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Articles

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Chair's Report

Kent Rutter, Haynes and Boone, LLP, Houston

As the Appellate Section's annual meeting approaches and my year as Chair draws to a close, one thing is clear—this wasn't the year any of us signed up for. We made big plans, and a pandemic threw everything into disarray.

And yet, I am pleased—and frankly, somewhat astonished—to report that through it all, the Appellate Section accomplished as much this year as ever before. The credit goes to our tenacious team of officers, council members, and committee chairs. Their energy, creativity, and perseverance proved to be unstoppable.

It helped that we got off to a strong start. We held live events in locales spanning 800 miles across our great state, from El Paso to Beaumont, with Austin, Houston, and Tyler in between. Among these events were our popular "Coffee with the Courts" socials, organized by Chief Justice Sandee Marion and former Justice Jason Boatright.

When the pandemic hit, our CLE programming did not go on hiatus, but instead moved online. Steve Hayes, working with Marla Broadus and Audrey Vicknair, posted hour after hour of high-quality CLE videos to our website, where members can view them and obtain MCLE credit for free. Credit also goes to Tom Leatherbury and Lucy Forbes, whose committee worked with local bar organizations across Texas to provide live and virtual CLE programming, much of which was recorded and made available to our members online. Meanwhile, April Farris and Steve Knight updated our online library of CLE papers, which contains hundreds of articles covering every appellate subject there is.

Also featured on our website—which is capably maintained by Bill Little, Will Peterson, Rich Phillips, and Natasha Breaux—are scores of interviews with former appellate justices. The stories they tell are fascinating and help us put into context the challenges of the present moment. Fortunately, JoAnn Storey, Perry Cockerell, Andrew Johnson, and Thomas Allen were

able to conduct many interviews before the pandemic struck. Since then, they have been editing and posting these videos for all to enjoy.

The interviews are also published here, in the Appellate Advocate. In this issue you will also find our survey regarding the Texas Rules of Appellate Procedure, conducted by former Justice Bob Pemberton. The quality of the Appellate Advocate is second to none, thanks to our managing editors: Jody Sanders, Jason Boatright, Kristen LaFreniere, and Dana Livingston.

Neither a pandemic nor a ransomware attack impeded our pro bono efforts, led by Rachel Ekery and carried out by a dedicated crew of volunteer lawyers. And certainly, there was no dampening the passionate views that Appellate Section members hold on the subject of appellate judicial selection. This spring, 546 members completed an online survey regarding methods of selecting Texas appellate judges, with 167 members additionally providing written comments. It was my privilege to present the survey results to the Texas Commission on Judicial Selection, which will make recommendations to the Legislature by the end of the calendar year.

Looking ahead, course directors Scott Rothenberg and Judge Tanya Garrison have assembled exceptionally strong lineups of speakers for the Advanced Appellate and Appellate 101 courses, which will be held online.

I am grateful for the technology that makes this possible. But I will miss the conversations that happen in the foyer outside the ballroom (even when they draw noise complaints), in the hallways, at dinner, and late into the night at the Four Seasons bar. This would have been my 25th consecutive year in attendance. To be honest, these opportunities for conversation are the main reason I never stay home.

This year, I imagine, many of the conversations would have centered on diversity. Please allow me a moment to touch on that issue here.

As in a brief, the place to start is with the facts. Among the population of Texas, people of color represent 61%, and African-Americans represent 13%. Among Texas lawyers, people of

color represent 29%, and African-Americans represent 5%. Among members of the Appellate Section, people of color represent 12%, and African-Americans represent 2%.

Put another way, it's not just that people of color are underrepresented in the legal profession by a factor of more than two to one. Equally troubling is that attorneys of color are underrepresented in the Appellate Section, likewise by a factor of more than two to one.

It will take time—and more importantly, effort—before everyone, regardless of background, has an equal opportunity to participate in appellate practice. One obvious step we can take is to engage minority law students in conversation about our practices and welcome them to join us. Toward that end, in February the Appellate Section presented a forum at Thurgood Marshall School of Law. Students packed a lecture hall to hear Justice Gina Benavides, former Justice Jennifer Caughey, former Justice Dale Wainwright, and Joseph Vale discuss opportunities in appellate practice. The event was organized by our Diversity Committee, led by Justice Benavides and Kirsten Castañeda, and our Law School Liaison Committee, led by Suzy Prucka, Jennifer Caughey, and Chris Dove.

On this front and others, you can expect that the Appellate Section will do much more in the year to come. Our 2020-2021 Chair, Jerry Bullard, has been instrumental to the leadership of the Appellate Section for many years, and I can't thank him enough for his advice, support, and friendship.

In the meantime, please stay in touch with your friends and colleagues in the appellate community. The conversation never stops on Facebook and Twitter, where Lucy Forbes and Raffi Melkonian post the latest news.

Looking back on the year, we have much to be proud of. That could be said every year, of course, but this year it is true in an entirely new way. For that, I offer my sincere thanks to the leaders and members of the Appellate Section. Through all the challenges we have faced together, it has been an honor and privilege to serve as your Chair.

Disclaimer

Contributions to the *Appellate Advocate* are welcome, but we reserve the right to select material to be published. We do not discriminate based upon the viewpoint expressed in any given article, but instead require only that articles be of interest to the Texas appellate bar and professionally prepared. To that end, all lead article authors who submit an article that materially addresses a controversy made the subject of a pending matter in which the author represents a party or amici must include a footnote at the outset of the article disclosing their involvement. Publication of any article is not to be deemed an endorsement of the views expressed therein, nor shall publication of any advertisement be considered an endorsement of the product or service advertised.

The 2019 Texas Legislature and Appellate Practice: Laws Enacted and Proposed

Elizabeth Lee Thompson[1]

Members of the Texas Legislature introduced almost 7,800 bills and resolutions during the 2019 regular session.[2] Of the almost 1,500 bills and resolutions that passed and became law, many affect appellate practice.[3] This article concentrates on enacted legislation of central concern to most appellate practitioners. It also describes a proposed bill—which is a repeat player—concerning a Court of Business Appeals that did not become law but that may indicate the direction of future legislation.[4]

Substantive and Procedural Law Affecting Appellate Practice

Laws passed in 2019 affect broad and diverse areas of law. But eight pieces of legislation concern substantive or procedural laws that appellate practitioners commonly confront.

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[2] Legislative Reference Library of Texas, 86th Legislature Bill Statistics (July 22, 2019). For a general overview of enacted and proposed bills affecting litigation, *see* Christy Amuny, Jerry D. Bullard, and William J. Chriss, *Legislative Update 2019: Litigation*, State Bar of Texas, TexasBarCLE Webcast, July 11, 2019 and accompanying paper.

[3] Legislative Reference Library of Texas, 86th Legislature Bill Statistics.

[4] Numerous other enacted laws will be of concern to individual appellate attorneys depending on the substance and focus of their practice.

1. Amendments to the Texas Citizen Participation Act[5]

Effective September 1, 2019, HB 2730 amends sections of the Texas Citizen Participation Act, chapter 27 of the Civil Practice and Remedies Code. The amending legislation does the following:

- Amends the definition of "exercise of the right of association" to mean "to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern"
- Amends the definition of "matter of public concern" to mean "a statement or activity regarding: (A) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety or celebrity; (B) a matter of political, social, or other interest to the community; or (c) a subject of concern to the public"
- Amends the definition of "legal action" to include declaratory relief and to exclude alternative dispute resolution proceedings, post-judgment enforcement actions, and "procedural action[s] taken or motion[s] made in an action that does not amend or add a claim for legal, equitable, or declaratory relief"
- Excludes government entities, officials, and employees acting in an official capacity from being "part[ies]" who may file a TCPA motion to dismiss
- Provides that a movant must give 21 days' notice before the date of the motion to dismiss hearing; adds a deadline for filing a response to a motion to dismiss to no later than seven (7) days before the date of the hearing concerning the motion to dismiss; and allows modification of the notice date of the hearing or response due date by agreement or order of court

[5] Act of May 17, 2019, H.B. 2730, 86th Leg., R.S. (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.001(2), (6)–(7), 27.003(a)–(b), (d)–(e), 27.005(a)–(b), (d), 27.006, 27.007, 27.0075, 27.009, 27.010).

- Modifies the burden of proof that the movant must meet to prevail on a motion to dismiss to require the movant to "establish[] an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law"
- Changes the imposition of sanctions against the non-moving party upon grant of a motion to dismiss to discretionary instead of mandatory
- Expands the types of claims excepted from the TCPA, including non-compete and trade secret claims, certain actions under the Family Code, attorney disciplinary actions and proceedings, and eviction suits
- Specifies types of claims subject to the TCPA, including communications related to artistic works, published articles, consumer opinions or commentary, business ratings, and actions against a victim or alleged victim of family violence.

These amendments apply to an action filed on or after September 1, 2019.

2. Awards of Costs and Attorney's Fees for Motions to Dismiss under Rule 91a: Discretionary Instead of Mandatory[6]

HB 3300 amends Civil Practice and Remedies Code section 30.021 to make a court's award of costs and attorneys' fees discretionary (instead of mandatory) after the grant or denial of a rule 91a motion to dismiss—or other motion to dismiss adopted by the Supreme Court pursuant to Government Code section 22.004(g). The change becomes effective and only applies to civil cases commenced on or after September 1, 2019.

[6] Act of May 21, 2019, H.B. 3300, 86th Leg., R.S. (to be codified as an amendment to TEX. CIV. PRAC. & REM. CODE ANN. §30.021).

3. Certificate of Merit: Third-Party Plaintiffs and "Practic[ing]" Affiants[7]

Effective June 10, 2019, SB 1928 amends two aspects of statutes governing requirements for certificates of merit. First, amendments to Civil Practice and Remedies Code sections 150.001 and 150.002 apply the requirement to file a certificate of merit in complaints against licensed or registered professionals to third-party plaintiffs, in addition to plaintiffs. The amendments include adding the definition of "claimant" to mean "a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification." The amended statute defines "complaint" to mean "any petition or other pleading which, for the first time, raises a claim against a licensed or registered professional for damages arising out of the provision of professional services by the licensed or registered professional." Second, SB 1928 amends section 150.002 to require that the certificate of merit affidavit be by a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who "practices" (instead of just "is knowledgeable") in the defendant's area of practice. The changes apply to a legal action or arbitration commenced on or after June 10, 2019.

4. Notices of Appeal to Court Reporters[8]

SB 891 requires that a notice of appeal—including an interlocutory appeal—be served on each court reporter responsible for preparing the reporter's record, in addition to serving a notice of appeal on the parties, as currently required by Rule of Appellate Procedure 25.1(e). It also provides that the Supreme Court may not amend or adopt rules that conflict with this notice of appeal requirement. This change amends chapter 51 of the Civil Practice and Remedies Code to add

[7] Act of May 23, 2019, S.B. 1928, 86th Leg., R.S. (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. §§150.001, 150.002).

[8] Act of May 26, 2019, S.B. 891, 86th Leg., R.S. (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. §51.017).

section 51.017 and is effective September 1, 2019.

5. Service or Notification by Publication on Internet Website and Service by Social Media[9]

SB 891 also includes two changes in service and publication. First, it authorizes service of citation by publication and notices by publication through a public information internet website developed and maintained by the Office of Court Administration. In accordance with the requirements of the statute, the Office of Court Administration created the website and the Supreme Court adopted rules governing the submission of public information on the website.

SB 891 also amends Civil Practice and Remedies Code chapter 17 to authorize a court to allow substituted service of a defendant by electronic communication through social media. The statute requires the Supreme Court to "adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence" by December 31, 2020. This new service through social media only applies to an action commenced on or after the effective date of the Supreme Court rules.

6. Changes to Statutory County Court Jurisdiction and Jury Composition and New Expedited Rules for County Court at Law Cases under $250,000[10]

SB 2342 requires the Supreme Court of Texas to adopt rules by January 1, 2021 to "promote the prompt, efficient, and cost effective resolution of civil actions filed in county courts at law in which the amount in controversy does not exceed $250,000."

The bill also modifies the jurisdiction and jury composition of statutory county courts, including by (1) increasing the

[9] Act of May 26, 2019, S.B. 891, 86th Leg., R.S. (to be codified as Tex. Gov't Code Ann. § 72.034, Tex. Civ. Prac. & Rem. Code Ann. § 17.033).

[10] Act of May 26, 2019, S.B. 2342, 86th Leg., R.S. (to be codified as amendments to Tex. Gov't Code Ann. §§ 22.004, 25.0003, 25.0007).

amount-in-controversy jurisdiction to up to $250,000 for a statutory county court when the court exercises civil jurisdiction concurrently with the constitutional jurisdiction of the county court and the district court's civil jurisdiction; and (2) providing for a 12-member jury (unless the parties agree to a lesser number) in civil cases in a statutory county court that involve amounts in controversy in excess of $250,000. These changes only apply to causes of action filed on or after September 1, 2020.

7. Affidavits for Costs and Reasonableness of Services[11]

HB 1693 amends section 18.001 of the Civil Practice and Remedies Code to clarify that an affidavit stating that the amount charged for a service was reasonable and that the service was necessary "is not evidence of and does not support a finding of the causation element of the cause of action that is the basis for the civil action."

The amendments effectuate deadlines by when a party (or the party's attorney) offering an affidavit into evidence or a party controverting a claim in an affidavit must serve a copy of the affidavit or counteraffidavit on all other parties:

- for an affidavit, by the earlier of 90 days after the date the defendant files an answer or the date the offering party must designate expert witnesses under a court order or as required by the Texas Rules of Civil Procedure,
- for a counteraffidavit, by the earlier of 120 days after the defendant files its answer or the date the party must designate expert witnesses under court order or as required by the Texas Rules of Civil Procedure,
- for an affidavit for services provided for the first time after a defendant's answer date, by the earlier of the date the offering party must designate expert witnesses under a court order or as required by the Texas Rules of Civil Procedure, and
- for a counteraffidavit in response to a post-answer services affidavit, by the later of 30 days after service of

[11] Act of May 21, 2019, H.B. 1693, 86th Leg., R.S. (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. § 18.001).

the affidavit or the date the party must designate expert witnesses under a court order or as required by the Texas Rules of Civil Procedure.

