

Supreme Court of Texas
August 22, 2014

Texas Department of Human Services v. Okoli

No. 10-0567

Case Summary written by Linda Castillo, Staff Member.

Justice Brown delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Johnson, and Justice Guzman joined.

Oliver Okoli was an employee of Texas Department of Human Services (TDHS). Okoli was trained to report illegal acts by other employees by first reporting the activity to his direct supervisor. In a memorandum Okoli was informed that any violation of the Penal Code would be referred to the Office of Inspector General (OIG) for possible prosecution. After discovering his that his supervisor was falsifying dates on TDHS benefits forms to avoid delinquencies, Okoli brought it to the supervisor herself, who put him on a “three-month corrective action plan” as punishment. Okoli then reported it to his supervisor’s supervisor, and then to his Lead Program Manager. After reporting the action to the Lead Program Manager, Okoli was terminated.

Okoli sued TDHS under the Texas Whistleblower Act, alleging that he was terminated for reporting that his supervisor falsified dates and documents. TDHS responded with a plea of jurisdiction because Okoli failed to make a good-faith report of violation of law to an appropriate law-enforcement authority. The trial court denied TDHS’s plea and they appealed. The appeals court affirmed and TDHS appealed. The Supreme Court of Texas reversed and remanded, instructing the court to consider the case under the holding in *State v. Lueck*. The appeals court affirmed the trial court’s order, holding that Okoli had a good-faith belief that he was reporting to the appropriate law-enforcement authorities.

Issue: Whether Okoli made a report to an appropriate law-enforcement authority as defined by the Whistleblower Act.

The Court first looked at The Whistleblower Act, which prohibits a state or local governmental entity for taking retaliatory personnel action against a public employee who in good-faith reports a violation of the law by the governmental entity or another public employee to an appropriate law-enforcement authority. TEX. GOV’T CODE § 554.002(a). According to the Act, an appropriate law-enforcement authority is part of a state or local governmental entity, or the federal government, that the employee in good faith believes is authorized to enforce the law allegedly violated or investigate or prosecute the violation of criminal law. TEX. GOV’T CODE § 554.002(b). In *Texas Department of Transportation v. Needham*, the Court held that an employee’s belief is in good-faith if the employee believed the governmental

entity qualified and the employee's belief was reasonable based on the employee's training and experience. 82 S.W.3d 314, 321 (Tex. 2002).

Since *Needum*, the Court has constantly held that reports up the chain of command are insufficient to trigger the Act's protection. The Court found that Okoli's case could not be distinguished from *Needum*, where the employee was made aware that their supervisors lacked authority to enforce the law. It reasoned that Okoli, via the internal memorandum, had knowledge that the reports of wrongdoing would be forwarded to the OIG for possible prosecution, and therefore, that his supervisor lacked law-enforcement authority. The Court held that when an employee, Okoli, reports wrongdoing internally, with the knowledge that the report will have to be forwarded somewhere else for prosecution the employee is not reporting the violation to the appropriate law-enforcement authority or could he have had a good-faith belief that he did so.

Therefore, to satisfy the Whistleblowers Act's requirements a report must be made to a person who retains the law-enforcement powers specified by the Act and works for a governmental arm specifically charged with exercising such powers. The judgment of the court of appeals was reversed and Okoli's claim was dismissed for lack of jurisdiction.

Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch

No. 13-0084

Case Summary written by Brittany Dumas, Staff Member.

Justice Boyd delivered the opinion of the Court. Justice Brown did not participate in the decision. Mel Acres sued Houston for nuisance, trespass, and negligence seeking loss of fair market value of Mel Acres' 155-acre property. The trial court found that Houston did not create a permanent nuisance or trespass resulting in permanent injury; rather, the court found Houston was negligent causing loss of \$349,312.50 of its market value. The court of appeals affirmed and the Supreme Court of Texas granted review.

Houston operates a metal processing facility on its property. Rainwater flows from Houston's property through a culvert under the highway and into a large stock tank on Mel Acres' Ranch. After a rancher noticed that his calves were having health issues, in combination with an associate's eyewitness account that Houston was dumping and discharging materials through the culvert, Mel Acres hired an environmental consultant. After evaluating the initial test results and finding that there was a presence of arsenic, chromium, copper, nickel, and zinc in the culvert, and the presence of copper exceeding state action levels in the stock tank, Mel Acres filed a complaint with the Texas Commission on Environmental Quality (TCEQ). The TCEQ found that Houston had violated TCEQ regulations governing discharge of hazardous waste and also committed an unauthorized discharge of waste, which directly affected Mel Acres' property. Houston was formally reprimanded by the

TCEQ and ordered to stop all discharge activities and also clean up the ranch. Additionally, the TCEQ stated that Houston must perform an Affected Property Assessment Report regarding Mel Acres' ranch.

