

No. 19-6040

ORIGINAL

Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

RUTHEN JAMES WEEEMS III — PETITIONER
(Your Name)

vs.

BAYLOR SCOTT & WHITE-HILLCREST — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TEXAS SUPREME COURT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ruthen James Weems III IDCT # 2130110
(Your Name)

12071 Fm 3522, Abilene, Texas 79601
(Address)

Abilene, Texas 79601
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Issue No. 1: The Texas Supreme Court held that Weems asserted a health care liability claim against Baylor, Scott and White - Hillcrest. But under Section 74.051 of the Texas Medical Liability Act a claimant like Weems must provide a presuit authorization form releasing the medical records at issue, and under Section 74.351, a claimant like Weems must provide an expert report within 120 days after the defendant's original answer. Here, Weems sued Baylor, Scott and White - Hillcrest for falsifying information in a third party's medical records. Weems had no authority to release these third party medical records under Section 74.051 of the Act. And both state and federal privacy laws prevented Weems from obtaining these third party medical records to meet the expert report requirement under Section 74.351 of the Act. Are the terms of the statute unconstitutional where they irreconcilably conflict with both state and federal law preventing claimants like Weems from advancing meritorious claims?

Issue No. 2: The trial court dismissed Weems' claims against Baylor Scott and White - Hillcrest Medical Center for his failure to meet the expert report requirement pursuant to Section 74.351. But there is evidence in the record which clearly establishes that Weems, who was being held in jail on charges which stemmed from the false information in the medical record, filed a timely motion with the court to obtain a copy of the expert report, and it was the court's inaction that prevented Weems from meeting the expert report requirement under Section 74.351. Did this abuse of discretion by the trial court violate Weems' constitutional rights under the procedural Due-Process Clause of the Fourteenth Amendment?

Issue No. 3: Weems filed suit against Baylor, Scott and White-Hillcrest in May, 2016, on the grounds that the false information in medical records published by Baylor, Scott and White-Hillcrest had been used to charge, indict, and hold Weems in jail for nearly twenty months by that time. Weems' claims against Baylor, Scott and White-Hillcrest were not merely financial liability claims, but Weems' fundamental rights were implicated where Weems was being deprived of life and stood to be tried and convicted based on the false information in the third party's medical records. After Weems' claims against Baylor, Scott and White-Hillcrest were dismissed in November, 2016, the false information in the third party's medical records was used to convict Weems and sentence him to life in February, 2017. But this could not have happened if the trial court had not dismissed Weems' claims against Baylor, Scott and White-Hillcrest. Did the trial court's dismissal of Weems' claims against Baylor, Scott and White-Hillcrest violate Weems' rights under the substantive Due-Process Clause of the United States Constitution?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☒ reported at 2019 WL 1867916; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Sixth Court of Appeals court appears at Appendix B to the petition and is

- ☒ reported at 06-17-00018-CV, 566 S.W.3d 293, 05-11-17; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from state courts:

The date on which the highest state court decided my case was April 26, 2019.
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date:
June 21, 2019, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitutional Amendment Fourteen - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Texas Constitution, Article 1, Section 13 - Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All 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.
3. Texas Constitution, Article 1, Section 19 - No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.
4. Chapter 74 of the Texas Civil Practice and Remedies Code
5. Health Insurance Portability and Accountability Act of 1996, 42 U.S.C.S. Section 1320d

STATEMENT OF THE CASE

On November 6, 2014, Ernest Bradshaw ("Bradshaw") was taken by ambulance to Baylor, Scott and White-Hillcrest Medical Center ("BSWH") alleging that he had been shot in the head and described Ruthen James Weems III ("Weems") as the person who had shot him. BSWH personnel falsely confirmed to police that Bradshaw had been shot in the head at point-blank range. This information was used by police to arrest Weems for the attempted murder of Bradshaw. On January 21, 2015, this false information was used by a grand jury in McLennan County, Texas ~~was~~ to indict Weems for intentionally causing bodily injury by shooting Bradshaw. (Appx. D). Weems maintained steadfastly that Bradshaw was not shot.

Over a year and a half later, while still confined in the McLennan County Jail, on May 27, 2016, Weems filed this lawsuit against BSWH. (C.R. 4-7). Weems' claims were that a nurse at BSWH knowingly, intentionally, and willingly falsely reported that Bradshaw had been shot in the head and that Bradshaw did not have any injuries that were consistent with any that might have been caused by a gunshot upon which a determination that he had been shot could have been made, and that as a trained nurse, it had to have been apparent to her at the time that the medical report was written

that Bradshaw was not shot. Weems also alleged that this medical report was written with the specific intent that this information would be used to try to lock Weems up for the remainder of his life.