In addition, for services provided after a deadline, a party may supplement an initial affidavit on or before 60 days before trial commences and a party may supplement a counteraffidavit on or before 30 days before trial commences.

HB 1693 also provides that a party offering affidavits and counteraffidavits into evidence must file notice with the court when serving the affidavit or counteraffidavit. It also provides that the parties may alter the deadlines in section 18.001 by agreement or with leave of court. The amendments apply to all actions commenced on or after September 1, 2019.

8. Orders Subject to Interlocutory Appeal and Expedited Appeals in Proceedings Concerning Dangerously Damaged or Deteriorated Structures or Substandard Buildings in Certain Municipalities[12]

HB 36 "relat[es] to expedited proceedings in cases involving dangerously damaged or deteriorated or substandard buildings or improvements in certain municipalities." The act makes an additional type of order subject to interlocutory appeal. New subsection 51.014(a)(14) of the Civil Practice & Remedies Code allows interlocutory appeal of an order that "denies a motion filed by a municipality with a population of 500,000 or more in an action filed under 54.012(6) or 214.0012, Local Government Code." Section 54.012(6) concerns suits by a municipality to enforce an ordinance "relating to dangerously damaged or deteriorated structures or improvements[.]" Section 214.0012 involves suits by property owners "aggrieved by an ordinance of a municipality" regarding a substandard building. In addition, HB 36 provides for expedited proceedings, including accelerated appeals, in proceedings under these statutes. The act was effective June 14, 2019.

[12] Act of May 24, 2019, H.B. 36, 86th Leg., R.S. (to be codified as amendments to TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a), TEX. LOC. GOV'T CODE ANN. §§ 54.0155, 214.001, 214.0012).

The Judiciary and Court System

1. Interim Study Regarding the Selection of Appellate and Trial Judges[13]

Numerous bills and resolutions in the 2019 legislative session sought to affect the process of judicial selection in Texas.[14] The bill that passed, HB 3040, did not change the process but instead established the Texas Commission on Judicial Selection, effective June 14, 2019. The Commission will study and review methods for selecting the judiciary for statutory county courts, district courts, courts of appeals, the Court of Criminal Appeals, and the Supreme Court. It will comprise fifteen members: four appointed by the Governor; four by the Lt. Governor (three must be senators and at least one from each party); four by the Speaker of the House (three must be House members and at least one from each party); and one member appointed by each of the Chief Justice of the Supreme Court, the Presiding Judge of the Court of Criminal Appeals, and the State Bar of Texas board of directors. The Commission must submit its report by December 31, 2020. The Commission expires January 2, 2021.

2. Judicial Compensation and Retirement[15]

HB 2384 enhances judicial salary and retirement benefits effective September 1, 2019. The law maintains the current salary levels for judges at all levels—including district court, court of appeals, Supreme Court, and Court of Criminal Appeals. But the law complements that base salary with a tiered salary structure based on tenure of service as a state court judge. Judges with at least four years of service credited in the Judicial Retirement System (JRS) will receive a salary of

[13] Act of May 21, 2019, H.B. 3040, 86th Leg., R.S.

[14] *See* Tex. S.B. 561, S.B. 1069, S.J.R. 25, S.J.R. 35, H.B. 3061, H.B. 4504, H.J.R. 148, 86th Leg. R.S. (2019).

[15] Act of May 24, 2019, H.B. 2384, 86th Leg., R.S. (to be codified as amendments to, e.g., TEX. GOV'T CODE ANN. §659.012).

110% of their base salary. Judges who have served at least eight years (with eight years credit in the JRS) will receive a salary of 120% of their base salary.

Proposed Legislation that Did Not Pass

Business Court and Court of Business Appeals[16]

In the 2015 and 2017 sessions, legislators introduced bills that sought to create a chancery court but those bills failed to pass.[17] In 2019, HB 4149 and SB 2259 contained similar provisions to the 2015 and 2017 bills.[18] Like the previous bills, the 2019 bills were not enacted by the legislature. The central provisions of the proposed Business Court and Court of Business Appeals (particularly as relevant to appellate practice) include:

- The creation of a specialized statewide civil trial court and appellate court that would hear particular business-related litigation cases, including violations of the Business Organizations Code and business-related disputes in which the amount in controversy exceeds $10 million. The business court would not have jurisdiction over personal injury claims, governmental entities, cases under the Estates Code, Family Code, DTPA, or provisions governing trusts in the Property Code (absent consent to jurisdiction).
- In addition to provisions governing the business trial court (such as its appointed judges, clerk, venue, fees, and removal procedures), the proposed bills provided that the Court of Business Appeals would handle appeals from the business trial court. The Governor would "appoint seven active justices from the courts of appeals to serve as the" Court of Business Appeals.

[16] Tex. H.B. 4149, 86th Leg., R.S. (2019); Tex. S.B. 2259, 86th Leg., R.S. (2019).

[17] Amuny, Bullard, & Chriss, *Legislative Update 2019: Litigation*, p. 32. The 2015 bill was voted out of committee but did not pass in the House and the 2017 bill was referred to committee but did not receive a hearing. *Id.*

[18] *Id.*

Justices would sit in "randomly selected panels of three" and would serve for six-year terms.

- Parties would appeal from the Court of Business Appeals to the Supreme Court of Texas.

This overview of enacted and proposed legislation focuses on those portions of the 2019 legislative session of concern to many appellate practitioners. But, because of the diverse substantive practices of appellate attorneys, numerous other new laws or proposed pieces of legislation may be of interest to particular attorneys.

Social Media Use And Appellate Practice: Avoiding Ethical Pitfalls

John G. Browning

I. INTRODUCTION

According to the ABA's 2018 Legal Technology Survey Report, 79% of lawyers responding use one or more social media platforms like Facebook or Twitter for professional purposes. Marketing/business development remains the leading reason for lawyers' involvement on social media, although case investigation and research are often cited as well. And in our increasingly wired world in which over 82% of adult Americans maintain at least one social networking profile—and in which Facebook boasts over 2.2 billion users and Twitter processes a billion tweets every 48 hours—the potential for using social media in ways that violate attorneys' ethical restrictions looms large. Lawyers across all practice areas have tweeted, Instagrammed, posted, and Snapchatted their way into disciplinary proceedings, judicially-imposed sanctions, and other forms of ethical hot water. But in the comparatively staid, even monastic confines of the appellate world, can appellate lawyers fall prey to the siren song of social media?

That answer is a resounding, if somewhat surprising, "yes." As this article discusses, appellate lawyers, clerks and other court staffers, and even judges, have seen their online activities result in public embarrassment, job loss, and disciplinary action. And while reviewing the record in an underlying case and engaging in legal research may not be typical paths to social media misuse, breaching confidentiality by discussing certain aspects of a case on social media platforms is a very real danger.

II. APPELLATE STAFF ATTORNEY TAKES HEAT FOR SOME TWEETS

Let's begin with a cautionary tale. A newly-minted graduate

of a law school in Kansas started her first job at the court of appeals as a judicial assistant to a sitting judge.[1] About a year later, she was promoted to research attorney. One day, she noticed an unusual amount of security and soon learned the reason why: the Kansas Supreme Court would host an attorney disciplinary proceeding against a former Kansas Attorney General who had attracted controversy while in office.

The research attorney decided to view the oral arguments using the computer in her office, where she also proceeded to "live Tweet" the proceedings, sending out a series of tweets that included personal observations about the proceedings. Some of her Twitter followers were aware of her position with the Court of Appeals. A journalist with the Associated Press learned of the tweets and contacted the Kansas Judicial Center's public information officer the next day for comment. That officer quickly met with the court's personnel director, who immediately called the research attorney and instructed her to cease tweeting. Shortly thereafter, a meeting was held with the personnel director, public information officer, and the acting chief for the court of appeals. The attorney's supervising judge (who was traveling out of state) contacted her by phone and advised her she was being placed on leave and would be escorted out of the building.

She deleted her tweets and apologized for them, but the damage was already done. Her employment was terminated and, within days, she reported her conduct to the Kansas bar's disciplinary body. The former Attorney General's counsel filed a motion to stay his own disciplinary proceedings pending a decision on the "communications of support staff."

For over seven months, the research attorney was unemployed. She eventually found temporary employment doing document review at a law firm. Following a disciplinary hearing into her conduct, the panel concluded that she had

[1] Information about this incident can be found in Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 CORNELL L. REV. 879, 932-33 (2018). *See also* Debra Cassens Weiss, *Tweeting Lawyer Gets Lightest Sanction for Disbarment Prediction During AG's Ethics Hearing*, AM. BAR ASS'N J. (Jan. 15, 2014).

engaged in professional misconduct. It noted that the situation was aggravated by the fact that she had sent the tweets on court time, and that her position had given her a unique platform from which to speak.

The panel recommended an informal admonition—the lightest sanction possible—in light of several mitigating circumstances, including her lack of prior disciplinary history, her public apology and self-reporting, and her lack of law practice experience. And while the sanction itself may have been lenient, the damage had already been done to her professional reputation, and enshrined her as a cautionary tale for the Digital Age.

III. AN APPELLATE JUSTICE AND "TMI" ON FACEBOOK

From loose lips that can sink judicial ships, we move on to the perils of oversharing on social media—this time not by an appellate lawyer, but by an appellate judge.[2] In November 2017, an Ohio Supreme Court Justice was also a candidate for governor, and he decided to share his thoughts about sexual harassment on Facebook.

The post led to an immediate backlash, from his own party, his opponent, the media, and his colleagues on the court. He deleted his post, but posted new comments on Facebook, at first lambasting his critics. He later wrote a post apologizing for causing offense, but commending himself for elevating the discussion of sexual harassment.

Within twenty-four hours of that last post, he returned to Facebook, this time in more contrite fashion. He apologized for his original post, deleted it, and resigned from the bench shortly thereafter. He remained in the gubernatorial race, but finished a distant fourth in the primary.

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[2] Information about this incident can be found at Lindsey Bever & Marwa Eltagouri, *Ohio Governor Candidate Apologizes for Boasting of Sexual History with '50 Very Attractive Females'*, WASH. POST (Nov. 18, 2017), https://www.msn.com/en-us/news/politics/ohio-governor-candidate-apologizes-for-boasting-of-sexual-history-with-%E2%80%9950-very-attractive-females%E2%80%99/ar-BBF8oOB?li=BBnbcA1.

IV. IT'S 3 A.M.; DO YOU KNOW WHAT YOUR STAFF HAS BEEN TWEETING?

Appellate lawyers and judges should be aware of the ethical risks presented by their own misuse of social media. And because lawyers and judges have an ethical responsibility to supervise their non-lawyer employees, an area of significant concern is the social media activity of staff. For appellate courts, this includes all court employees, ranging from the "best and brightest" clerks who have recently graduated from law school and briefing attorneys to judicial interns, legal assistants and secretaries, and administrators. Because of this, appellate courts would be well-advised to adopt social media or internet usage policies for all employees (lawyer and non-lawyer alike). Courts' internal handling of matters before them are confidential, and courts must balance the First Amendment freedoms of current and prospective court employees with the courts' legitimate interest in protecting the integrity and efficiency of their work.[3] The online activities of court employees can implicate or even threaten multiple ethical obligations, including the duty to maintain confidentiality, the duty to avoid conduct that would jeopardize the integrity and independence of the judiciary, and the duty to avoid any conduct that would cause a reasonable person to question the impartiality of the court.

The Supreme Court of Texas has adopted a "Policy on Public Comment and Social Media Policy" that is a model for appellate courts everywhere. Reminding its employees that "Social Media is a public place," this policy states that:

> No Court employee, without Court authorization, may comment publicly:
> – on the Court's handling or decision of a case or administrative matter;

[3] There is a robust body of U.S. Supreme Court jurisprudence on the limitations that may be placed on the First Amendment rights of public employees, ranging from *Pickering v. Board of Education*, 391 U.S. 563 (1968) to *Garcetti v. Ceballos*, 547 U.S. 410 (2006). However, an extensive discussion of this topic is beyond the scope of this paper.

- on any case that is or may come before the Court;
- on any matter in such a way as to reasonably suggest that the Court or its staff is inclined to any view of a case that is or may likely come before the Court;
- on any matter in such a way that could reasonably be expected to generate controversy or disruption within the Court or its staff, impede their general performance and operation, or adversely affect working relationships necessary for their proper functioning;
- on any matter in such a way that could reasonably be expected to cast the Court in an unfavorable light, or subject it to criticism, or impair its relations with the other Branches of Government;
- on any matter in such a way as to reasonably suggest that the person speaks as a Court employee rather than as a private citizen.[4]

V. OTHER AREAS OF ETHICAL CONCERN

A. A MATTER OF COMPETENCE

Another reason for appellate practitioners to be cognizant of the ethical risks presented by social media use is the duty to provide competent representation to clients. Per Order of the Supreme Court of Texas on February 26, 2019, Rule 1.01 of the Disciplinary Rules of Professional Conduct (Competent and Diligent Representation) has been amended. It now includes a revised Note 8 adding that lawyers must be conversant in "the benefits and risks associated with relevant technology" as part of remaining "proficient and competent in the practice of law." In doing so, Texas became the thirty-sixth state to recognize a new requirement of tech competence, following the ABA House of Delegates' August 2012 approval of changes to the Model Rules of Professional Conduct.[5]

[4] The Supreme Court of Texas, *Policy on Public Comment and Social Media Policy*.

[5] *See generally* John G. Browning, *The New Duty of Digital Competence:*

This new duty of tech competence has been invoked in a wide variety of contexts, from implementing proper email protocols to maintaining encrypted electronic communications for the preservation of confidentiality to becoming proficient in electronic filing of documents. One of the areas in which tech competence plays a role, according to both court cases and ethics opinions, is the use of social media. And while appellate attorneys engaged in review of an appellate record or conducting legal research may not have reason to investigate a case or litigant on social media like a trial attorney, or to research the social media posts of prospective jurors, they engage on social media in other ways that have ethical dimensions—such as discussing a case on appeal in an online forum.