Issue 1: Whether or not stigma damages are allowed under Texas law and if so, and when are they allowed?

Essentially the Court does not identify if stigma damages are allowed under Texas law. Instead, the Court states even if stigma damages are recoverable under Texas law, Mel Acres' evidence was not sufficient to prove damage. The Court stated that even when stigma damages are legally recoverable, it is often impossible to prove because evidence cannot be based on conjecture.

Issue 2: Whether McKinney's testimony is legally competent to support the jury's damages finding?

Mel Acres attempted to establish stigma damages based on testimony by McKinney, an expert witness and licensed real estate attorney. McKinney stated that she used two methods of valuation in order to establish stigma damages. First, she stated that she relied on the "sales-comparison" approach to determine the value of the ranch. Second, she looked to other environmentally contaminated properties in order to determine the ranch's "impaired" value. She used these two methods of valuation in order to calculate the ranch's lost market value. Based on these two calculations, she concluded that the ranch suffered a 60% or \$1,397,500 loss in market value due to "market stigma."

The Court agreed that the sales-comparison approach is an acceptable means for determining the market value of land. Under this approach the appraiser compares the affected land with similar-type land. However, the Court found that McKinney did not actually rely on this approach. She did not look at sales price of the two comparable properties and did not determine the ranch's value by adjusting for differences in the properties. Instead, she calculated the ranch's impaired value by reducing its unimpaired value by a percentage based on the percentage of diminution of the comparable land. The Court stated that even though this percentage-reduction approach may be accepted in other cases it is not here because (1) the data does not prove that the two properties lost market value, (2) McKinney's reasoning can only be sound if losses were only based on market stigma and no other market factors, and (3) there was no determination of differences in the ranch and the other comparable properties. Because McKinney had no foundation to stand on, her assertions did not prove stigma damages by Houston. McKinney relied on insufficient data and unsupported assumptions to prove her analysis. Her testimony was therefore insufficient and conclusory.

The Supreme Court of Texas held that stigma damages were not available because the loss of market value evidence was insufficient. The Supreme Court of Texas; therefore, reversed and entered a take-nothing judgment in favor of defendant, Houston.

Tenet Hospitals Ltd. v. Rivera

No. 13-0096

Case Summary written by Jessica Eaton, Staff Member.

Justice Guzman delivered the opinion of the Court.

In 1996, when Elizabeth Rivera was nine-months pregnant with her daughter, M.R., she went to the emergency room of Providence Hospital complaining of a cough and fever. She was evaluated and discharged by Dr. Michael Compton. She noticed decreased fetal movement the next day and delivered her daughter via emergency C-section. The child was deprived of oxygen and is now permanently brain damaged. Rivera claims her daughter's injuries resulted from the hospital and Dr. Compton's failure to properly assess and monitor her and failure to notify her OB/GYN.

In 2003, the Texas Legislature enacted the Medical Liability Act, barring medical malpractice claims ten years after the act or omission that caused injury. Therefore, Rivera had three years before her claim would be barred. In 2004, Rivera's lawyer sent the hospital a notice of health care liability claim. However, the actual lawsuit was not filed until 2011, five years after the statute of repose barred the claim.

The trial court granted the hospital and Dr. Compton's motion for summary judgment based on the statute of repose. The Eighth District Court of Appeals reversed holding the statute of repose violated the open courts provision as applied to the daughter, M.R. The Supreme Court of Texas granted the hospital and Dr. Compton's petitions for review and now reverse.

Rivera argued two challenges to the statute of repose before the Supreme Court of Texas. She asserted the open courts challenge was like previous statute of limitations held unconstitutional pertaining to minors. Additionally, Rivera argued the retroactivity of the statute terminated M.R.'s claim before she was of the age of majority.

The open courts provision of the Texas Constitution states "[a]ll courts shall be open and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13. The court reasoned that the open courts provision is a due process complaint and requires the party to use due diligence when pursuing a claim. The party must advance a fact issue showing she "did not have a reasonable opportunity to be heard." *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011).