BSWH filed its original answer on July 7, 2016, alleging that Weems had asserted a health care liability claim, and that Weems had 120 days from that date to serve an expert report on BSWH pursuant to Chapter 74 of the Texas Civil Practice and Remedies Code. (Appx. E).

On September 14, 2016, some fifty days before the 120th day of the deadline, Weems filed a motion for order of release of expert findings requesting that the court issue an order requiring Walter M. Reaves, Jr. ("Reaves") to turn over a copy of the expert report to BSWH, citing that due to his incarceration this was the only way that Weems could possibly meet the expert report requirement. (Appx. F). (Appx. G). The trial court refused to exercise discretion over Weems' timely filed motion. The trial court's inaction prevented Weems from meeting the expert requirement which led to Weems' claims against BSWH being dismissed for failure to serve an expert report on BSWH as required under Section 74.351 on November 28, 2016.

Weems timely filed notice of appeal in the Tenth Court of Appeals on December 29, 2016, citing that his claim was not subject to the expert report requirement under Section 74.351 because there was no evidence that there had been any breach of any standard of care with regards to any treatment that Bradshaw received. Rather, Weems claimed that BSWH put fraudulent information in Bradshaw's medical records with the specific intent that this information would be used to cause Weems harm. On January 24, 2017, this case was transferred from the Tenth Court of Appeals to the Sixth Court of Appeals. (Appx. B at 2).

On May 11, 2017, the Sixth Court of Appeals entered its judgment finding that Weems had not asserted a health care liability claim against BSWH where his claim was that BSWH fabricated the information in Bradshaw's medical records. (Appx. B). The Sixth Court of Appeals reversed and remanded the case back to the trial court.

On July 14, 2017, BSWH filed a Petition for Review with the Supreme Court of Texas. Through the court's pro bono program, Sean M. Reagan ("Reagan") was appointed to represent Weems at this stage. BSWH never denied Weems' claims that Bradshaw had not been shot, nor did BSWH ever allege that the information in

Bradshaw's medical records in regards to this particular treatment was accurate. Rather, BSWH simply stated that whether a "misdiagnosis is the result of fraud or mere negligence", "Weems' claims are health care liability claims under Texas law, and he should be required by law to comply with the expert report requirements under Section 74.351." (BSWH's petition at page 3). BSWH's petition was granted and submitted for oral argument.

Oral argument was held on January 31, 2019. (Appx. H). On April 26, 2019, the Texas Supreme Court held that Weems' claim was an HCLC and reversed the court of appeals judgment, dismissing Weems' claim for failure to meet the expert report requirement under Section 74.351. (Appx. A).

On May 20, 2019, Weems filed a motion for rehearing. On June 21, 2019, Weems motion for rehearing was denied. (Appx. C).

SUMMARY OF THE ARGUMENT

The Texas Supreme Court held that Weems' claims against BSWH are health care liability claims ("HCLC") and dismissed them because Weems failed to meet the expert report requirement under Section 74.351. Weems now asserts in three separate issues that throughout the proceedings he was denied his United States Constitutional right to due process of law.

In the first instance, if Weems is a claimant under Chapter 74 of the Texas Civil Practice and Remedies Code the statute is unconstitutional because the terms of the statute prevented Weems from advancing his valid claim. It is undisputed that Weems was never treated at BSWH, and it is undisputed that Bradshaw was not injured during the provision of any treatment that he received. No one was injured during Bradshaw's treatment. Rather, Weems set out that BSWH staff misrepresented that Bradshaw was shot when he was not, and this misrepresentation caused Weems to be arrested, charged, and ultimately convicted of shooting Bradshaw with the intent to commit murder. In order for Weems to meet the expert report requirement under Section 74.351, Weems would be required to obtain copies of Bradshaw's medical records for an

expert to review. However, both state and federal privacy laws prevent third parties from obtaining patients' confidential medical records. Thus, in Weems' case, if Weems is in fact a claimant under Chapter 74 this conflict between privacy laws and the statute unconstitutionally restricted Weems' ability to pursue his claims.

Secondly, the Texas Supreme Court dismissed Weems' claims against BSWH for his failure to meet the expert report requirement under Section 74.351. However, the record clearly shows that Weems filed a motion with the trial court requesting that the court issue an order requiring Reaves to release to BSWH the expert findings. It was the court's failure to exercise its discretion on Weems' motion which prevented Weems from meeting the expert report requirement and violated Weems rights under the procedural Due-Process Clause of the United States Constitution.