B. What Can You Discuss Online About a Case?

Like attorneys in virtually every other area of practice, appellate lawyers can benefit from the use of online platforms to ask questions of colleagues, share tips on written and oral advocacy, compare notes on judicial decision-making, and even engage in debate over the virtues of the Oxford comma. One such forum unique to Texas is the Texas Lawyers Facebook. Since launching in 2014, this group has expanded to more than 11,000 members, and has answered more than one million questions. Like the listservs of specialty bars, this forum provides an online presence where Texas lawyers can give and receive advice in a private, judgment-free environment. For the appellate bar, there is #AppellateTwitter. Launched in 2016, this national online community for appellate specialists provides members with a chance to discuss mandamus strategies, legal research tools, amicus brief rules in a given jurisdiction, dealing with "benchslaps," and even job opportunities. Given the often isolated nature of appellate work, #AppellateTwitter members frequently point to the benefits of obtaining feedback, tips, and mentoring from being a part of this online community.[6]

Being Ethical and Competent in the Age of Facebook and Twitter, 44 Dayton L. Rev. 179 (2019).

[6] Richard Acello, *#AppellateTwitter Lawyers Chat, Help One Another and*

But discussing one's cases online carries certain risks, particularly if a lawyer is not careful about confidential information. In August 2018, the Professional Ethics Committee issued Opinion No. 673, which asked whether a lawyer violated the Disciplinary Rules of Professional Conduct by seeking advice for the benefit of the lawyer's client from other lawyers in an online discussion group. Acknowledging the growing presence of online forums like the Texas Lawyers Facebook Group, the opinion noted how common it is for lawyers to have informal, lawyer-to-lawyer consultations to "test their knowledge, exchange ideas, and broaden their understanding of the law."[7] Engaging in the same practice online passed ethical muster, the Opinion concluded, as long as the discussion is limited to "general" or "abstract" inquiries and confidential information is not divulged. Even so, if a hypothetical is used that might match or identify a specific person or entity, an online discussion done without the client's consent may violate the Disciplinary Rule.

In a recent Formal Ethics Opinion, the ABA adopted a particularly conservative approach. In 2018's Formal Opinion 480, entitled "Confidentiality Obligations for Lawyer Blogging and Other Public Commentary," the Committee imposed a heightened duty of confidentiality for lawyers who communicate publicly on the internet, holding that lawyers may not reveal information relating to a representation, *including information contained in a public record*, unless authorized by a provision of the Model Rules.[8] In other words, for lawyers considering commenting about their cases in blogs, tweets, Facebook posts, listservs, podcasts, and of course more traditional avenues of communication, the ABA views confidentiality as so fundamental to the lawyer-client relationship that it

Even Develop Business, AM. BAR ASS'N J. (July 1, 2019), http://www.abajournal.com/magazine/article/appellate-twitter-lawyers. The author can attest to the benefits of #AppellateTwitter.

7 Opinion No. 673, Professional Ethics Committee of the State Bar of Texas.

8 Formal Ethics Opinion No. 480, *Confidentiality Obligations for Lawyer Blogging and Other Public Commentary*, AM. BAR ASS'N (Mar. 6, 2018) (emphasis added).

will apply even to information that may be publicly available and easily obtained. While this opinion acknowledges that new online platforms provide "a way to share knowledge, opinions, experiences, and views," it nevertheless points out that, while "technological advances have altered how lawyers communicate, and therefore may raise unexpected practical questions, they do not alter lawyers' fundamental ethical obligations when engaging in public commentary."[9]

VI. CONCLUSION

In today's digital environment, social media allows commentators incredible reach with the blinding speed of a search engine. Consequently, appellate attorneys—like their counterparts in other practice areas—need to be mindful of that when they express opinions online or on social media platforms, even when they think they are acting in a purely personal capacity. Lawyers face heightened public and ethical scrutiny when they make statements on social media, so if you wouldn't put it in a letter or pleading, you probably shouldn't post it on Facebook or tweet about it.

[9] *Id.*

Judicial Selection Report

During the last session, the Texas Legislature created the Texas Commission on Judicial Selection, which is charged with studying the fairness, effectiveness, and desirability of selecting judges through partisan elections, as compared with other methods for selecting judges.

In connection with its work, the Commission invited the Appellate Section to weigh in on potential methods of selecting appellate judges. Given that the Appellate Section is not taking any position on these issues, the Section responded to the invitation by conducting a survey to gauge the opinions of individual members of the Section. The survey was conducted electronically between May 22 and June 1, 2020, and 546 members completed the survey.

The survey contained four questions. In the first question, respondents were asked to consider seven concerns with potential relevance to various methods of selecting appellate judges. "The selection of judges who lack relevant experience or qualifications" was the primary concern of respondents, with 88.3% saying it is very or extremely important to reduce or eliminate this concern. "The selection of judges based primarily on friendships or political relationships" was second, with 75.0% saying it is very or extremely important to reduce or eliminate this concern. "Pressure on a sitting judge from his or her political party" was third, with 72.7% saying it is very or extremely important to reduce or eliminate this concern.

In the second question, respondents were asked to rank seven potential methods of selecting appellate judges. Their preferred method was non-partisan elections. The second most preferred method was a gubernatorial appointment for a term of years, to be followed by non-partisan elections. The third most preferred method was a gubernatorial appointment for a term of years, to be followed by retention elections in which voters decide whether to retain or replace the judge.

In the third question, respondents were asked whether, if Texas were to establish a bipartisan judicial qualifications committee, they believed such a committee would fairly and objectively assess the qualifications of potential judges without regard to political considerations. This question was answered "yes" by 54.5% of respondents and "no" by 39.2%, with 6.3% expressing no opinion.

In the fourth and final question, respondents were asked whether Texas should require that a potential judge be approved by a bipartisan judicial qualifications committee as a prerequisite to being either appointed or included on a ballot. This question was answered "yes" by 62.0% of respondents and "no" by 31.4%, with 6.6% expressing no opinion.

The survey results were presented in a written report and testimony to the Commission at its meeting on June 5, 2020. The written report also contains 167 written comments that survey respondents provided to the Commission.

"It's interesting to me that so many people took the time to address this issue, which at least tells me that this is an issue that is very high on everyone's radar," David Beck, Chair of the Commission, said of the survey. Thomas R. Phillips, former Chief Justice of the Texas Supreme Court, echoed that view. "Having a sense of what the problems are and what the solutions might be from 500 active appellate practitioners and judges will be very helpful to this Commission and its work."

Appellate Rules Subcommittee's Report on TRAP Survey Results to the State Bar of Texas Appellate Section Officer's Council

I. Background

At the direction of State Bar of Texas Appellate Section leadership, the Appellate Rules Subcommittee conducted a survey of the Section membership to elicit comment concerning the Texas Rules of Appellate Procedure (TRAPs). The survey consisted of a single question:

> How are the TRAPs working today?
>
> The State Bar of Texas Appellate Section Rules Committee is surveying Texas lawyers to hear your comments and suggestions as to whether any refinements or revisions to the Texas Rules of Appellate Procedure are warranted. Are there existing TRAPs that need improvement or elimination? Problems that should be addressed by new or different TRAPs? Or the TRAPs "ain't broke, so don't fix" them?
>
> We would love to hear from you via the Appellate Section's Facebook page, our Twitter feed, or send your ideas to texasappellateruleideas@gmail.com.

This question was disseminated to the Section membership at large beginning in July 2019, through means that included blast emails, Facebook postings, and announcements made at the Fall 2019 Section meeting and the State Bar Advanced Appellate CLE. An abbreviated, Twitter-compatible version of the same inquiry was also contemporaneously disseminated through that

platform. The survey remained open into the present Section year, under the currently constituted Subcommittee, while awaiting the publication of the Winter 2019 *Appellate Advocate*, which was to advertise the survey and include the full survey question. Shortly after that edition was published, a round of follow-up or "last call" emails, Facebook postings, and tweets were sent to Section members advising that the survey would close at the end of February 2020.

II. The Responses

The survey elicited a total of nineteen responses from seventeen individuals, although two of the respondents did not speak to the TRAPs or any particular rule. Notably among that pair, Judge David Newell took the opportunity to remind Section leadership that the Court of Criminal Appeals, like the Texas Supreme Court, has its own Rules Advisory Committee, and provided an email address through which that body accepts rules-related suggestions.[1]

The relatively small number of survey responses perhaps implies a predominant "ain't broke, so don't fix it" view among Section members, or at least that any problems that may exist in the TRAPs are not widely perceived to be of sufficient scope or gravity to warrant the bother of submitting a comment, even with the convenience of multiple electronic means for doing so. Yet it is the quality rather than quantity of responses that matters most, and the comments that were received included a number of thoughtful suggestions as to ways to improve the TRAPs. Two topical areas were most prominent: (1) the ramifications of efiling or other modern technological innovations for appellate practice; and (2) motions for en banc reconsideration.

[1] Judge Newell provided the following email address: TxCCARulesCommittee@txcourts.gov.

In addition to Judge Newell's comment, attorney Andrew Olivo urged greater clarification regarding the scope of representation of court-appointed counsel in parental-termination cases. The issues raised by Mr. Olivo would appear to implicate legal standards or policies beyond the TRAP realm.

A. E-innovation and its implications

Three respondents—Texas Supreme Court Clerk Blake Hawthorne, Lucy Forbes, and Tyler Talbert—urged that the TRAP requirements relating to the designation of the clerk's record and related fees should be abolished in favor of the current federal approach of requiring trial court clerks to transmit the now-wholly-electronic clerk's record to the court of appeals automatically and for free whenever an appeal is filed. They suggested that while the current rule may have been warranted by cost considerations back in the paper era, it serves only to add unnecessary expense and inefficiency now that there is little or no incremental cost to reproducing and transmitting documents in electronic form.

In addition to citing these benefits for all litigants, Ms. Forbes stressed access-to-justice considerations in support of the change. And to that same end, Ms. Forbes would similarly leverage recent technological advances to combat inefficiencies and expense currently associated with the reporter's record and a growing shortage of court reporters. While "mean[ing] no disrespect to the hardworking court reporters," she maintained that "[t]he Reporter's Record should be transcribed in such a way that it only requires human intervention in the event that the transcription is needed" and that [t]he pay system should be re-visited also." She added that "[t]he Supreme Court should be proactive with implementing rules for technology aids in transcription with safeguards so that indiscernible words can be deciphered. There is no reason a court reporter has to be present unless a record is needed."

Two more respondents advocated greater reliance upon efiling in criminal cases to reduce expense and procedural burdens. Observing that "efiling is mandatory now [and] [t] he motions are automatically forwarded to the judge's email in every system," Patrick McCann urged that "[t]he presentation in open court rule within ten days [under TRAP 21.6, concerning new-trial motions in criminal cases] is antiquated and no longer needed." Shana Stein Faulhaber insisted that it is "[t]ime to do

away with paper copies to the CCA."

But a final comment on the e-subject, submitted by Rich Robbins, sounded a cautionary note. He suggested that the Texas Rules of Civil Procedure are now "more supportive" than the TRAPs in the event of efiling-related-technical failures.[2] He recommended that this aspect of the TRAPs be revised or updated to conform to the TRCP.

B. Motions for en banc reconsideration

Two respondents, Michael J. Ritter and Anne Johnson, called attention to uncertainty regarding the meaning of "when permitted" in TRAP 49.7's second sentence[3] when a motion for en banc reconsideration is filed after a motion for panel rehearing is overruled, which had recently prompted a three-way split of the en banc Dallas Court of Appeals.[4] Additionally,

[2] Mr. Robbins cited as examples TRAP 9.2(c)(5) ("If a document is untimely filed due to a technical failure or a system outage, the filing party may seek appropriate relief from the court.") and 9.4 ("Nonconforming Documents. If a document fails to conform with these rules, the court may strike the document or identify the error and permit the party to resubmit the document in a conforming format by a specified deadline."). He contrasted these provisions with TCRP 21(6) ("Technical Failure. If a document is untimely due to a technical failure or a system outage, the filing party may seek appropriate relief from the court. If the missed deadline is one imposed by these rules, the filing party must be given a reasonable extension of time to complete the filing.") and (11) ("Non-Conforming Documents. The clerk may not refuse to file a document that fails to conform with this rule. But the clerk may identify the error to be corrected and state a deadline for the party to resubmit the document in a conforming format.").

[3] *See* TRAP 49.7 ("A party may file a motion for rehearing as a separate motion, with or without filing a motion for rehearing. The motion must be filed within 15 days after the court of appeals' judgment or order, ***or when permitted***, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration. . . .") (emphasis added).

[4] *Cruz v. Ghani*, 593 S.W.3d 376 (Tex. App.—Dallas 2019, pet. denied). To summarize the competing analyses, (1) in the majority opinion for the thirteen-member court, seven justices concluded that "when permitted" included any period in which the court still had plenary

it happened that Mr. Ritter had authored a law review article in The Review of Litigation in which he advocated rule revisions to address that issue and various other aspects of Rule 49. He submitted the following excerpt from the then-current draft:

> B. Recommendations for the Bench
>
> This subpart makes recommendations for Texas's high courts and courts of appeals. Because Texas's high courts no longer sit in panels and consider whether to grant en banc review, these recommendations focus on the high courts' rulemaking authority and on how courts of appeals can more efficiently and consistently decide whether to grant en banc review.
>
> 1. For Texas's High Courts
>
> To assist courts of appeals in more efficiently and consistently deciding whether to grant en banc review, the Supreme Court of Texas and Court of Criminal Appeals should consider clarifying what satisfies Rule 41.2(c)'s uniformity and extraordinary circumstances standards. The high courts should also consider clarifying the requirements of the contents of en banc motions and the intended deadline for such motions when a motion for panel rehearing is filed.[1] Despite several revisions to Rule 49, the rule remains unclear as to whether a motion for en banc reconsideration must contain "points" similar to motions for panel rehearing or whether the "points" for en banc reconsideration

power, and found jurisdiction on that basis, *id.* at 382; (2) four dissenting justices concluded that "when permitted" incorporated Rule 49's limitations on subsequent or multiple motions for rehearing (i.e., essentially the treating motion for en banc reconsideration as a subsequent motion for rehearing for those purposes), which made the en banc motion untimely, *id.* at 398; and (3) two concurring justices found jurisdiction by relying on the principle that appellate courts should reach the merits if an "arguable interpretation" of the rules would permit it to do so, *id.* at 386.

are arguments regarding the en banc standards. Federal Rule 35 has served as a model for promulgating Rule 49 and the original rules for en banc review; Federal Rule 35 remains a model for promulgating a separate rule that specifically addresses only motions for en banc reconsideration.[2] Much of the lack of clarity in the Texas Rules of Appellate Procedure can be resolved by using consistent terminology to refer for motions for panel rehearing and motions for en banc reconsideration, instead of using the terms interchangeably in some parts, but not in others, or merely by creating a separate rule for each type of motion. The high courts should also consider promulgating page or word limits for motions for panel rehearing and en banc reconsideration.[3]

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[1] See, e.g., Cruz v. Ghani, No. 05-17-00566-CV, 2019 WL 3282963 (Tex. App.—Dallas July 22, 2019, no pet.) (en banc) (revealing significantly divergent views of the rules governing motions for en banc reconsideration).