The court has construed the due diligence obligation of the open courts provision three times in the past 20 years. In *Shah v. Moss*, the plaintiff sued the defendant for negligence when he performed eye surgery and then neglected to provide adequate post-surgical treatment. 67 S.W.3d 836, 839 (Tex. 2001). The court

found the plaintiff knew about the injury for seventeen months before filing, but he offered no explanation for the gap in filing. *Shah*, 67 S.W.3d at 840-41. The court held this was a failure to file suit within a reasonable time. *Id.* Later, in *Yancy v. United Surgical Partners Int'l Inc.*, the plaintiff went into cardiac arrest during a kidney removal surgery, resulting in her being comatose. 236 S.W.3d 778, 780. Nineteen months later, the plaintiff's guardian sued two defendants, and added two additional defendants twenty-two months later. *Yancy*, 236 S.W.3d at 780. Again, the plaintiff's guardian gave no explanation for the delay of twenty-two months, and the court found the open courts provision did not revive her claim. Recently, in *Stockton v. Offenbach*, a mother of a minor was unable to serve an expert report on a defendant, and moved for substituted service for the report forty days after filing suit. *Stockton*, 336 S.W.3d at 617-18. She did not notify the trial court of the impending 120 day deadline, and the motion was granted four months later. *Id.* at 617. The court held she did not raise a fact issue explaining her due diligence concerns and her open courts challenge was overruled. *Id.* at 617-18. The court noted that the mother being a next friend of her minor child did not prevent it from attributing the lack of due diligence to her child. *Id.*

In sum, the Supreme Court of Texas found that delays of four months, seventeen months, and twenty-two months constituted a lack of due diligence. Here, Rivera, acting as next friend of her daughter, waited over six-and-a-half years to file her claim, did not establish a fact issue establishing she did not have a reasonable opportunity to bring suit, and therefore lacked due diligence. A next friend's lack of due diligence was found in *Stockton* to potentially block a minor child's open courts challenge. *Stockton*, 336 S.W.3d at 617-18.

Rivera additionally challenges the retroactivity of the statute's constitutionality as applied to M.R. In *Robinson v. Crown Cork & Seal Co.*, the Supreme Court of Texas established a three-part test in determining constitutionality of retroactive laws: (1) "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings"; (2) "the nature of the prior right impaired by the statute"; and (3) "the extent of the impairment." 335 S.W.3d 126, 145 (Tex. 2010). Here, these issues, lowering the malpractice insurance premiums and increasing access to health care, are sufficient public interests to overcome a constitutional challenge. Next, M.R.'s type of claim is clearly established, but the strength of her individual claim is unknown due to a sparse record that fails to indicate strength. Finally, before the statute in 2003, a minor had until age twenty to bring suit, but M.R. (and Rivera as her next friend) had a three-year grace period. The court noted that a grace period of two months had been upheld previously. Here, Rivera (and M.R.) had a three-year grace period until her claim was extinguished, and therefore the statute is not unconstitutional because the court has upheld much shorter grace periods. Rivera demonstrated knowledge of the claim by sending the notice requirement of the statute to the

hospital one year into the three-year grace period. Additionally, Rivera brought suit while M.R. was still a minor.

Accordingly, the Eighth District Court of Appeals' judgment was reversed, and judgment was rendered that Rivera take nothing.

Justice Lehrmann, dissenting.

Justice Lehrmann asserted that this holding contradicts precedent in which this court has refused to bar a minor's claim because of the inaction of a parent. Foreclosing M.R.'s open courts challenge by assigning Rivera's lack of due diligence to her "is both fundamentally unfair and contrary to our decisions in *Sax v. Votteler* . . . and *Weiner v. Wasson* . . ." This court's analysis in both of these cases stated a parent's lack of due diligence in pursuing her child's health care liability claim should not foreclose the claim. Justice Lehrmann would have held the Medical Liability Act's ten-year statute of repose unconstitutional. Additionally, the statute's retroactivity extinguished M.R.'s claim before she was legally capable of pursuing it. Justice Lehrmann believed the retroactivity component was also unconstitutional.

In Re The State Bar of Texas

No. 13-0161

Case Summary written by Sarah Ellison, Staff Member.

Justice Devine delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Johnson, Justice Guzman, Justice Lehrmann, and Justice Brown joined.