Thirdly, Weems' substantive due process rights were violated when the trial court dismissed his claim pursuant to Section 74.351 only for Danny Owens ("Dr. Owens"), one of the doctors who treated Bradshaw, to show up and testify at Weems trial, which led to Weems being convicted of shooting Bradshaw and being sentenced to life in prison. Even assuming that Bradshaw had been 'misdiagnosed', on February 15, 2017, at

the very least, BSWH should have had grave concerns about whether Bradshaw had actually been shot because Weems had filed suit against BSWH nearly nine months earlier. Yet, BSWH did nothing to prevent Weems from sustaining further injury due to the misrepresentations made by BSWH in Bradshaw's medical records. It should shock the conscience that Weems, who had been in jail for nearly two years by the time that he filed suit against BSWH, would petition the courts making the courts aware that his life was in jeopardy of being stolen away from him due to the false information in Bradshaw's medical record, and that the trial court would fail to give Weems an adequate opportunity to be heard on his claims.

ARGUMENT AND AUTHORITIES

ISSUE NO 1: The Texas Supreme Court held that Weems asserted a health care liability claim against Baylor, Scott and White - Hillcrest. But under Section 74.051 of the Texas Medical Liability Act a claimant like Weems must provide a presuit authorization form releasing the medical records at issue, and under Section 74.351, a claimant like Weems must provide an expert report within 120 days after the defendant's original answer. Here, Weems sued Baylor, Scott and White - Hillcrest for falsifying information in a third party's medical records. Weems had no authority to release these third party medical records under Section 74.051 of the Act. And both state and federal privacy laws prevented Weems from obtaining these third party medical records to meet the expert report requirement under Section 74.351 of the Act. Are the terms of the statute unconstitutional where they irreconcilably conflict with both state and federal law preventing claimants like Weems from advancing meritorious claims?

1. Determining Whether A Statute Denies A Constitutional Right To A Litigant.

Under Texas law, when determining whether a statute denies a constitutional right to a litigant, a court analyzes the statute using the criteria established by Sax v Votteler, 648 S.W. 2d 661 (Tex. 1983). Sax sets out a two-part test: 1) the litigant must show that a cognizable common law action is being restricted; and 2) the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. Sax, 648 S.W. 2d at 666.

Infliction of injury by a medical practitioner is an undisputed cause of

4. Facts.

In the case before this Court right now, Weems relies on a unique set of circumstances. During the early morning hours of November 6, 2014, Bradshaw was taken via ambulance to BSWH claiming that he had been shot in the head and that it was Weems who had shot him. Bradshaw was treated by BSWH and released within hours.

While Bradshaw was at BSWH, hospital staff told officers from the Waco Police Dept. that Bradshaw had been treated for a gunshot wound, and in Bradshaw's medical records, BSWH alleged that Bradshaw had a gunshot wound to his forehead. But Bradshaw had not been shot. The police used this false information to arrest Weems for attempted murder a couple of hours later, and a grand jury in McLennan County, Texas relied on the false information in the medical report authored by BSWH staff to indict Weems for shooting Bradshaw on January 21, 2015. (Appx.D).

After Weems had been held in custody for over eighteen months for the alleged shooting of Bradshaw, on May 27, 2016, Weems filed this lawsuit against BSWH on the grounds that BSWH misrepresented facts to law enforcement and in Bradshaw's medical records with the specific intent that this false information would be used to

lock Weems in prison for the remainder of his life. (C.R. 4-7). It is undisputed that Weems was not a patient of BSWH, and there is no evidence that Weems ever received any health care or medical care from BSWH. (See R.R. at 8) ("Nobody treated Weems. Hillcrest didn't treat Mr. Weems. The physician who diagnosed Bradshaw didn't treat Mr. Weems.") Likewise, it is undisputed that Bradshaw was not injured by BSWH's care or treatment. And it is undisputed that Weems did not sue BSWH in a representative capacity, e.g., administrator of an estate.

5. Weems' Claims Were Unconstitutionally Restricted By Section 74.051.

If Weems is a claimant under the Act as the court held, under Section 74.051, (Appx. E at 10), then Weems would have been required to give written notice of his claim by certified mail to any health care provider against whom the claim is asserted at least 60 days before the claim was filed. Texas Civil Practice and Remedies Code Section 74.051(a). (Appx. E at 10). This mandatory notice ~~must~~ be accompanied by a form authorizing the release of medical records of "the patient" whose treatment is the subject of the claim. *Id.* at Section 74.051(d) ("All parties shall be entitled to obtain complete unaltered copies of the patient's medical records..."); Texas West Oaks Hosp., L.P. v.