[2] See Fed. R. App. P. 35 (providing the same uniformity standard used in Texas Rule 41.2(c)).

[3] See Tex. R. App. P. 9.4(i) (setting word and page limits for filings, but not for motions, such as a motion for en banc reconsideration).

Finally, Dylan Russell suggested that clarification was needed as to whether a motion for en banc consideration can ever be filed in an original proceeding, including after a motion for rehearing is filed and denied.

* * *

The remainder of the responses consisted of solo comments addressing various other TRAPs or proposing new TRAPs.

C. Supersedeas

Michelle Dawn Daniel urged, "Please clarify motion to increase security under 24.4 when there has been an evidentiary

hearing in the trial court. How do you get a prompt hearing on the issue of a supersedeas bond if you have to get findings of fact and conclusions of law? Deadlines, briefing, etc very unclear in that situation."

D. Perfecting appeal

Daniel Olds recommended a revision to TRAP 25.1(a) ("If a notice of appeal is mistakenly filed with the appellate court, the notice is deemed to have been filed the same day with the trial court clerk"). In his view, "mistakenly" seemed to imply a mens rea standard—i.e., "if the appellate court clerk knows that the notice of appeal was not filed with the appellate court mistakenly, but rather intentionally (i.e., the appellant knew where to properly file the notice of appeal but chose to file it with the appellate court instead), then the appellate court should reject the filing." As far as he was aware, though, no appellate courts were actually rejecting the filing in such an instance.

Depending on the proper meaning and import of "mistakenly," Mr. Olds offered three alternative recommendations. First, if "mistakenly" denoted a mens rea standard, Mr. Olds recommended revising the rule to clarify that the appellate court must determine whether the notice was filed with it mistakenly, as opposed to intentionally, and in the latter case reject the filing. If, on the other hand, "mistakenly" did not have that import, Mr. Olds recommended revising the rule to make it clear that the notice of appeal may be filed in either the trial court or the appellate court—or simply delete "mistakenly." He termed the latter option "probably the simplest fix," and one that "would not alter the way things currently work."

E. Error preservation

Jason Edward Niehaus urged that Rule 33.1 "has, for criminal cases, become next to meaningless in instructing

Counsel how to preserve error" and "should be amended to provide for when contemporaneous objection is insufficient to preserve error." He cited, by way of illustration, voir dire, jury charge, untimely disclosure of experts, untimely disclosure of extraneous offenses (TRE 404, 609 and CCP 37.07), and discovery/39.14 violations ("pending *Watkins* decision by CCA").

F. Dismissals

Daniel Olds also suggested a revision to TRAP 42.1(a)(2) (authorizing a court of appeals to dismiss an appeal "[i]n accordance with an agreement signed by the parties or their attorneys" and "render judgment effectuating the parties' agreement"). Mr. Olds proposed that the rule be revised to "specify that the parties or attorneys must physically sign the agreement, and not be permitted to electronically sign the agreement or sign for the other party." He explained his underlying concern as follows:

> The consequences of an agreement under TRAP 42.1(a)(2) are steep; the parties may be able to have the appellate court reverse the trial court's order and render judgment. In order for such a key action to take place, I think it would be good to force the parties to physically sign the agreement.
>
> First, even without attributing any malice on the part of either party, forcing physical signatures will lessen the possibility of any confusion about what the parties intend to do. For example, if the appellee's counsel tells the appellant's counsel that the appellant's counsel can sign for them, it is possible that the appellee's counsel may have misunderstood what the agreement said, and will thus have unintentionally given permission to lose their case. Similarly, if the appellee's counsel were to just electronically sign the agreement, they may not read

the agreement with full comprehension.

> To be sure, one can generally sign pleadings electronically, or even for other attorneys with their permission. However, when the consequences of such an agreement are so severe, I think it is best to force the parties to physically sign the agreement.
>
> Second, I think the rule should be revised in this way because at least some appellate courts, if not all, already operate this way. At least some courts will not honor an agreement pursuant to TRAP 42.1(a)(2) if the agreement has not been physically signed by the parties or their counsel.

G. Jurisdictional questions

Lisa Hobbs "would love an appellate rule that says, once a motion to dismiss is filed challenging the court's jurisdiction, the briefing deadlines are stayed pending a ruling on the motion to dismiss." She cited past experiences with having filed a meritorious and ultimately successful dismissal motion yet ended up having to brief the merits anyway (at her client's expense) while "the appellate court sits on it."

H. Post-submission briefs

Danny Davis proposed that the TRAPs should specifically address post-submission briefs. He observed that post-submission briefs can be useful and shouldn't be prohibited ("there are always moments where you forget a citation under the stress of argument or walk out of the courthouse thinking 'why didn't I say this?'") but could also "be abused as an opportunity for another round of briefing." He offered the following suggestions as to components or general guidelines for such a rule or rules:

Word count: My personal recommendation would be to keep post-sub briefs short, perhaps as short at 1200 words (half the length of the shortest existing page limit, a reply to a PFR). In my experience, clarifying something said at oral argument or providing citations can be easily done in that space. Any more just encourages re-arguing points already made.

Deadline: My personal recommendation for a deadline would be two weeks after the date of oral argument. Obtaining a recording of the oral argument takes little time, whether it's automatic (i.e., Supreme Court), by order (i.e., Houston), or impossible (i.e., Beaumont). Nor does it take much time to turn a recording into a transcript if desired. So in my experience, two weeks is plenty of time to accomplish the purpose of a post-submission brief. Extensions would be available if necessary, but I think a short deadline would set the tone that it can't be dragged out indefinitely.

As a former briefing attorney, I think a short deadline would also be appropriate because it's annoying to keep getting new things to deal with while trying to get an opinion out.

There's a question of whether the parties should have concurrent deadlines or sequential deadlines. Personally, I'd prefer concurrent, where both parties simultaneously address the oral argument, rather than sequential where one party uses their post-sub brief to address the other party's post-sub brief.

Permission: Some courts require a motion for permission to file a post-sub brief (i.e., El Paso, Beaumont), while others don't (i.e., Supreme Court, Houston). The only time I've seen permission denied is when the brief flagrantly violated my proposal above (a 50-page

brief that basically rehashed the entire case), so it's possible that enforceable rules might make motions for permission to file superfluous. But, that's a question better left to the judges than me, so maybe just leaving it subject to local rules is appropriate.

I. Anti-complexity measures

Voicing concern that complexity in court rules and procedures tends to favor "the wealthy and powerful" at the expense of those less so, Jason Boatright proposed that "[i]f a rule makes things harder on litigants but easier on courts, the tie should go to the litigants and the rule should be repealed." Mr. Boatright expressed similar concerns about a rule-interpretation jurisprudence that he perceived not to always be anchored firmly in the rules themselves. "Whatever the rules are," he urged, "courts need to follow them as written."

III. Conclusion

The Subcommittee is pleased to share this Report with readers of the Appellate Advocate.

Appellate Section Oral History Project
The Honorable Margaret Mirabal

Interviewed by Justice Tim Taft on December 10, 2002
Transcribed by Shannon Irion Morris on September 28, 2018

This interview was conducted on December 10, 2002, by Justice Tim Taft, Justice of the First Court of Appeals in Houston.

Attending were: Justice Adele Hedges, Justice Terry Jennings, Trey Gearhart, Chad Newton, Rachel Allen, Larita Reyes, Diane Kilpatrick, Sharon Kahn, Frank Evans, Maury Simpson, Janet Williams, Terry Jennings, Frank Price, Russ Hollenbeck, J.B. Wilson, Eddie Shoals, Margie Thompson, George Hebert.

J. TAFT: We have a whole series of questions here that appear to be fairly chronological, so, let me just start off with a few and we can pass this around.

J. TAFT: When did you come onto the [First Court of Appeals]?

J. MIRABAL: December 9, 1988. In fact, last night I was celebrating my 14th year on the court … I came on the court in December because I won an unexpired term … the reason I ran for the court of appeals at all is because I had run in the Democratic Primary the preceding March and had lost. And then, lo and behold, Ken Hoyt went to the federal bench and I had just run a campaign, a good campaign and that's why I got the Democratic nomination by the county chairs because I had just run a good campaign and I lost by a very small margin. So that, I find this in life, you know, I guess a lot of people do, but I go for one thing, doesn't work out and then a door opens because then that June there was this opening, I ran for it and I won. I just ran for the Supreme Court and I didn't win. But a door is opening I'm hoping, you know.

J. TAFT: The next question deals with what you were doing before you joined the court and I guess that would go together with what motivated you to run?

J. MIRABAL: Immediately before I went on the court, I was the head of a law firm, Mirabal & Associates. I was by myself and I had associate attorneys on the staff. And I was, prior to that appointment, I had been doing that since 1981. Before that I was with Sheinfield, Maley & Kay. Before that I was a briefing attorney for the court … I got married in August, I got married in June of my year as a briefing attorney on the court. I was Judge Evans's briefing attorney and when I left the court he highly recommended me to his former partners, so I went to his former law firm, anyway, and then I, in 1981 formed my own firm and one of the clients stayed with me that I was working with. So, by 1987 I had been the head of the law firm for six years, I'd been practicing law for 13 years. I was given all the administrative stuff about being the head of the law firm and bringing in the clients, hiring, firing, and billing and all that stuff, I was truly getting a little burned out, I was ready to look for something else. And Judge Evans called me one day and asked me, have you ever thought of running for the court of appeals.

* * *

J. TAFT: You've worked under three Chief Justices, what can you say about each? What did you learn from each?

* * *

J. MIRABAL: The first Chief Justice that I worked under was Chief Justice Evans. He was Chief Justice until January of '91. Then the Governor appointed Alice Oliver-Parrott, she was a trial judge, district trial judge here in Harris County … Each Chief Justice has their own style. Chief Justice Evans, it was a more laid-back court when he was chief

justice. Beth Warren was here; Sam Bass was here; Lee Duggan… We used to have meetings once a week when you were Chief Justice, we'd go over the docket … it was not unusual if a judge got kind of behind on the docket, because of a heavy case, Judge Duggan, I mean Judge Evans came to me one time and said Margaret I'll take over this case and write it for you if you need to because I know you're working on this huge case, I think I may have had exhibits all over my office, it was very nice, but of course I said no, I'll do it, you know, if I work later and harder I'll get it done. But, when Justice Oliver-Parrott came we didn't have as many meetings, she was personable and Chief Justice of the Court, a very dynamic personality, I don't know if any of you know her. And we ended up going from two women attorneys on this court to have three with Chief Justice Oliver-Parrott. At one point we had five before now, when we were majority women on the court, then it came back down to where we were not majority, now we're majority of women again, which is just something to note. I don't know what that means exactly, but I mean it's okay. And then of course Judge Schneider got us all up to date on docketing and we were very organized and, an excellent administrator. All three of them were excellent to work under … A Chief Justice gets $500 a year more than the rest of us and yet, the Chief Justice has to do two cases a week as well as run the court and all the administrative stuff.

J. TAFT: Looking back what is your most outstanding experience as a judge, both good and bad?

J. MIRABAL: Most outstanding?

J. TAFT: Most memorable, maybe?

* * *

J. MIRABAL: … [The] most fun I have in writing opinions

comes from writing dissents … because you have so much more freedom, I mean all the facts and everything is already set out in a majority opinion and when you're expressing your dissent, you can just sit there and like it flows, it's fun. I hope you all enjoy the research and writing. There have been times that I've left the office at 9:30 at night and I walk out, this is only six months ago. I'd just finished writing a dissent and sort of a difficult case and I looked at my office and said oh, I just love this this, I do, I just love it.

J. TAFT: What advice would you give to a new briefing attorney on the court?

J. MIRABAL: … You need, I mean, take the job extremely seriously because what you are doing really does affect the lives of the people who have had their trial and have appealed it. It's not just let's get this opinion done and out the door, what we write has an impact, a personal impact on the people who are involved. I know there's a lot of pressure to meet the deadline and let's get it out the door … You've got to look at the facts and see how the law applies to the facts of this case. And here's Judge Cohen.

* * *

J. TAFT: Going back to when you first came on the court as a judge, what advice, tips, information, recommendations would you have wanted to hear that maybe you did hear or maybe you didn't hear what kind of guidance would you have liked to have got when you first came on?

J. MIRABAL: … I would have liked to have known about the new judges school that they have in November. I didn't get invited either because I came on and I found out afterwards … There's a new judges school for people who just won an election or just been appointed, for trial judges as well as appellate judges and I felt like, you know, that probably

would have been a good thing to go to.

* * *

J. TAFT: Who was your mentor and what was the best or worse advice ever given to you?

* * *

J. MIRABAL: The one person who has been a mentor throughout my life has been Judge Evans … It was through his help that I ended up from the court going to his former law firm and it was an excellent experience. Judge Evans was very active in the bar associations, has always been, the local, state, and American Bar Association, and through him, he has all his former briefing attorneys involved in the bar activities and as a result I just kind of got the fire for it because the lawyers, we had a duty to give back to the community, instead of working through my church through the Bar Association and I remember talking to you at one time, I had served with you on a committee for looking at whether we should have a pro bono, a lawyer, and I had mentioned to Judge Evans that I'd like to chair that sometime… And I think you must have mentioned it to the president of the bar because I got appointed and I served as Chair for three years and we did quite a few pro bono program 20 years ago and it's still in operation and it has done a lot of good. And also with the mediations, ADR in Texas and I was in the first class of mediators training, and then he's the one brought up the idea of me running for the court. And so, keep in touch with your judges over the years because, you know, they are wonderful mentors.

* * *

J. TAFT: Well, let's talk a little bit about your interest in video cameras, where did that come from? How many tapes do

you think you've made of the court, where are they now?