This mandamus arises out of a disciplinary proceeding against former prosecutor Jon L. Hall, whom the Commission for Lawyer Discipline alleges suppressed exculpatory evidence in an aggravated robbery prosecution. In November 2011, the Commission was notified of an article which claimed Joshua Bledsoe was acquitted due to Jon L. Hall suppressing exculpatory evidence, including a 911 tape in which the robbery victim made statements that she later contradicted during the trial. After conducting an investigation, the Commission commenced a disciplinary action against Hall and assistant prosecutor, Vikram Vij, later dismissing the action against Vij. At Hall's request, the disciplinary action was heard before a grievance panel instead of in district court.

In response to the Commission's evidentiary petition, Hall contends that he did not have access to necessary records to defend himself because the records from the aggravated robbery case had been expunged. The Commission, with the consent of Bledsoe, sought access to the expunged records. Hall responded to this motion by

requesting that the trial court deny access to the expunged records. The visiting judge overhearing the motion ordered the Commission to turn over all information related to the Bledsoe arrest. Additionally, the grievance panel ordered that the Commission could not use any documents or other evidence related to the underlying criminal case and expungement order. Hall then filed a motion to strike the evidentiary petition, dismiss the disciplinary proceeding, and for summary judgment. Hall's summary judgment motion was granted.

The Commission appealed the panel's grant of summary judgment to the Board of Disciplinary Appeals and sought review of the trial court's order in the court of appeals.

Issue: Whether the visiting judge's application of the expunction statute in the December 11, 2012 order, was a clear abuse of discretion.

The Supreme Court held that the trial court abused its discretion by extending the expungement order to the Commission, interfering in the disciplinary proceeding in doing so. The court granted relief and directed the trial court to vacate its order of December 11, 2012, reasoning that the court's order interferes with the disciplinary proceeding and disrupts the regulatory scheme promulgated by this Court to govern cases of attorney discipline. In its analysis, the Texas Supreme Court looked to the purpose of the expunction statute. The expunction statute does not serve the purpose of eradicating all evidence of wrongful conduct. Here, the court finds that a process that was intended to protect Joshua Bledsoe is being used as a shield against charges of prosecutor misconduct. A person can "unexpunge" their records by putting them at issue in a different proceeding. In this case, Bledsoe unexpunged his records by filing a federal lawsuit against Jon Hall, voluntarily waiving his expunction rights for this purpose.

In re M.G.N.

No. 13-0409

Case Summary written by Tyler Frankel, Staff Member.

The opinion was delivered Per Curiam.

This case was concerning a child custody dispute. The final divorce decree between George and Monica Noyes appointed both of them joint managing custody of their two children. Both parties wanted sole custody of their children, thus they both agreed to a jury trial. The trial court empaneled twelve jurors for this trial and one alternate juror. After the cross-examination of one Tim Smoot, a former employer of George Noyes, Juror Joel Turney alerted a court deputy that Turney knew Smoot personally. When the trial court asked Turney whether he could still operate as an impartial juror, Turney stated that he was inclined to share his knowledge with other jurors unless the trial court told him he could not do so. The trial court ended up

dismissing Turney and replacing him with the one alternate juror and proceeded with the trial. Then, on the seventh day of trial, Juror George Park left a message with the clerk stating that he was ill and unable to attend the proceedings. Park also was unable to definitively state when he thought he would be able to return to trial. George Noyes' counsel moved for a mistrial, and the trial court denied this motion and an eleven-member jury returned a unanimous verdict denying both parties' request for sole custody. Following this, George Noyes appealed, arguing that the trial court violated his constitutional right to a jury trial, because an eleven-person jury fell short of constitutional and statutory strictures. The court of appeals agreed, and reversed and remanded for a new trial. Thus, Monica Noyes petitioned the Texas Supreme Court for review.

Issue: Whether a court needs to find a juror constitutionally disabled in order to substitute the alternate juror when doing so does not lead to a numerical diminution of a twelve-member jury.

Article V, § 13 of the Texas Constitution states that as few as nine jurors may render a verdict if, during trial, as many as three jurors “die, or become disabled from sitting.” TEX. CONST. art. V, § 13. Thus, if a trial court's dismissal of a juror results in a jury fewer than twelve members, the dismissal in question must either be based on the juror's constitutional disability or it must declare a mistrial. In order to avoid mistrials on this basis, the Texas Legislature implemented an “alternate” juror system and this alternate juror can substitute for a regular juror by a lesser standard—when a regular juror is “unable or disqualified to perform their duties”—than constitutional disability. TEX. GOV'T CODE § 62.020(c).