Williams, 371 S.W. 3d 171, 195 (Tex. 2012) (Lehrmann, J., dissenting). So, if Weems is a claimant under the Medical Liability Act, then he was required to provide a presuit authorization form that allowed BSWH to obtain "complete and unaltered copies" of Bradshaw's medical records. (Appx. E at 12); Section 74.052. Because a statute is to be read as a whole, and the courts interpret the legislation to give effect to the entire act, City of San Antonio v. City of Boerne, 111 S.W. 3d 22, 25 (Tex. 2003), when read as a whole the statute is unconstitutional because it restricted initiation of Weems' claims against BSWH because Weems had absolutely no legal authority to authorize the release of Bradshaw's medical records. And "[i]t is inconceivable that the Legislature intended to require health care claimants with meritorious claims to be blocked by the refusal of third parties (the patients "involved") to authorize release of their medical records." Williams, 371 S.W. 3d at 195 (Lehrmann, J., dissenting).

The conflict between Section 74.051 and Weems' position was discussed at oral argument. (See Appx. H at 9). ("Section 74.051 requires claimants such as Mr. Weems to give pre-suit notice, and then attaches [sic] a medical authorization, and then under

subsection D, Mr. Weems, and all parties in the case are entitled to unaltered medical records at - there at issue. But here, Bradshaw would have to give his consent for any of the parties to have those records. But Mr. Weems cannot force Baylor, Scott and White to give him Mr. Bradshaw's medical records."); *id.* at 12 ("And, and it - and it seems like to prove that claim, we're going to need Mr. Bradshaw's records and Mr. Reagan points out the act contemplates the Defendant acquiring the medical records of, of the patient, but how are we going to get Mr. Bradshaw's records in this case?"). BSWH did not offer any guidance on how the conflict between Section 74.051 and its argument that Weems' claim was an HCCLC could be resolved. (Appx. H at 12). ("Your Honor, and honestly, I've, I've heard that - I heard that discussion, and I've, I've wondered the same question myself. I mean I'm not 100 percent sure what the mechanism is for providing the re-medical records of a third party in these types of claims."). And the court did not address or resolve this conflict in its opinion. Weems, 2019 WL 1867916 at 1-6. (Appx. D).

There is no resolution to this conflict. Weems has absolutely no legal authority to authorize the release of any third party's medical records.

6. Weems' Claims Were Unconstitutionally Restricted By Section 74.351.

Under Section 74.351(a) (Appx. E at 45) Weems was required to file an expert report within 120 days after BSWH filed its original answer. This means that Weems was required to obtain Bradshaw's medical records then submit Bradshaw's medical records to an expert for review. However, both state and federal privacy laws disqualified Weems from obtaining Bradshaw's medical records from BSWH.

Under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. Section 1320d-6(a)(2) (Appx. I at 24), and the Texas Medical Records Privacy Act ("TMRPA"), Weems would be committing a criminal offense if he were to obtain individually identifiable health information relating to Bradshaw. And likewise, under Section 1320d-6(a)(3), *id.* BSWH would have committed a criminal offense if it had disclosed to Weems any individually identifiable health information of Bradshaw's. Because of these laws, if Weems is a claimant as the court held, due to the conflict between these laws and the statute, Weems' ability to ~~adv~~ advance his claims was unconstitutionally restricted.

Since it was not possible for Weems to obtain Bradshaw's medical records

there was no possible way for Weems to meet the expert report requirement under Section 74.351. Clearly, Texas has provided a constitutionally guaranteed right to redress for its citizens. TEX. CONST. art. 1, Section 13 (also known as the Open Courts Provision). Therefore, a litigant's cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis outweighs the denial of constitutionally guaranteed rights. McGlothlin v. Cullington, 989 S.W.2d 449, 452 (Tex. App.- Austin 1999) (construing 1995 version of Texas Medical Liability and Insurance Improvement Act). "We look to the restrictions encompassed in Section 13.01 (d)" Schorp v. Baptist Memorial System, 5 S.W.3d at 737. For all purposes, article 4590i, Section 13.01 is the same expert report requirement under Chapter 74, Section 74.351. Thus, this Court should look to the restrictions in Section 74.351.

Section 74.351 specifically provides that a plaintiff must file an expert report for each physician or health care provider before ~~on~~ on the 120th day after the defendant files his original answer. But Weems was never treated by BSWH, and Weems' medical records are not at issue. And since Weems had no legal authority to authorize any release of Bradshaw's medical records, much less obtain copies for

himself, there was no possible way for Weems to meet the expert report requirement of Section 74.351 (a).

Even BSWH does not dispute that Weems has a valid injury. (Appx. H at 5). ("And so, his injury is incarceration, his injury is wrongful intention, his injury being-- a-- and I'm certainly not against to whether or not, I think, he has a valid injury that would survive litigation."). However, if the court's opinion is correct and Weems is a claimant under Chapter 74, there was no legal avenue available for Weems to advance his claims, which violated his due process rights.