J. MIRABAL: I got my first video camera when we had our first daughter because I wanted to capture every little moment, so I'm a big believer in pictures and video cameras. Even when I go traveling, and we love to travel, my husband has a photographic memory. He can remember everywhere he's been. I need pictures because it all kind of runs together for me. But, so video cameras since January 7 when I had my first daughter and then years at the court, the same thing. All these wonderful people and wonderful events and the court family. The court is really a family … But, at the court to keep a history. So, people have made fun of me, I think Judge Hedges or Cohen, or somebody, one time they said oh, here comes Judge Mirabal with a video camera. So, the next meeting I didn't bring one, you know.

* * *

J. TAFT: How do you want to be remembered and described as a judge?

J. MIRABAL: Fair, dedicated. I don't know about brilliant, but objective. The one thing I did learn as a briefing attorney when I first worked for the court, in fact that was my first job for the court because I wasn't an advocate yet. I hadn't been in private practice yet. I come to the court and my job is to be objective. And so for one year that was my job is to look at both sides and then come up with my own recommendations and then I went off to private practice and was an advocate, but come back to the court as a judge, the training I had as a briefing attorney, you know, was extremely good because it was not hard to get back to that. And, I'm proud of that because I do try to be totally objective, look at the facts, look at the law and the case comes out the way it comes out. I do not approach a case with any kind of agenda, and I'm proud of that.

J. TAFT: What do you think your legacy is to the court?

J. MIRABAL: Videotape.

* * *

J. TAFT: You've mentioned something of the joy you found in the job, what did you enjoy least about being a judge on the court?

J. MIRABAL: Running for election and re-election. I was elected in '88 for an unexpired term so I had to run again in two years. Every time I ran I had an opponent. But you still have to raise the money and you still have to take time away from writing your opinion and it takes time away from the court, docket goes back up because you're out there, you want to keep your job and you're out there campaigning. I never was lucky like Judge Cohen in having an opponent file against me and I somehow got him off on technicalities … I ran again in '90 and I ran again in '96, and this time I ran for the Supreme Court. I ran for the Supreme Court in '94, too … and the worst part is in '96, and I don't know if I should say this in here. In '96, I got an opponent, I'm Democrat, he's Republican, he's a nice guy, but … he didn't raise any money, he didn't campaign, the day of the election he was out of town, a family vacation. He put his name on just thinking the "R" would win it for him. And, before '96, in the earlier days on the court I would work weekends, I'd work late at night, I would review all the full court circulations— After that election I won, I hardly, I won by half a percent. I got 50.5 percent of the votes, and it just like hit me, the voters don't care, nobody really, I mean it's the system, no matter how hard you work, if I didn't work at all, if I just goofed off and played golf every day, it would make no difference. That's not quite true, as I got all these endorsements and lawyers and I did win, but I won by so little. And now I review published full court circulations,

I don't work the weekends near like I used to, and nobody does, it's ineffective. I shouldn't have said that, probably, here.

J. TAFT: Maybe that leads into the next question. If you could change one thing about being a judge, what would it be?

J. MIRABAL: I would change the way judges are selected.

* * *

* * *

J. TAFT: And finally, is there anything about being a parent that influences you as a judge or as a judge that influences you as a parent?

J. MIRABAL: I think that, I think all of the judges come to the court with their past life experiences, we do. And, I mean, of course, you do, but I think each of us as a result maybe gleans the facts of cases a little bit differently. I remember a case that Judge Cohen and I and Judge Hedges were on, I think it was dealing with bad facts, a woman gave birth in ambulance and the baby died, before it was born. And the issue was, under Texas law because the baby wasn't born, you can't recover for the death of a fetus, but a mother can recover, we held, and along with time for the emotional and, the harm that she suffered physically herself. And I remember talking and Adele and I could understand that and Murry commented, I'm sure glad I have y'all on the panel because, you know, he really hadn't clued in on it.

* * *

J. MIRABAL: I am going to miss it here. I have loved almost all of the moments … I don't know what the future holds, I'm just real proud to spend the last 14 years with you all.

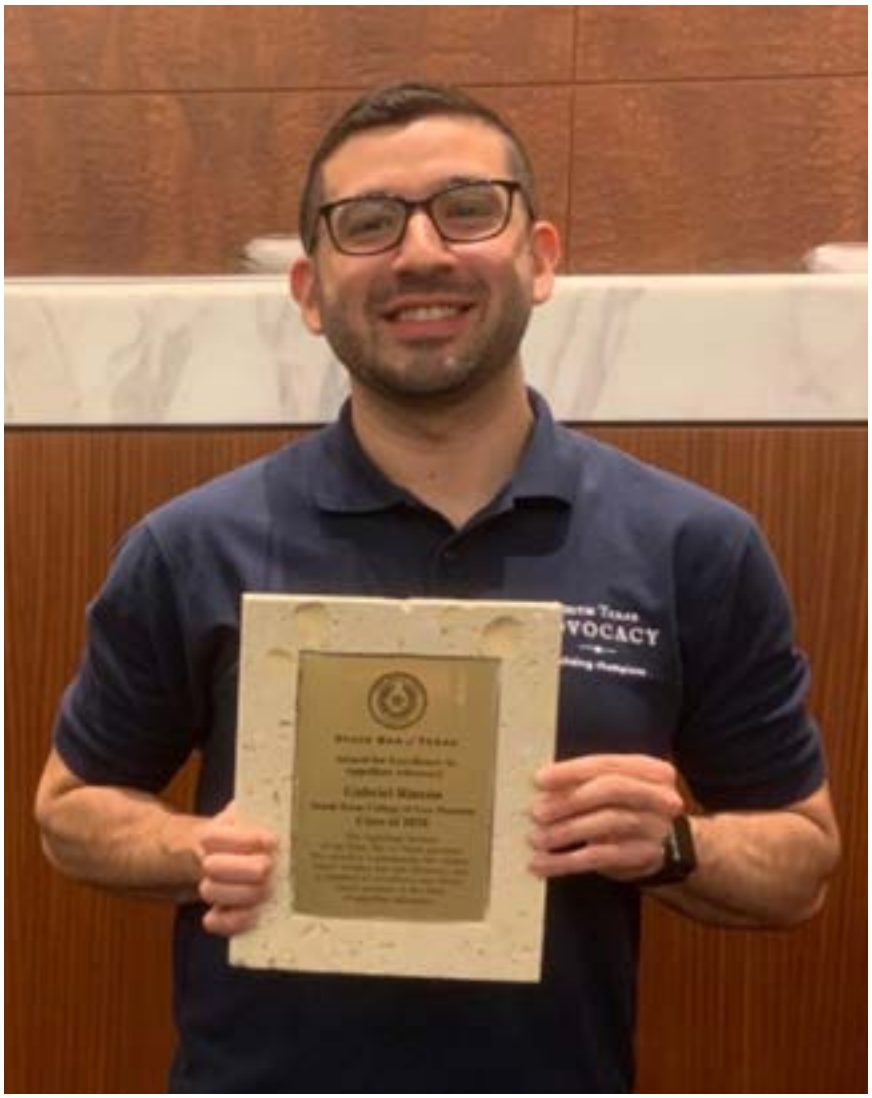
Appellate Section's 2020 Excellence in Appellate Advocacy Award

Susannah E. Prucka, Midland County District Attorney's Office

In Spring 2020, the Appellate Section recognized a graduating law student at each of Texas's ten law schools who has shown excellence and career promise in appellate advocacy with the Excellence in Appellate Advocacy Award. The Section congratulates these fine advocates and welcomes them to our profession!

Baylor Law School: Haley Mowdy Owen

SMU Dedman School of Law: Roslyn Dubberstein



South Texas College of Law: Gabriel Rincon

St. Mary's University School of Law: Natsumi Covey

Texas A&M University School of Law: Ian Klein

Texas Tech School of Law: Brooke Bohlen

Thurgood Marshall School of Law, Texas Southern University: KaieEssence Bodden

University of Houston Law Center: Rebecca Sonne

UNT Dallas College of Law: Kamran Anwar

University of Texas School of Law: Amber Magee

• • •

(Not pictured:)
Law School Liaison Committee Chairs
Jennifer Caughey and Susannah E. Prucka

United States Supreme Court Update

Matthew Frederick, Deputy Solicitor General, Office of the Solicitor General of Texas
Andrew Guthrie, Associate, Haynes and Boone, LLP, Dallas
Taylor Whitlow Hoang, Assistant Attorney General, Office of the Attorney General of Texas
Ryan Paulsen, Counsel, Haynes and Boone, LLP, Dallas

Bankruptcy

***Ritzen Group, Inc. v. Jackson Masonry, LLC*, __ S.Ct. __ (2020)**

After Jackson Masonry filed for bankruptcy, one of its creditors (Ritzen Group) filed a motion for relief from the automatic stay imposed by 11 U.S.C. § 362(a) so that it could continue pursuing its breach of contract claims against Jackson Masonry in state court. The Bankruptcy Court denied the motion, but Ritzen did not immediately appeal. Instead, it pursued its claims in an adversary proceeding before the Bankruptcy Court, which were denied on the merits. Ritzen then sought to appeal both the merits of its claims and the earlier order denying relief from the automatic stay. The District Court held that the latter appeal was untimely and the Sixth Circuit affirmed. Under 28 U.S.C. § 158(a), an appeal as of right lies from "final judgments, orders, and decrees" entered by bankruptcy courts "in cases and proceedings." The Sixth Circuit determined that Ritzen's motion for relief from the stay qualified as a discrete "proceeding" with its own appellate timetable, and that Ritzen missed its deadline by not appealing within 14 days of the denial.

The Supreme Court held that a motion to lift the automatic stay in bankruptcy cases is a distinct "proceeding" that terminates in a final, appealable order when the bankruptcy court denies the motion.

The Supreme Court affirmed in a unanimous opinion by Justice Ginsberg. The Court previously held in *Bullard*

v. Blue Hills Bank, 575 U.S. 496, 501 (2015), that the appeal provisions in Section 158(a) make orders in bankruptcy cases "immediately appeal[able] if they finally dispose of discrete disputes within the larger [bankruptcy] case." The Court agreed with a majority of circuits and leading treatises that an order denying relief from the automatic stay constitutes just such a final, immediately appealable decision. The Court found that a bankruptcy court's ruling on a stay-relief motion disposes of a procedural unit anterior to, and separate from, the merits of the claim-resolution proceedings. It also held that making such orders final and immediately appealable is more consistent with the text of the Bankruptcy Code and more efficient.

Civil Rights

***Comcast Corp. v. Nat'l Assn. of African American-Owned Media*, 140 S. Ct. 1009 (2020)**

Entertainment Studios Network ("ESN"), a television network operator owned by African-Americans, sought to have Comcast Corporation carry its channels. When Comcast refused, ESN sued, alleging violations of the statutory right "to make and enforce contracts" guaranteed by 42 U.S.C. § 1981. The district court dismissed the claim for failure to show "but for" causation, but the Ninth Circuit reversed, holding that it was enough to show that discrimination played "some role" in Comcast's decision.

The Supreme Court vacated and remanded to the lower court in an opinion by Justice Gorsuch. Longstanding tort law requires plaintiffs to establish "but for" causation at all stages of the lawsuit. The Court rejected ESN's arguments that section 1981 modified these requirements. The text, context, and history of the statute indicate that "but for" causation is required throughout the course of a lawsuit. The text of the statute does not support the "motivating cause"

The Supreme Court held that a plaintiff alleging violations of 41 U.S.C. § 1981 must show "but for" causation throughout litigation proceedings.

standard advocated by ESN, and another provision of the statute uses language, such as "on account of" and "by reason of," suggesting a "but for" standard. Further, the private right of action relied on by ESN was judicially created under a theory that required application of legal elements similar to those in analogous statutory causes of action. The Court also refused to import standards from other areas of discrimination law, such as Title VII and the burden-shifting framework of Court precedent.

Justice Ginsburg wrote an opinion concurring in part and concurring in the judgment. Justice Ginsburg agreed with the Court's determination of the appropriate causation standard but wrote separately to express her view that section 1981 applies not only to the decision whether or not to enter a contract but also throughout the process of contract formation.

***Hernandez v. Mesa*, 140 S. Ct. 735 (2020)**

Respondent, a border patrol agent, shot and killed a 15-year-old Mexican national, in a tragic and disputed cross-border incident. The agent was standing on U.S. soil when he fired the bullets that struck and killed the decedent, who was on Mexican soil, after having just run back across the border following entry onto U.S. territory. The shooting drew international attention, and the Department of Justice investigated, concluding that the agent had not violated Customs and Border Protection Agency policy or training. Petitioners sued for damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)—which allows for damage claims against federal agents arising out of constitutional violations—alleging that the shooting violated the decedent's Fourth and Fifth Amendment rights. The district court dismissed their claims, and the Fifth Circuit affirmed, refusing to recognize a *Bivens* claim for a cross-border shooting.

The Supreme Court declined to extend the Bivens cause of action to allow for damage claims arising out of an incident in which a border patrol agent shot a Mexican national across the United States-Mexico border.

The Supreme Court affirmed in an

opinion by Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh. The Court reiterated its earlier holdings that constitutional separation of powers requires it to exercise caution before extending *Bivens* to a new "context" like this. Unlike any previously recognized *Bivens* claim, a cross-border shooting claim has foreign relations and national security implications. In addition, Congress has been notably hesitant to create claims based on allegedly tortious conduct abroad. Ultimately, because of the distinctive characteristics of cross-border shooting claims, the Court refused to extend *Bivens* into this new field.

Justice Thomas concurred, joined by Justice Gorsuch, to state that the time has come to consider discarding the *Bivens* doctrine altogether.

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. The dissenters would hold that rogue conduct of United States law enforcement falls within a familiar, not a "new," *Bivens* setting and that, in any event, no special factors counsel against a *Bivens* remedy because neither U.S. foreign policy nor national security is endangered by this litigation.

Copyright Law

***Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020)**

The Georgia Code Revision Commission (the "Commission") sued Public.Resource.Org ("Public Resource") for copyright infringement after Public Resource refused to stop publishing the Official Code of Georgia Annotated (the "Code") assembled by the Commission working with Matthew Bender & Co., Inc. Public Resource counterclaimed, seeking a declaration that the Code and related annotations fall within the public domain. The district court ruled in favor of the Commission, but the Eleventh Circuit reversed, applying the government edicts doctrine to hold that the Code was not capable of copyright protection.

