: Andrew F. MacRae, Austin
For respondent: Amy Thomas, Mexia
REVERSED AND REMANDED, opinion by Justice Brister:

The principal issue is whether the court of appeals has jurisdiction over an interlocutory appeal from a trial court's refusal to strike an allegedly deficient expert report in a health-care liability claim. In this case Lewis objected to a second expert report Funderburk filed after the trial court granted him a 30-day extension to cure a defect in the original report. The trial court denied Lewis's objection to the second report and motion to dismiss. Lewis then appealed the ruling, but the court of appeals dismissed his case for lack of jurisdiction, holding that Texas Civil Practice & Remedies Code section 51.014(a)(10) does not grant an interlocutory appeal

to challenge the adequacy of an expert report.

The Supreme Court HOLDS that the court of appeals has interlocutory jurisdiction to review allegedly inadequate expert reports. Section 74.351 has numerous subparts, including (b) requiring trial courts to dismiss a claim with prejudice and award fees if "an expert report has not been served" by the statutory deadline; (c) allowing a 30-day extension of the deadline if a report is found inadequate; and (*l*) providing that a motion challenging a report's adequacy should be granted only if the report does not represent a good-faith effort to comply with the statute. Of these and other rulings a trial court might make under section 74.351, the Legislature provided for interlocutory review of just two: if a trial court *denies* relief sought under subpart (b) and when a trial court *grants* relief under subpart (*l*). The question here is whether the trial court's order falls under (b) or (*l*) — a jurisdictional question as a denial under (b) is immediately appealable but a denial under (*l*) is not. The Court disagrees that Lewis's motion seeking dismissal and attorney fees falls under subpart (*l*). Funderburk argues that because subpart (b) refers to cases in which an expert report "has not been served," it must be limited to cases in which there is no report at all. But in section 74.351(c), the Legislature made clear that when it used the words "an expert report has not been served," it meant to include cases in which an inadequate report has been served. Lewis also argues that the 30-day extension allowing a claimant to "cure the deficiency" permits only amendments by the original expert rather than substitutions by a new one. But the statute provides that "a claimant may satisfy *any requirement* of this section . . . by serving reports of separate experts." That requirement like all others may be satisfied by serving a report from a separate expert.

Opinion in HTML

Opinion in PDF

Briefs

Justice O'Neill CONCURRING:

While an absent report and a deficient one are treated the same way under section 74.351(b) for purposes of interlocutory appeal, the Legislature has precluded review of the latter when an extension to cure has been granted. When a report, however deficient, has been served, the trial court's actions in denying the dismissal motion and granting an extension are inseparable and section 51.014(a)(9) bars review of the trial court's order.

The court of appeals concluded otherwise.
O'Neill concurrence in HTML
O'Neill concurrence in PDF

Justice Willett CONCURRING:

This case presents the Court with a "grossly substandard filing pitched as a bona fide report" under Section 74.351. Extensions forgive deficient reports, not absent ones. If a report is missed, not just amiss, courts are remiss if they do not dismiss.
Willett concurrence in HTML
Willett concurrence in PDF

Per curiam opinions decided by *Lewis v. Funderburk*,
all REVERSED AND REMANDED:

07-0094
Philip A. Moore, M.D. v. Kristy Katiga
from Tarrant County and the Second District Court of Appeals, Fort Worth
Opinion in HTML
Opinion in PDF

07-0173
Roberto Diaz-Rohena, M.D. v. Cynthia S. Melton
from Tarrant County and the Second District Court of Appeals, Fort Worth
Opinion in HTML
Opinion in PDF

07-0174
Center for Neurological Disorders, P.A. v. Roger P. George
from Tarrant County and the Second District Court of Appeals, Fort Worth
Opinion in HTML
Opinion in PDF

07-0227
Wendy Collini, M.D. v. Martha Pustejovsky

from Tarrant County and the Second District Court of Appeals, Fort Worth
Opinion in HTML
Opinion in PDF

07-0228
Graham Oaks Care Center Inc. v. Allagra Farabee
from Young County and the Second District Court of Appeals, Fort Worth
Opinion in HTML
Opinion in PDF

07-0312
Lou Virginia Danos v. Kevin Rittger, M.D.
from Harris County and the First District Court of Appeals, Houston
Opinion in HTML
Opinion in PDF

07-0368
Hill Regional Hospital v. Maxine Runnels
from Hill County and the 10th District Court of Appeals, Waco
Opinion in HTML
Opinion in PDF

07-0422
Metwest Inc. v. Miguel Rodriguez Jr.
from Tarrant County and the Second District Court of Appeals, Fort Worth
Opinion in HTML
Opinion in PDF

06-0660
Medical Center Dallas Ltd. v. Carlisle Corp.
from Dallas County and the Fifth District Court of Appeals, Dallas
For petitioner: Robert B. Gilbreath, Dallas

For respondent: Michael L. Knapek and William D. Ellerman, Dallas
Justice Hecht did not participate
REVERSED IN PART, TRIAL COURT JUDGMENT REINSTATED, opinion by Chief Justice Jefferson:

The issue is whether attorneys fees may be recovered in a warranty-breach action. In this case Medical Center sued Carlisle for breaching its written warranty of roofing materials against premature deterioration. Jurors awarded Medical Center $110,500 damages for the defective roof and more than $121,000 for attorneys fees. The court of appeals affirmed the judgment for warranty breach, but reversed on attorneys fees because the hospital's warranty claim was distinct from a breach-of-contract claim that would allow attorneys fees to be awarded.

The Supreme Court HOLDS that attorneys fees may be recovered for warranty breach because an express warranty in this case sounds in contract, not tort. An express warranty is a distinct claim from contract, but it is nonetheless a part of the basis of a bargain and is contractual in nature. Recognizing that breach of an express warranty is founded on contract comports with a party's expectations under the economic-loss rule.

Opinion in HTML
Opinion in PDF
Briefs