ISSUE NO 2: The trial court dismissed Weems' claims against Baylor, Scott and White-Hillcrest Medical Center for his failure to meet the expert report requirement pursuant to Section 74.351. But there is evidence in the record which clearly establishes that Weems, who was being held in jail on charges which stemmed from the false information in the medical record, filed a timely motion with the court to obtain a copy of the expert report, and it was the court's inaction that prevented Weems from meeting the expert report requirement under Section 74.351. Did this abuse of discretion by the trial court violate Weems' constitutional rights under the procedural Due-Process Clause of the Fourteenth Amendment?

I. Facts.

On November 6, 2014, Bradshaw was taken to BSWH alleging to have been shot in the head and claiming that it was Weems who had shot him. Weems was arrested and charged with attempted murder a few hours later. While in jail, Weems told anyone who would listen that Bradshaw had not been shot. On January 21, 2015, a grand jury in McLennan County, Texas used the information in the medical records authored by BSWH personnel to indict Weems for shooting Bradshaw. (Appx. D). Weems remained in the McLennan County Jail where he continued to argue that Bradshaw had not been shot.

Eventually, some 16 months later, on March 3, 2016, upon motion from Weems' counsel, Judge Matt Johnson of the 54th District Court of McLennan County, Texas entered an order granting Weems funds for a forensic pathology expert. State of Texas v. Ruthen James

Weems, 2015-229-C2. (Appx. J). On March 17, 2016, Edward McEluea ("McEluea"), who was the investigator in Weems' criminal case made the trip to the McLennan County Jail where he notified Weems that through his attorney at the time, Richard Ferguson ("Ferguson"), Dr. Robert Charles Bux ("Dr. Bux") had been obtained as an expert witness, and it had been determined by Dr. Bux that Bradshaw had not been shot. On May 27, 2016, proceeding pro se, Weems filed suit against BSWH. BSWH filed its original answer on July 7, 2016. Ferguson withdrew from Weems' case on August 29, 2016. Judge Johnson then appointed Reaves to represent Weems.

On September 14, 2016, a motion and proposed order for release of expert findings (Appx. K) was filed, and on September 15, 2016, both were forwarded to the trial court. (Appx. K). The trial refused to exercise discretion over Weems' timely filed motion. On November 9, 2016, BSWH filed its first amended motion to dismiss regarding plaintiff's failure to file an expert report pursuant to 74.351, Tex. Civ. Prac. and Rem. Code. On November 28, 2016, after a short hearing, the trial court granted BSWH's motion, dismissing Weems' claims with prejudice.

Both the state and federal constitutions guarantee due process of law. U.S. CONST. AMEND. 14, Section 1; TEX. CONST. ART. 1, Section 19. Texas has provided for a constitutionally guaranteed right to redress for its citizens. Schorp, 5 S.W. 3d at 737.

3. Weems As A Prisoner Retained His Constitutional Right To Court Access. -

Access to courts is protected by First Amendment right to petition for redress of grievances and the Fourteenth Amendment guarantees of procedural and substantive due process. Jackson v. Procunier, 789 F. 2d 307, 310 (5th Cir. 1986). Prisoners retain their constitutional right to court access, and that access must be adequate, effective, and meaningful. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed. 2d 72 (1977); Marange v. Fontenot, 879 F. Supp. 679, 684-85 (E.D. Tex. 1995).

4. Weems' Burden.

A party complaining of abuse of discretion in trial court has the burden to bring forth a record showing such abuse. Simon v. York Crane and Rigging Co., Inc., 739 S.W. 2d 793 (Tex. 1987).

5. Weems' Timely Filed Motion.

Many of the circumstances involved in Weems' case are unique. As stated

previously, Weems had been detained in the McLennan County Jail for over a year and a half, where inmates have no access to a law library, when he filed suit against BSWH.

After BSWH filed its original answer, roughly two months later Weems filed a motion for release of expert findings requesting that the trial court order Reaves to turn over to BSWH a copy of the findings of the expert who had reviewed the evidence in his case.

(Appx. F). There is evidence in the record that this motion was filed with the district clerk on September 14, 2016, and forwarded to the trial court on September 15, 2016.

(Appx K). At the time that it was filed, Weems still had almost 50 days left to meet the 120 day deadline under Section 74.351.