The Supreme Court affirmed in an opinion by Chief Justice

Roberts. Under the government edicts doctrine, government officials empowered to act with the force of law cannot, for purposes of copyright law, be "authors" of the works they create in the course of their duties. The doctrine originated in three cases dealing with judicial works, but the Court concluded that it applied equally to the works of legislators, including any explanatory materials they prepare in their official roles. Applying these principles, the Court held that the government edicts doctrine applied to the Code and its annotations. The Commission acts as an arm of the Georgia Legislature and within its official duties in preparing the Code and related annotations. Reaching this conclusion, the Court rejected counterarguments raised by the Commission. The fact that annotations are included within the scope of copyright protection generally does not preclude application of the government edits doctrine, which focuses on whether the party seeking copyright protection qualifies as an author. Similarly, the broad exclusion of all federal officials does not preclude a narrower application of the doctrine to state judges and legislators. Finally, the Commission's attempt to apply the government edicts doctrine based on whether the text at issue has the force of law is inconsistent with the precedent that established the doctrine.

The Supreme Court held that annotations to a state statutory code were not subject to copyright protection because they were prepared by legislative officials in the exercise of their official duties.

Justice Thomas dissented in an opinion joined by Justice Alito and joined by Justice Breyer as to all but Section II-A (expressing the view that the Court should be more willing to address problematic precedent). Justice Thomas interpreted the government edicts doctrine differently, concluding that it permits copyright protection for explanatory notes, such as the annotations to the Code, even when included with the official text bearing the force of law. He reasoned that this interpretation is consistent with copyright law and the current practice of 22 states, 2 territories, and the District of Columbia.

Justice Ginsburg dissented in an opinion joined by Justice Breyer. In Justice Ginsburg's view, the annotations at issue enjoy copyright protection because they were not created as part of the legislative process: they were created after the statutes at issue; they are descriptive of the law; and they are prepared for the public, not the legislature.

Criminal Law

Davis v. United States, 140 S. Ct. 1060 (2020)

In 2016, Charles Davis, a previously convicted felon, was found in possession of a semiautomatic handgun and methamphetamine pills. He subsequently pleaded guilty to being a felon in possession of a firearm and to possession of drugs with the intent to distribute. The presentence report noted that Davis also faced drug and gun charges in Texas courts from a previous arrest. The district court sentenced Davis to four years and nine months in prison and ordered that his sentence run consecutively to any sentences that state courts might impose. Davis did not object.

On appeal, Davis argued that the district court erred by ordering the separate sentences to run consecutively. He claimed that under the Sentencing Guidelines, his sentences should run concurrently because they were part of the "same course of conduct." As Davis did not raise this argument in the district court, most circuits would have reviewed the issue only for plain error. The Fifth Circuit did not consider the argument at all. It explained that Davis' argument raised factual issues, and under circuit precedent, questions of fact capable of resolution by the district court upon proper objection at sentencing can never constitute plain error. *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991) (per curiam).

In a per curiam opinion, the Court vacated the judgment of the Fifth Circuit, abrogating *United States v. Lopez*. The Court held that the Federal Rules of Criminal Procedure do not immunize unpreserved factual errors from plain error review. The Court relied on Rule 52(b), which provides, "A plain error

that affects substantial rights may be considered even though it was not brought to the court's attention." The opinion also emphasized that Supreme Court precedent does not "shield any category of errors from plain-error review." The case was remanded for further proceedings consistent with the opinion.

***Holguin-Hernandez v. United States*, 140 S. Ct. 762 (2020)**

The petitioner was convicted of drug trafficking and sentenced to 60 months in prison. At the time of his conviction, he was also serving a term of supervised release related to an earlier crime. The government asked the court to find that petitioner had violated the conditions of that earlier term, to revoke it, and to impose an additional consecutive prison term of 12 to 18 months in prison, consistent with the pertinent sentencing guidelines. Petitioner's counsel urged the trial court to impose either no additional time for the violation of the supervised release or, at the least, to impose something less than the applicable range. The court then imposed an additional sentence of 12 months, and petitioner's counsel made no further objection. Petitioner appealed, arguing that the 12-month sentence was unreasonably long. The Fifth Circuit held that petitioner had forfeited this argument by failing to object in the district court to the reasonableness of the sentence and affirmed because this was not a "plain error."

The Supreme Court reversed in a unanimous opinion authored by Justice Breyer. By "informing the court" of the "action" he "wishes the court to take," a party ordinarily brings to the court's attention his objection to a contrary decision. FED. RULE CRIM. PROC. 51(b), 52(b). And that is certainly true in cases such as this one, where a criminal defendant advocates for a sentence shorter than the one ultimately imposed. Judges would ordinarily understand this argument to mean that the shorter sentence would be

The Supreme Court held that a criminal defendant's trial-court argument for a specific sentence (of less than 12 months) preserved his claim on appeal that the 12-month sentence imposed by the court was unreasonably long.

"sufficient" and the longer sentence "greater than necessary" to achieve the purposes of sentencing, as in the parlance of the Sentencing Guidelines. Therefore, the Court held nothing more was needed to preserve the claim that a longer sentence was unreasonable because Rule 51 does not require an objecting party to use any particular language.

Justice Alito concurred in an opinion joined by Justice Gorsuch, writing separately to emphasize what the Court was not deciding, including whether this petitioner properly preserved his substantive-reasonableness arguments, which the Fifth Circuit could decide on remand.

***Kansas v. Glover*, 140 S. Ct. 1183 (2020)**

A police officer ran a truck's license plate. The officer learned that Charles Glover, Jr. was the registered owner and that Glover had a revoked driver's license. The officer assumed Glover, as the registered owner, was driving and initiated a traffic stop. Glover was charged with driving as a habitual violator. Glover filed a motion to suppress all evidence seized during the stop, arguing that the officer lacked reasonable suspicion. The district court granted Glover's motion to suppress, but the court of appeals reversed. The Kansas Supreme Court reversed, holding that the officer did not have reasonable suspicion.

The Supreme Court held that, after running a license plate and learning that the registered owner has a revoked driver's license, a police officer's initiation of a traffic stop is reasonable when the officer lacks information negating an inference that the registered owner is the driver.

In an opinion written by Justice Thomas, the Supreme Court reversed. An officer may initiate a traffic stop when he has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *U.S. v. Cortez*, 449 U.S. 411, 417–18 (1981). Reasonable suspicion can be established by factual and practical considerations of everyday life on which reasonable and prudent men act. Officers must be allowed to make commonsense judgments and inferences about behavior. In this case, the

officer drew the commonsense inference that Glover, as the registered owner, was likely driving. This inference amounts to more than reasonable suspicion to initiate the stop, even though the registered owner of a vehicle is not always the driver. Officers can rely on the probability that drivers with revoked licenses often continue driving. The Fourth Amendment does not require inferences to be grounded in an officer's law enforcement training or experience. Lastly, the Court made clear that its holding is narrow. The totality of the circumstances must be considered, and the presence of additional facts might dispel reasonable suspicion.

Justice Kagan, joined by Justice Ginsburg, concurred. Because Kansas law only revokes licenses for serious or repeated driving offenses, a person with a revoked license has already shown a willingness to break driving laws. This was enough to warrant a reasonable suspicion that Glover was driving without a license.

Justice Sotomayor dissented, opining that the Court's decision reduced the State's burden of proof. Reasonable suspicion must be based on an officer's experience and expertise, not on common sense. Additionally, a stop must be individualized and based on a suspicion, and not simply a likelihood, that the person being stopped is engaging in wrongdoing.

***Kahler v. Kansas*, 140 S. Ct. 1021 (2020)**

Kansas law allows the defense that, as a result of mental disease or defect, the defendant lacked the culpable mental state required as an element of the offense charged. Kansas does not recognize a moral incapacity defense, which asserts that the defendant knew what he was doing but could not tell moral right from wrong. However, moral incapacity can play a role in the sentencing phase to reduce punishment. James Kahler was charged with capital murder after killing four family members. At trial, Kahler offered evidence showing that severe depression had prevented him from forming the intent to kill, but the jury convicted him of capital murder.

During sentencing, Kahler offered additional evidence of his mental illness. The jury imposed the death penalty. Kahler appealed, arguing that Kansas's failure to allow the moral incapacity defense violated the Fourteenth Amendment's Due Process Clause. The Kansas Supreme Court held that due process does not require that a state adopt any particular insanity test.

In an opinion written by Justice Kagan, the Supreme Court affirmed, holding that the Due Process Clause does not require a state to recognize the moral insanity defense. A state rule on criminal liability "violates due process only if it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Leland v. Oregon*, 343 U.S. 790, 798 (1952). The Court's primary guide in applying this standard is historical practice regarding the insanity defense, which does not show that any one insanity rule is so settled as to require that the states adopt it. Additionally, doctrines of criminal responsibility are within the province of the states. Contrary to Kahler's claim that Kansas has abolished the insanity defense, Kansas recognizes the cognitive capacity insanity defense, which negates criminal liability, and permits a defendant to offer mental health evidence the defendant deems relevant at sentencing.

The Supreme Court held that the Due Process Clause does not compel the acquittal of a defendant who, because of mental illness, could not recognize his criminal act as morally wrong at the time he committed his crime.

Justice Breyer, joined by Justices Ginsburg and Sotomayor, dissented, asserting that the historical practice regarding the insanity defense has always required a higher degree of individual culpability than intent alone. Kansas' approach has eliminated the core of the insanity defense, which asserts that due to mental illness, the defendant lacked the mental capacity necessary for his conduct to be considered morally blameworthy.

***McKinney v. Arizona*, 140 S. Ct. 702 (2020)**

James McKinney was convicted in Arizona state court on two counts of first-degree murder. On habeas review, the Ninth Circuit held that the state courts had failed to properly consider mitigating evidence of McKinney's posttraumatic stress disorder. Rather than remand for a jury to resentence McKinney, the Arizona Supreme Court reweighed the aggravating and mitigating factors and upheld McKinney's death sentences.

The Supreme Court affirmed in an opinion by Justice Kavanaugh. Under Supreme Court precedent, when a court decides on collateral review that a criminal sentencing failed to account for mitigating circumstances, a state appellate court may conduct a reweighing of aggravating and mitigating factors on remand. The fact that the Court's precedent involved an improperly considered aggravating factor, rather than, as here, an improperly omitted mitigating factor, does not alter the analysis. The Court also rejected the argument that reversal was required because the trial court, rather than the jury, made the initial determination that aggravating circumstances required the death penalty. The Court's decisions requiring jury determination of this question were made long after McKinney's sentence became final on direct review, and the Arizona Supreme Court's reweighing of the factors qualified a collateral, not direct, review under Arizona state law.

Justice Ginsburg dissented in an opinion joined by Justices Breyer, Sotomayor, and Kagan. The dissenting justices disagreed with the Court's conclusion that the reweighing of the sentencing factors qualified as collateral review. According to the dissenting justices, the Arizona Supreme Court engaged in the same analysis originally undertaken on direct review and thus required application of Court precedent requiring a jury assessment of the aggravating factors.

The Supreme Court held that a state appellate court was entitled to reweigh mitigating and aggravating factors after the Ninth Circuit held on habeas review that the original analysis failed to consider a necessary mitigating factor.

***Shular v. United States*, 140 S. Ct. 779 (2020)**

The Armed Career Criminal Act (ACCA) mandates a 15-year minimum sentence of imprisonment for defendants with prior convictions for a "serious drug offense." Section 924(e)(2)(A)(ii) of the Act defines a "serious drug offense" as "involv[ing] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." The question presented in *Shular v. United States* was whether the "serious drug offense" definition called for a comparison to a generic offense.

The case arose after Eddie Lee Shular pleaded guilty in a federal district court to possessing a firearm after having been convicted of a felony and possessing with intent to distribute cocaine and cocaine base. The district court imposed the 15-year mandatory minimum under the ACCA because Shular had previously pleaded guilty to five counts of selling cocaine and one count of possessing cocaine with intent to sell. The district court determined that these convictions qualified as "serious drug offenses." The Eleventh Circuit affirmed the conviction.

Shular argued that the terms used in the statutory definition refer to offenses, rather than conduct. Therefore, a court must first identify the elements of these "generic" offenses before asking whether the elements of the state crime matched those of the "generic" crime when determining if the convictions qualified as "serious drug offenses." The government urged the Court to view the terms in the definition as referring to conduct, meaning that any crime matching the conduct listed in the definition would count as a "serious drug offense."

In an opinion by Justice Ginsburg, the Court agreed with the government, holding that the definition of "serious drug offense" requires only that the state offense involve the conduct specified in the federal statute. The Court noted that the terms used in the definition, such as "manufacturing" and "distributing," were unlikely names for generic offenses. The terms could, however, "undoubtedly" describe conduct. By contrast, the neighboring provision defining "violent felony" demonstrated when a generic-offense analysis is required.

There, the definition referred to the specific offenses of "burglary, arson, or extortion," not conduct.

The Court also cited the statute's use of the term "involv[es]" as more evidence that the following terms refer to conduct and not a specific offense. If Congress wished to refer to generic offenses, it would have been much simpler to use "is" instead. The Court dismissed Shular's argument that rejecting the generic-offense approach would lead to an anomalous result. It explained that its interpretation of the statute would lead to consistency in the application of the ACCA mandatory minimum to offenders engaged in the proscribed conduct.

Finally, the Court dismissed Shular's reliance on the rule of lenity, concluding that the statutory meaning was clear. Justice Kavanaugh wrote a concurring opinion elaborating on this point. He stated that the rule of lenity only applies when "after consulting traditional canons of statutory construction" there is "grievous" ambiguity.

Employment Law

Babb v. Wilkie, 140 S. Ct. 1168 (2020)

Noris Babb sued the Department of Veterans Affairs ("VA") under the Age Discrimination in Employment Act ("ADEA"), alleging that she suffered adverse employment actions because of her age. The district court granted the VA summary judgment after finding that although Babb established a prima facie case, the VA rebutted it with legitimate reasons for the challenged actions, and no jury could reasonably find that those reasons were pretextual. The Eleventh Circuit affirmed, rejecting Babb's argument that ADEA only required a showing that age was a factor in the challenged employment decision.