Here, the trial court substituted an alternate juror for Turney, and, according to the statute, the trial court only needed to find that Turney was disqualified for fulfilling his duties and that an alternate was qualified to take his place. This Court stated that because the parties did not brief these issues, this Court did not have to address them. Therefore, this Court stated that if the court of appeals concludes that the trial court did not abuse its discretion in substituting the alternate juror, it must then assess whether the trial court abused its discretion in proceeding with eleven jurors after finding Park constitutionally disabled. Therefore, The Texas Supreme Court reversed the court of appeals' judgment and remanded for that court to consider the remaining issues in a manner consistent with this opinion.

Henkel v. Norman

No. 13-0712

Case Summary written by Josue Galvan, Staff Member.

Per Curiam. Justice Brown did not participate in the decision.

Christopher Norman (“Norman”), a mail carrier, was delivering mail in Houston on Saturday, January 9, 2010. As part of his usual delivery route, he often walked on sidewalks and through lawns. While the day was unusually cold, neither rain, sleet, nor snow had been reported in the area, despite the fact that the National Weather Service had issued a hard freeze warning for the weekend of January 8-10. Norman decided to walk through Henkel’s lawn to hand Lisa the mail, since she was standing on her front porch. As he turned to leave, Lisa said, “Don’t slip.” However, Norman slipped and fell on Henkel’s sidewalk. Norman sued the Henkels, not only claiming that he was injured by the fall, but that the Henkels had been aware of the sidewalk’s icy condition and had not done anything to remove the ice, remedy the condition, or prevent ice from accumulating. The Henkels filed a summary judgment motion, asserting that there was no genuine issue of material fact since Lisa had “explicitly warned [Norman] regarding potentially icy conditions just seconds before he fell.” The trial court granted the Henkels’ motion, and Norman appealed. The court of appeals reversed in a two to one decision, holding that Lisa’s general instruction was “not conclusive evidence of a warning, let alone an adequate warning.” The dissenting Justice noted that the warning had been adequate because it informed Norman of the particular hazard.

Issue: Whether a “don’t slip” statement made by a homeowner to a mail carrier is sufficient, as a matter of law, to warn him of the icy sidewalk.

Reviewing the case de novo, the Court reversed the court of appeals’ decision. The Court noted that while Norman was an invitee and was thus owed a certain standard of care, the third element of a premises liability claim against an owner—the property owner failed to take reasonable care to reduce or eliminate the risk—is negated if the property owner does one of two things: (1) Adequately warns the invitee about the condition; or (2) Takes reasonable actions meant to make the condition reasonably safe. Considering the totality of the circumstances, the Court held that a reasonable person could have only interpreted Lisa’s warning to refer to the slippery walking surface. Thus, because Lisa’s warning communicated the existence of the hazardous condition in a way that a reasonable person would understand, her warning was sufficient as a matter of law, given the totality of the circumstances, to negate the third element of Norman’s claim. In reversing the court of appeals’ decision, the Court remanded the case for consideration of additional issues Norman wished to bring up on appeal.

Chapman Custom Homes, Inc. v. Dallas Plumbing Co.

No. 13-0776

Case Summary written by John Garza, Staff Member.

Per Curiam.

Chapman Custom Homes (Chapman) contracted with Builder to build a home and Builder subcontracted with Dallas Plumbing Company (Plumber) to install the plumbing. Upon the completion of the home, the plumbing allegedly began to leak and caused severe damage to the home. Chapman and Builder sued Plumber, alleging breach of contract, breach of express warranty, and negligence. The trial court granted Plumber's motion for summary judgment and the court of appeals affirmed, holding that the pleadings only alleged a breach of contractual duties and Chapman was not a party to the subcontract between Builder and Plumber.

The Supreme Court of Texas disagreed with the court of appeals and held that Chapman's amended petition properly stated a negligence claim for the negligent performance of a contract that proximately injures the property or person of a nonparty. In addition, the Court held that the economic loss rule does not apply to cases in which the alleged breach of duty is independent of any contractual undertaking and when the harm is not merely loss of a contractual benefit. Because Chapman sufficiently alleged a negligence claim, the Court reversed and remanded the case to trial court.