There may have been some confusion because Weems referred to Texas Code of Criminal Procedure Article 39.14 (e)(1). (Appx. L). But this is because it was Weems' court-appointed criminal attorney, Reaves, whom Weems was attempting to obtain the document from. Confusion aside, Weems' motion still met the necessary criteria under Texas Rule of Civil Procedure 205.3, Discovery From Non-Parties. Weems' motion stated with enough specificity; 1) whom Weems sought the discovery from; 2) the address of the non-party; 3) exactly what document Weems was seeking;

4) the deadline Weems had to meet; and 5) the reason that Weems needed the court to issue an order. (Appx. M). Weems asserts before this Court that if he had had Bounds access to a law library, any confusion in his motion could have been avoided, but the motion was still sufficient to notify the court that if it did not order Reeves to turn over a copy of this critical document, there was no way that Weems could meet the deadline from jail.

6. The Trial Court's Abuse Of Discretion.

In Grant v. Wood, 916 S.W. 2d 42, 45 (Tex. App.- Houston [1st Dist.] 1995) it states; The trial court unquestionably has some discretion in the manner in which it rules on motions, for summary judgment. While an appellate court may not prescribe the manner in which a trial court exercises its discretion, the trial court commits a clear abuse of discretion when it refuses to exercise its discretion to hear and rule on pending motions. See Cooke v. Millard, 854 S.W. 2d 134, 135 (Tex. App.- Houston [1st Dist.] 1992, orig. proceeding).

And in In re Marriage of Runberg, 159 S.W. 3d 194, 197 (Tex. App.- Amarillo 1995) it explains; A trial court abuses its discretion if its decision is arbitrary, unreasonable,

and without reference to guiding rules and principles. See Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997). Likewise, a trial court abuses its discretion if it declines to exercise a power of discretion vested in it by law when the circumstances require that the power be exercised; or if it arrives at its choice in violation of an applicable legal rule, principle, or criterion. See Koch v. Koch, 27 S.W. 3d 93, 95 (Tex. App.- San Antonio 2000, no pet.); Landon v. Jean-Paul Budinger, Inc., 724 S.W. 2d 931, 939-40 (Tex. App.- Austin 1987, no writ).

Weems has already met the burden of showing in the record that his motion for release of expert findings was timely filed, that it stated with sufficient specificity to make the court aware that Weems needed this document to meet the deadline under Section 74.351 (a), and that Weems had no other way of obtaining it because he was in jail, and the trial court refused to exercise its discretion.

At oral argument BSWH's main issue was that Weems failed to meet the expert report requirement under Section 74.351. On two separate occasions BSWH illustrated what should have been presented if Weems' claim was going to go forward. (Appx H, at 3) (We need-- there should have been an expert the court provided, where a doctor-- if this claim was going to go forward, came forward and said, "I've looked into the medical

records, I've looked at the x-rays and CAT scans, or whatever else exists, and there is no gunshot."), and (Appx. H at 4) ("They still need to know that at a very basic level, the nurse got it wrong, and the only way it's going to happen is, for an expert to walk into a room and say, I've looked at the medical records I've looked at the x-rays, I looked at the photographs, I've examined this, I'm a doctor, I'm a nurse, and that is not a gunshot wound.").

The fact is that on September 14, 2016, when Weems filed his motion for order of release of expert findings there was in Reaves' possession, in the form of a written document, a report from one Dr. Bux which specifically states all of the things mentioned by BSNH during oral argument. (See Appx. N). This report is dated June 24, 2016, nearly 3 months before Weems filed his motion for order of release. Thus, it was the trial court that deprived Weems of the opportunity to meet the 120 day expert report requirement. Fundamental fairness dictates that a party not be arbitrarily deprived of the right to offer its evidence. Monsanto Company v. Davis, 25 S.W.3d 713, 785-86 (Tex. App. Waco 2000). Because there was no legal basis for the court to refuse to consider Weems' motion, Weems was arbitrarily denied the opportunity to present his case. This amounted

to an abuse of discretion. Striedel v. Striedel, 15 S.W. 3d 1163, 1166 (Tex. App.- Corpus Christ 2000, no pet.).

7. The Trial Court's Action Was So Arbitrary That It Deprived Weems Of His Constitutional Right Under The Procedural Due-Process Clause.

One of the reasons that Weems' case is unique is because it was not just about recovering damages in his lawsuit against BSWH. Weems was also being held against his will in the McLennan County Jail, and had been there for almost 2 years, accused of a shooting that had never occurred, where the medical records from BSWH were being relied on to hold Weems in custody. Furthermore, Weems was in jeopardy of possibly remaining incarcerated for the remainder of his life if it was not uncovered that the information in the medical records was not true. Also, if Weems had asserted an HCLC as was BSWH's argument, under Section 74.351(b), if Weems did not meet the expert report requirement his claims would be dismissed with prejudice.