The Supreme Court held that a plaintiff can establish liability against a federal employer under the Age Discrimination in Employment Act by showing that age was a factor in a challenged employment decision.

The Supreme Court reversed in an opinion by Justice Alito. The provision of ADEA governing federal employment

requires the personnel decisions "shall be made free from any discrimination based on age." Interpreting this language, the Court held that the ADEA requires federal employment decisions to be made free from the taint of differential treatment based on age. Prior cases addressing the causation standard in other statutes, such as the private-sector ADEA provision and Title VII, involve statutory text that is significantly different. The fact that federal employers are held to a higher standard than private employers is not unusual and in any event is consistent with the fact that Congress passed a different provision with different text applying to the federal government. Although the ADEA does not require "but for" causation to establish liability, such a showing is required by traditional tort and remedies law in order to obtain any remedy other than an injunction or other forward-looking relief.

Justice Sotomayor wrote a concurring opinion joined by Justice Ginsburg. The concurring justices wrote separately to express their view that the ADEA provision in question could apply to claims alleging discriminatory process and that a successful plaintiff alleging a process claim might be able to recover damages for out-of-pocket expenses incurred because of the discrimination.

Justice Thomas dissented. In his view, the language of the provision did not clearly displace the traditional standard of but-for causation, and the Court's reading otherwise is so expansive as to allow a party who obtains a favorable employment decision to nonetheless successfully sue if age is taken into account in the employment decision.

Election Law

Republican National Committee v. Democratic National Committee, 140 S.Ct. 1205 (2020)

This case arose when plaintiffs, individual Wisconsin voters, community organizations, and the state and national Democratic parties, filed lawsuits against members of the Wisconsin Elections Commission in federal district court. Based

on the unprecedented number of absentee ballot requests in the Wisconsin elections stemming from the COVID-19 public health crisis, the district court concluded that the existing deadlines for absentee voting would unconstitutionally burden Wisconsin citizens' right to vote. It issued a preliminary injunction that extended the deadline for voters to request absentee ballots from April 2 to April 3 and ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by 4 p.m. on April 13. The question presented was whether the Court should uphold this injunction contradicting Wisconsin state law, which requires that absentee ballots be mailed and postmarked by election day to be counted.

The intervening defendants, the Republican National Committee, applied to the Seventh Circuit for a partial stay challenging the extension of the deadline for absentee ballots. The Seventh Circuit declined to modify the absentee-ballot deadline.

In a per curiam opinion, the Supreme Court granted the stay, requiring that absentee ballots be either "(i) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8:00 p.m." The Court explained that the district court's injunction conflicted with *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006), by changing voting procedures so close to the election date. Illustrating the substantial changes required by the preliminary injunction, the district court found it necessary to enjoin the release of election results for six days after the election. The Court was concerned that this attempt would fail, with negative implications for the integrity of the election. The Court also emphasized that the plaintiffs did not ask for this relief in their preliminary injunction motions.

Justice Ginsburg dissented in an opinion joined by Justice Breyer, Justice Sotomayor, and Justice Kagan. The dissent disagreed with the Court's characterization of the case as a "narrow, technical question," arguing that the Court's order would result in the "massive disenfranchisement" of tens of thousands of voters who were unlikely to receive their ballots

by the postmark deadline. The dissent noted that the plaintiffs did "specifically request" the given remedy at the preliminary injunction hearing. The dissent then responded to the Court's concern about last-minute interventions by asserting that if the district court should have hesitated before acting, then this Court's intervention "is all the more inappropriate." (The majority responded that its order merely corrected an error.) The dissent was also unsatisfied by the majority's suggestion that the situation was not "substantially different" from an "ordinary election." Asserting that tens of thousands of voters were unlikely to receive their ballots by election day, due to the public health crisis, the dissent concluded that the majority's concerns "pale in comparison" with the risk of disenfranchisement.

Environmental Law

***Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020).**

For nearly a century, the Anaconda Copper Smelter in Butte, Montana contaminated an area of over 300 square miles with arsenic and lead. Over the past 35 years, the EPA has worked with the current owner of the smelter, Atlantic Richfield Company, to implement a cleanup plan under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). In the interim, a group of 98 landowners sued Atlantic Richfield in Montana state court for restoration damages to their land. The landowners' proposed restoration plan includes measures beyond those the EPA found necessary to protect human health and the environment. On cross-motions for summary judgment, the Montana courts found that CERCLA

The Supreme Court held that, while the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") does not strip Montana courts of jurisdiction over state-law claims for restoration damages against the owner of a former copper smelter by neighboring landowners, CERCLA requires EPA approval before those landowners can take remedial action.

does not strip them of jurisdiction over the landowners' state-law claims. The Montana Supreme Court also rejected Atlantic Richfield's argument that the landowners are "potentially responsible parties" under CERCLA, which would mean they could not take remedial action without EPA approval.

The Court affirmed in part and reversed in part in an opinion authored by Chief Justice Roberts. The Court first held that CERCLA does not strip the Montana courts of jurisdiction over the state-law claims in this case. Although CERCLA provides that federal courts have exclusive jurisdiction of cases "arising under" the Act, the landowners' common-law claims for nuisance, trespass, and strict liability arise under Montana law and are therefore not barred—even if those claims might result in a greater degree of remediation. However, the Court held that the landowners are "potentially responsible parties" under CERCLA such that any cleanup would require EPA approval. The definition of potentially responsible parties includes any "owner" of a "facility," defined to include any site where a hazardous substance has come to be located. 42 U.S.C. §§ 9601(9)(B), 9607(a)(1). Because arsenic and lead were discharged onto the landowners' properties, the landowners are potentially responsible parties. Thus, the EPA's approval would be required and could ameliorate any conflict between the landowners' restoration plan and the EPA's plan, just as Congress envisioned.

Justice Alito concurred in the judgment, but dissented in part because he was unwilling to endorse the Court's holding that state courts have jurisdiction to entertain "challenges" to EPA-approved CERCLA plans.

Justice Gorsuch concurred in part and dissented in part, joined by Justice Thomas, to state his view that the landowners are not potentially responsible parties and should not have to seek EPA approval to clean up their own land.

County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462 (2020)

In *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court considered whether the Clean Water Act requires a

permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, specifically groundwater. The language of the Act forbids the "addition" of any pollutant from a "point source" to "navigable waters" without an appropriate permit from the EPA. The Ninth Circuit held that the Act requires a permit when "the pollutants are fairly traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into the navigable water." In an opinion by Justice Breyer, the Court rejected the "fairly traceable" standard, holding that the provisions at issue require a permit when there is a direct discharge from a point source into navigable waters or when there is the functional equivalent of a direct discharge.

The County of Maui operates a wastewater reclamation facility which collects sewage, partially treats it, and then pumps the treated water through four wells. The "effluent" then travels a half-mile through groundwater to the Pacific Ocean. The plaintiffs claimed that Maui was discharging a pollutant to navigable waters in violation of the Clean Water Act. The Ninth Circuit ruled in favor of the environmental groups, espousing the "fairly traceable" standard. The Court granted certiorari to resolve differences in the standards adopted by the different courts of appeals.

The Court found the proposed standards advocated by the Ninth Circuit, Maui, and the United States Solicitor General to be too extreme. The plaintiffs adopted the Ninth Circuit's "fairly traceable" standard, which would require a permit if the pollutants in a navigable water could be fairly traced from the point source "such that the discharge is the functional equivalent of a discharge into the navigable water." Maui argued that the statute created a "bright-line" test that the point source must be the "means of delivering pollutants to navigable waters." Finally, the Solicitor General argued that the Court should follow a recent EPA Interpretive Statement, which concluded that "all releases of pollutants to groundwater" are excluded from the scope of the permitting program.

The Court chose a more moderate standard. Justice Breyer

agreed with Maui that the Ninth Circuit standard was too broad because it may allow the EPA to assert permitting authority over the release of pollutants that took many years to reach navigable waters in a highly diluted form. This result would upend Congress' intention to leave substantial responsibility and autonomy to the States over regulating groundwater pollution.

However, the Court noted that the interpretations advanced by Maui and the Solicitor General were too narrow. The Court rejected Maui's argument that the meaning of "from any point" is about how the pollution arrived and not where it originated. Justice Breyer explained that the use of "from" with "to" indicates that Congress was referring to a destination and an origin. Likewise, the Court rejected the view taken by the EPA Interpretative Statement. The Solicitor General did not advocate for the court to give the agency *Chevron* deference, but the Court noted that they often "pay particular attention" to the agency's views in light of its expertise, experience, and familiarity with the demands of the issue. However, the Court found this proposed definition neither persuasive nor reasonable. The Court noted that "wells" were included in the definition of "point source," and wells typically discharge pollutants through groundwater.

The Court concluded that the statute requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent* of a direct discharge. The Court explained that the number of relevant factors precluded a more specific test, and it provided a list of seven factors that could be relevant, emphasizing that time and distance will most often be the most important factors.

Justice Kavanaugh concurred to defend the Court's interpretation as consistent with the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which held that the statute does not establish a "bright-line" test. He also disagreed with Justice Thomas' assertion in dissent that the Court did not identify relevant factors.

Justice Thomas wrote a dissent joined by Justice Gorsuch.

Justice Thomas would have held that a permit is required only when a point source discharges pollutants directly into navigable waters. He argued that the inclusion of "addition" in the statutory language limits the meaning of "discharge" to the augmentation of navigable waters.

In a separate dissent, Justice Alito criticized the majority for creating a rule that provides no clear guidance. In his reading, the statute could be interpreted to mean only that a permit is required if pollutants eventually made their way to the ocean or if the pollutants were discharged directly into the ocean from a point source. He argued that the text requires direct discharge. He criticized the majority for failing to define the "functional equivalent" of a "direct discharge." In his view, a properly broad understanding of the term "point source" would remedy most of the majority's concerns over a potential "loophole" in the statute. He also asserted that the "functional equivalent" test violated the clear statement rule because it impinges on traditional state authority and gives the EPA power over decisions of vast "economic and political significance" without a clear statement of congressional intent.

Family Law

Monasky v. Taglieri, 140 S. Ct. 719 (2020)

In this international law case, the Court granted certiorari to clarify the definition of "habitual residence" under the Hague Convention on the Civil Aspects of International Child Abduction. In an opinion by Justice Ginsburg, the Court held that a child's "habitual residence" depends on the totality of the circumstances specific to the case and does not require an actual agreement between the parents on where to raise their child. The Court further held that the habitual residence determination was subject to deferential clear-error review by appellate courts.

The plaintiff in this case was Michelle Monasky, a U.S. citizen who brought her infant daughter, A.M.T., to the United States after her Italian husband, Domenico Taglieri, allegedly

abused Monasky. Taglieri petitioned a federal district court for the return of A.M.T. to Italy pursuant to the Hague Convention. Under the Hague Convention, a child wrongfully removed from her country of "habitual residence" ordinarily must be returned to that country, with an exception if the return would put her at a "grave risk" of harm or place her in "an intolerable situation." The district court granted relief, citing the shared intention of the parents for A.M.T. to live in Italy. A divided Sixth Circuit panel and a divided en banc court affirmed. Importantly, the en banc majority held that an infant's habitual residence depends on "shared parental intent."

The Supreme Court disagreed with the circuit court's view that the child's "habitual residence" hinged on an actual agreement between the parents on where to raise the child. The Hague Convention does not define the term "habitual residence." Employing the ordinary meaning of "habitual" as "customary" or "usual," the Court concluded that the place where a child is "at home" should be the child's "habitual residence." It held that this determination "depends on the totality of the circumstances," a fact-driven inquiry that requires courts to be "sensitive" to the unique circumstances of each case. The Court explained that this interpretation was consistent with the Convention's explanatory report, which treated habitual residence as "a question of pure fact," as well as a clear trend in the decisions of other treaty partners.

In determining that the habitual-residence determination under the Hague Convention was subject to clear error appellate review, the Court emphasized the factfinding nature of such a determination. Justice Ginsburg concluded that the determination was "barely" a mixed question of law and fact. After the trial court identifies the standard, all that remains is a factual question. Thus, the habitual-residence standard is a task for factfinding courts and should be judged on appeal under the deferential clear-error standard. The Court further noted that this standard supports the Hague Convention's desires for an expedited process.

Instead of remanding for consideration under the newly

defined standard, the Court affirmed. It explained that the district court had received all of the relevant facts, and there was no reason to expect a different outcome. Moreover, remand would unnecessarily slow down a process that the Convention intended to expedite.

In a concurring opinion, Justice Thomas wrote that he would reach the same outcome deciding the case "principally" on the plain meaning of the text. He argued that the ordinary meaning of both "habitual" and "residence" provide strong evidence that the habitual-residence determination is inherently fact driven. Justice Thomas cautioned against reliance on the understandings of sister signatories, as their interpretations have evolved over time and are not always consistent with the text. Justice Alito concurred separately, contending that the standard of review on appeal should be abuse of discretion, as the habitual-residence determination is not a pure question of fact but requires a heavily factual inquiry.

Federal Civil Procedure

***Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020) (per curiam)**

Employees of several Catholic schools in Puerto Rico sued in the local court arguing that their pension benefits had been improperly eliminated. They sued the Roman Catholic and Apostolic Church of Puerto Rico (the "Church") along with the schools and other entities with a role in the pension trust. The trial court denied a preliminary injunction requiring payment of the benefits in a decision affirmed by the court of appeals, but the Puerto Rico Supreme Court reversed. The supreme court held that the defendants would be required to pay the benefits if the pension trust could not and remanded for the trial court to resolve a dispute regarding which

The Supreme Court held that orders entered by a Puerto Rico trial court after removal of the case to federal court and before remand of the case to the trial court rendered those orders void for lack of jurisdiction.

of the defendants had legal personhood. At that point, one of the defendants removed the case to federal court based on the ongoing bankruptcy proceedings of the pension trust. Days after the bankruptcy case was dismissed, the Puerto Rico trial court determined that the Church was the only defendant with separate legal personhood and issued orders that it fund the pension. The court of appeals reversed, but the Puerto Rico Supreme Court reinstated the trial court orders, holding that the Church was the only entity that could be ordered to fund the pensions.