With not only Weems' claims against BSWH at stake, but his life as well, it was so arbitrary and unreasonable for the trial court to refuse to exercise its discretion over Weems' motion for order of release of expert findings that Weems was

deprived of his right to procedural due process. If the trial court had granted Weems' motion, not only could Weems' claims against BSWH go forward, but the court's action would also have prevented Weems from being convicted and sentenced to life based upon the misrepresentations appropriated in Bradshaw's medical record which was created by BSWH.

As a preliminary matter, the procedural due process clause is implicated only if a person has a constitutionally recognized interest in life, liberty, or property.

Frazier v. Garrison I.S.D., 980 F.2d 1514, 1528 (5th Cir. 1993); citing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985).

Procedural due process may require government to assure that individuals are afforded certain procedures before they are deprived of life, liberty, or property. United States v. LULAC, 793 F.2d 636, 647 (5th Cir. 1986).

At the very minimum, when Weems notified the court through his motion for order of release of expert findings that there was in the possession of Reeves evidence not only to meet the threshold requirement to pursue his claims against BSWH under Chapter 74, but which would also show that Weems had been in jail for two years based

on a ruse, justice required that the trial court give Weems an opportunity to present this evidence. A hearing and ruling on Weems' motion was in order, and the failure to afford Weems such procedures deprived Weems of both life and liberty without due process.

ISSUE NO. 3: Weems filed suit against Baylor, Scott and White-Hillcrest in May, 2016, on the grounds that the false information in medical records published by Baylor, Scott and White-Hillcrest had been used to charge, indict, and hold Weems in jail for nearly twenty months by that time. Weems' claims against Baylor, Scott and White-Hillcrest were not merely financial liability claims, but Weems' fundamental rights were implicated where Weems was being deprived of life and stood to be tried and convicted based on the false information in the third party's medical records. After Weems' claims against Baylor, Scott and White-Hillcrest were dismissed in November, 2016, the false information in the third party's medical records was used to convict Weems and sentence him to life in prison in February, 2017. But this could not have happened if the trial court had not dismissed Weems' claims against Baylor, Scott and White-Hillcrest. Did the trial court's dismissal of Weems' claims against Baylor, Scott and White-Hillcrest violate Weems' rights under the substantive Due-Process Clause of the United States Constitution?

1. The Negative Impact Of The Dismissal Of Weems' Claims.

After the trial court refused to exercise discretion over Weems' motion for order of release of expert findings, on November 28, 2016, the court dismissed Weems' claims against BSWH with prejudice.

On February 15, 2017, during Weems' trial for this alleged shooting, Dr. Owens, one of the BSWH personnel responsible for the medical records at issue, testified as an expert witness for the State. Texas v. Weems (8 R.R. 8-21). During his testimony Dr. Owens stated repeatedly that Bradshaw had a gunshot wound to the head. (8 R.R. 13-20). After listening to Dr. Owens' testimony the jury found Weems guilty of shooting

Bradshaw with the intent to commit murder and sentenced Weems to life in prison.

2. The Substantive Due-Process Clause.

In Brown v. Nationsbank Corp., 188 F.3d 579, 591 (5th Cir. 1999) it explains; "The touchstone of due process is protection of the individual against arbitrary action of the government." Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). The Due Process Clause was intended to prevent government officials from abusing their power or employing it as an instrument of oppression. See Collins v. City of Harker Heights, Tex., 503 U.S. 115, 126, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992). The cognizable level of executive abuse of power is that which "shock the conscience," violates the "decencies of civilized conduct," or interferes with rights "implicit in the concept of ordered liberty." Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 209-10, 96 L.Ed. 183 (1952). Obviously, this guarantee of due process protects citizens against deliberate harm from government officials. See Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

This Court noted that behavior most likely to "shock the conscience" and thus support a substantive due process claim is "conduct intended to injure in some

way unjustifiable by any government interest." County of Sacramento v. Lewis, 523

U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed. 2d 1043 (1998).

3. The Trial Court's Action Was Meant To Oppress Weems.

On November 28, 2016, when the trial court dismissed Weems' claims against BSWH, Weems, who was indigent, had already been in jail for nearly 25 months. And as long as Weems was in jail, it would be impossible for Weems to retain legal counsel to represent him on his claims against BSWH.

The circumstances also show that a scheme was already underway where Reeves would withhold all evidence favorable to Weems throughout his criminal trial, allowing Weems to be convicted of this alleged shooting and insuring that BSWH would not be held liable in Weems' cause of action against it, under the assumption that Weems unable to push his claims forward from prison without professional legal assistance. By refusing to issue the order for the release of expert findings, which Weems was definitely entitled to after remaining in jail for two years waiting for this to come to surface, and was also discoverable under Tex. R. Civil. Proc. 205.3, the trial court effectively killed Weems' only opportunity to prevent BSWH from following through with

the plan that had been orchestrated to lock Weems up for the remainder of his life just as Weems had alleged in his original petition.

While BSWH has asserted repeatedly in its filing and during oral argument that Weems has now been convicted of shooting Bradshaw, and that a jury believed the evidence, (Appx. H at 3) (Mr. Weems is in jail serving time for having attempted to murder him. So, the evidence has been presented to a court and to a jury, and he's been -- and he's been found guilty. He's gone to jail for that ca-- for that claim.). However, there are a couple of very substantial issues that this Court would hopefully factor into the equation. The first being that Reaves and prosecutors set Weems' trial for the week of February 13, 2017. It is not a coincidence that this was the very same week as the Annual Academy of Forensic Sciences Convention, and thus, Weems had been held in custody for over 27 months awaiting the 'only' week of the year when 'no' forensic expert would be available to testify for Weems' defense. Then on February 15, 2017, Dr. Owens, from BSWH, came in and testified for the State, alleging that Bradshaw had been shot. But it is undisputed that Weems had filed suit against BSWH more than 8 months before Dr. Owens' testimony. By this time BSWH had to know that Bradshaw had not been

shot. Even looking at BSWH's position throughout these proceedings, BSWH has never alleged that Weems was wrong, and that Bradshaw was shot. BSWH's sole defense has been that whether it is intentional or negligent, a misdiagnosis is a health care liability claim.

4. BSWH Had A Duty To Correct This Misrepresentation.

Under Texas law, a duty to disclose is owed when a party learns that previous affirmative representations are in fact false. Washington v. U.S. Dept. of Housing and Urban Dev., 953 F. Supp. 762, 776 (N.D. Tex. 1996); citing Susanoil, Inc. v. Continental Oil Co., 519 S.W. 2d 230, 236 (Tex. Civ. App. - San Antonio 1975, writ ref'd n.r.e.). Thus, BSWH had a duty to come forward and correct the misrepresentations made by its staff which had already caused Weems so much grief. BSWH did not. Rather, Dr. Owens came in and convinced a jury that Weems had shot Bradshaw in the head when he knew this information was false. This misrepresentation was calculated to injure Weems. The injury that Weems suffered is apparent.

5. The Harm Suffered By Weems Was Deliberate.

The trial court was fully aware of the circumstances surrounding Weems' case.

That Weems was in jail, and had been for two years, and stood to be tried based upon the information in the medical report from BSWH. The outcome was easily foreseeable when Weems was forced to take such drastic measures ~~at~~ as petitioning the court in an attempt to obtain a court order to get a copy of the expert report from the attorney who was supposed to be representing him. In ignoring Weems' motion and dismissing Weems' claims against BSWH it appears that the trial court intended to prevent Weems from having the expert report entered into any record, which ensured that the miscarriage of justice that had been planned for Weems could be carried out.

When the trial court arbitrarily ignored Weems' motion then dismissed Weems' claims against BSWH, Weems' rights were violated under the ~~substantive~~ substantive Due-Process Clause of the United States Constitution.

REASONS FOR GRANTING THE PETITION

Weems believes that this Court should grant this petition for two reasons. The first being that there is a conflict between the statute and privacy laws that must be resolved, because as it stands, the statute is unconstitutional where claimants like Weems are unable to advance meritorious claims since the law prevents them from obtaining third party medical records. Granting this petition would impact future cases because it would prevent medical professionals in the future from intentionally misrepresenting facts to deliberately harm third parties, who would then be unconstitutionally prevented from petitioning the courts for redress because there is no mechanism for obtaining individually identifiable health information, which is required to begin the process of filing suit.

And secondly, because in his petition Weems has presented this Court with a claim that involves a pure constitutional crisis. Weems, who undeniably has a meritorious claim against BSWH, filed his lawsuit from jail pro se. Weems put the trial court on notice that his life was in grave danger of being stolen away due to the misrepresentations made by BSWH, and Weems did petition the court in an attempt to meet the expert report requirement. It was the court's inaction which prevented

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Weems from meeting the expert report requirement. The trial court then dismissed Weems' claims with prejudice, only to have BSWH go in and use this false information to convince a jury to convict Weems for shooting Bradshaw and sentence him to life in prison, seemingly with impunity. Weems has been dealt an immense injustice. One that offends the United States Constitution. By granting this petition the Court would not only give Weems the opportunity to finally present his evidence as the Due-Process Clause requires, but it would also prevent health care professionals from falsely believing that the law protects them from liability for deliberately harming third parties with false information that is known to be false in the future.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ruthen J. Weems III

Date: Sept. 17, 2019