The Supreme Court vacated the lower court decision in a per curiam opinion. The Court did not reach the merits because it held that the Puerto Rico trial court lacked jurisdiction to enter the pension funding orders because of the removal to federal court. Under settled federal law, state courts lose all jurisdiction over a case upon removal to federal court and any orders entered after removal and before remand are void. Because the federal court did not remand the case until nearly five months after the payment orders were issued, those orders were void.

Justice Alito concurred in an opinion joined by Justice Thomas. The concurring justices joined the opinion of the Court but wrote separately to highlight several issues raised by the case that may merit future review, including whether subdivisions of the Church (such as the schools) qualify as separate entities and the implication of the lower courts' holdings on First Amendment rights of churches to determine their own structure.

Federal Courts

Rotkiske v. Klemm, 140 S. Ct. 355 (2019)

After Kevin Rotkiske failed to repay a credit card debt, the credit card company referred his debt for collection by Klemm & Associates ("Klemm"). Klemm sued to collect the debt in 2008 but later withdrew the suit. Klemm refiled in 2009 and attempted service at an address where Rotkiske no longer

lived. Rotkiske did not respond and Klemm obtained a default judgment. Five years later, Rotkiske learned of the default judgment and sued Klemm under the Act. Klemm moved to dismiss the suit as untimely under the Act's one-year discovery rule. Rotkiske argued that an equitable discovery rule applied to delay the running of the limitations period until he knew or should have known of the violation of the Act. The district court rejected this argument and dismissed the action. The Third Circuit affirmed.

The Supreme Court affirmed in an opinion by Justice Thomas. The Act states that a lawsuit may be brought within one year from the date "the violation occurs." This expressly starts the running of the limitations period at the time the Act is violated. Unlike other federal statutes, the Act does not include language that would delay the limitations period until discovery of the violation. Accordingly, the Court refused to apply a general discovery rule. The Court also rejected Rotkiske's argument for application of an equitable discovery rule based on allegations that Klemm purposely served process in a way that ensured Rotkiske would not receive service. The Court held that Rotkiske failed to preserve the issue at the Third Circuit and did not raise it in his petition for certiorari.

The Supreme Court held that the statute of limitations in the Fair Debt Collection Practices Act (the "Act") precludes application of a general discovery rule.

Justice Sotomayor concurred in the judgment. Justice Sotomayor agreed with the majority but wrote separately to clarify that while the issue of an equitable discovery rule in cases of fraud was not preserved in this case, it is a well settled rule that may apply in other cases.

Justice Ginsburg dissented. Justice Ginsburg agreed that the discovery rule does not generally apply to the one-year statute of limitations in the Act. But she concluded that Rotkiske sufficiently alleged application of the fraud-based discovery rule to permit his claims to proceed.

***Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020)**

Section 1342 of the Affordable Care Act ("ACA") created the Risk Corridors program to compensate insurers for unexpectedly unprofitable plans during the first three years of insurance marketplaces. These consolidated cases present three legal questions: (1) whether section 1342 obligated the federal government to pay participating insurers the full amount calculated by that statute, (2) whether the obligation survived the riders attached to appropriations bills by Congress, and (3) whether petitioners may sue the government under the Tucker Act to recover on that obligation.

The ACA created a formula for calculating payments under the program in section 1342: if the insurance plan loses a certain amount of money, the federal government "shall pay" the plan; if the plan makes a certain amount of money, the plan "shall pay" the government. When Congress enacted the ACA, it did not appropriate the funds for the potential payments owed, as the program was anticipated to be revenue-neutral. Contrary to expectations, the program ran a deficit for each of its first three years totaling over $12 billion. At the end of the first year, Congress enacted a bill appropriating money for the Centers for Medicare and Medicaid Services (CMS) Program Management. The bill contained a rider restricting the funds from being used for payments under the Risk Corridor program. The rider was present in each of the appropriations bills for the following two years.

Four health-insurance companies that participated in the healthcare exchanges sued the federal government for damages in the United States Court of Federal Claims, invoking the Tucker Act. Only one of the petitioners prevailed, but the United States Court of Appeals for the Federal Circuit ruled for the government in each appeal, finding that the appropriations riders impliedly repealed or suspended the government's obligation created under section 1342. The Supreme Court reversed.

Justice Sotomayor's majority opinion explained that Congress can authorize agencies to enter into contracts and incur obligations in advance of appropriations. Importantly, such obligations can be created "without also providing details about how [they] will be satisfied." The language of section 1342 makes clear that Congress had created an obligation; it uses the term "shall" three times, which usually connotes a requirement. The Court further noted that the two adjacent provisions differentiate between when the Secretary of the Department of Health and Human Services "shall" do something and when it "may" exercise discretion.

The Court dismissed as unpersuasive the government's argument that the Appropriations Clause and the Anti-Deficiency Act qualified the obligation by making payments contingent on appropriations. Justice Sotomayor explained that those provisions merely constrain employees on making payments without appropriations. Neither address whether Congress can create obligations directly by statute.

The Court held that the appropriations riders did not impliedly repeal the obligation created by section 1342. It emphasized that repeals by implication are disfavored, noting that this "aversion is 'especially' strong 'in the appropriations context.'" The government must point to something more than the lack of sufficient appropriations. In this case, Congress merely appropriated a smaller sum than required to make the payments. The Court supported this finding by referencing the fact that the agencies reiterated after the first rider that the ACA requires the Secretary to make full payments to insurers

Finally, the Court found that the Risk Corridors statute was "fairly interpreted" as mandating compensation for damages, so the insurers' claims fell within the Tucker Act's waiver of immunity. The Court acknowledged that the Tucker Act does not create substantive rights, so the plaintiff must base the damages action on "other sources of law, like statutes or contracts." The Court employed a "fair interpretation" test to establish whether the statutory claim fell within the Tucker Act's immunity waiver. This "fair interpretation"

test holds that "a statute creates a right capable of grounding a claim within the waiver of sovereign immunity if it can be fairly interpreted as mandating compensation by the federal government for the damages sustained." The Court leaned on the mandatory "shall" language to find that section 1342 can be fairly interpreted to mandate compensation. Neither of the two established exceptions to the Tucker Act applied in this situation.

Justice Alito dissented, focusing on the grant of the right of action. He faulted the majority for failing to reconcile the "money-mandating" test used in this case with recent decisions regarding the recognition of private rights of action. In his view, the "can fairly be interpreted as mandating compensation" test possibly does not have a reasonable basis for existence, or at a minimum should be examined by the Court. He argued that this "money-mandating" test "bears a disquieting resemblance to the sort of test that a common-law court might use in deciding whether to create a new cause of action." Because federal courts do not have general power to create new causes of action, Justice Alito would have used more caution before inferring this right of action.

Immigration

Barton v. Barr, 140 S. Ct. 1442 (2020)

Andre Barton, a Jamaican national and longtime lawful permanent resident of the U.S., was convicted of state crimes on three separate occasions over a 12year span. In September 2016, the U.S. Government sought to remove Barton. After the Immigration Judge determined that Barton was removable, Barton applied for cancellation of removal. An applicant for cancellation of removal: (1) must have been a lawful permanent resident for at least five years; (2) must have continuously resided in the U.S. for at least seven years

The Supreme Court held that the offense that precludes cancellation of removal under 8 U.S.C. § 1129b does not have to be the offense that triggered removal.

after lawful admission; (3) must not have been convicted of an aggravated felony; and (4) during the initial seven years of continuous residence, must not have committed certain offenses listed in 8 U.S.C. § 1182(a)(2). The Immigration Judge and the Board of Immigration Appeal held that Barton was removable based on his firearms and drug offenses and that he was not eligible for cancellation of removal because he had committed a crime listed in § 1182(a)(2)—aggravated assault—during his initial seven years of residence. The Eleventh Circuit affirmed.

In an opinion written by Justice Kavanaugh, the Supreme Court affirmed. The Court noted that § 1129b precludes cancellation of removal in two ways: (1) if the lawful permanent resident has been convicted of an "aggravated felony" at any time, and (2) if the lawful permanent resident committed certain serious crimes during the initial seven years of residence.

The cancellation of removal statute operates like a traditional recidivist sentencing statute by providing that a noncitizen's prior crimes can render him ineligible for cancellation of removal. Similar to looking beyond the offense of conviction during criminal sentencing, an immigration judge can look beyond the offense that triggered removal in determining whether the lawful permanent resident is eligible for cancellation of removal.

Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, filed a dissenting opinion, asserting that the Court erred by conflating inadmissibility and deportability. For purposes of cancellation of removal, Barton cannot be considered inadmissible because he has already been admitted to the U.S. Therefore, for Barton to be ineligible for cancellation of removal, he must have committed an offense that made him deportable. Because the Government failed to prove Barton committed an offense that made him deportable, Barton should prevail.

***Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020)**

Section 242(a) of the Immigration and Nationality Act provides for judicial review of a final government order

removing an alien from the United States. This review is limited under section 1252(a)(2)(C) when the removal is based on the commission of certain crimes, including aggravated felonies and controlled substance offenses. Another subsection, referred to by the Court as the "Limited Review Provision," states that in such instances courts may only consider "constitutional claims or questions of law." The question presented in *Guerrero-Lasprilla v. Barr* was whether the phrase "questions of law" in the Limited Review Provision includes the application of a legal standard to undisputed facts.

The two petitioners in this consolidated case were aliens who lived in the United States. Both committed a drug crime and left the country following removal orders that became administratively final. Each petitioner's window for filing a timely motion to reopen his removal proceedings closed years before they asked the Board of Immigration Appeals to reopen their removal proceedings. They argued that the 90-day time limit should be equitably tolled. The Board denied their requests for equitable tolling, finding that that they had failed to demonstrate the required due diligence. The Fifth Circuit denied their requests for review, citing the Limited Review Provision to conclude that the court lacked jurisdiction over the factual question involved. Both petitioners claimed that the underlying facts were undisputed.

The Supreme Court reversed in an opinion authored by Justice Breyer, holding that the phrase "questions of law" in the Limited Review Provision includes the application of a legal standard to settled facts. Citing the "familiar principle of the presumption favoring judicial review of administrative action," the Court noted that interpreting the Limited Review Provision to forbid mixed questions would eliminate judicial review of the Board's decisions that announced the right legal standard. It also relied on the inclusion of a "zipper clause"—intended to "consolidate judicial review of immigration proceedings into one action in the court of appeals"—which indicated Congress' understanding that "questions of law and fact" included the application of law to facts.

The Court explained that this interpretation is consistent with the Limited Review Provision's statutory history and relevant precedent. The Provision was enacted in response to the Court decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which interpreted jurisdiction-stripping provisions of the Immigration and Nationality Act to permit habeas corpus review in order to avoid the serious constitutional question raised by barring judicial review of certain removal orders. The Court noted that numerous circuit courts have held that habeas review includes the application of law to undisputed facts. The Court further emphasized that the House Committee Report provided that the amendments, including the Limited Review Provision, were created to provide an alternative to habeas corpus in the courts of appeals.

The Court dismissed the government's argument that section 1252(a)(2)(C) forbids review of a removal order based on the alien's commission of certain crimes. Justice Breyer answered this concern by acknowledging that subparagraph (C) initially did forbid judicial review, but that the Limited Review Provision was later enacted in response to the decision in *St. Cyr*. The Court emphasized that judicial review of removal orders would still be streamlined with their interpretation of the Limited Review Provision.

Justice Thomas dissented in an opinion joined in part by Justice Alito. The dissent faulted the majority for improperly applying the presumption favoring judicial review, stressing that the text of the Limited Review Provision authorized courts to review only "constitutional claims or questions of law." The Court has often recognized that questions of law, questions of fact, and mixed questions of law and fact are three distinct categories. Congress could have included mixed questions in the text of the Limited Review Provision if it wanted to do so. Writing only for himself, Justice Thomas also questioned the merits of the presumption of reviewability. He argued that the presumption improperly elevates the "supposed purpose" of the Administrative Procedure Act ("APA") and legislative intent over statutory text and that the clear-and-convincing

evidence requirement to find a lack of reviewability appears to conflict with the Constitution.

***Kansas v. Garcia*, 140 S. Ct. 791 (2020)**

Three unauthorized aliens were convicted under Kansas state law for using someone else's social security number on federal and state tax forms they submitted upon obtaining employment. The Kansas Court of Appeals affirmed the conviction, but the Kansas Supreme Court reversed, holding that federal law prohibited the state from using any information, including social security numbers, because that information is also included on a federal I-9 work authorization form.

The Supreme Court reversed in an opinion by Justice Alito. The federal statute relied on by the Kansas Supreme Court provides that information on the I-9 form may only be used to enforce federal law, but it is silent regarding the use of information on the federal and state tax forms relied on by Kansas authorities in this case. Reviewing the statute, the Court concluded that it expressly preempted the Kansas law underlying the convictions at issue in the case. The preemption clause applies only to state laws imposing criminal or civil penalties on employers who hire unauthorized aliens. The fact that the I-9 requires certain information, such as a name, address, or social security number, does not mean that such information is only "contained in" the I-9 form when it is also presented, and relied upon, in other forms. Similarly, the statutory restriction on using the federal verification system for law enforcement purposes outside specified federal statutes does not implicate Kansas' use of tax forms because those forms play no part in the verification system.

The Supreme Court held that federal law governing the misuse of information submitted to the federal employment verification system did not preempt a state law penalizing the misuse of information on state and federal tax forms.

The Court also refused to find implied preemption. The statutory limitation on the use of the federal verification information did not create a comprehensive

and exclusive system regarding any information that may be required for employment. And the Court found that the Kansas statutes did not conflict with any federal laws.

Justice Thomas wrote a concurring opinion joined by Justice Gorsuch. The concurring justices agreed with the Court that the Kansas state law was not preempted by federal law but wrote separately to express their view that the Court should refuse to find preemption based on judicially discerned purposes and objectives of federal law.

Justice Breyer concurred in part and dissented in part in an opinion joined by Justices Ginsburg, Sotomayor, and Kagan. The dissenting justices agreed with the Court's express preemption holding but would have concluded that the Kansas statute was impliedly preempted. Under their view, the text, structure, and purposes of the federal statute demonstrate an intent to reserve to the federal government the power to prosecute people for misrepresenting information to convince an employer they are authorized to work in the country.

Labor and Employment

Intel Corporation Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

ERISA requires plaintiffs with "actual knowledge" of an alleged fiduciary breach to file suit within three years of acquiring that knowledge as opposed to the sixyear period that would otherwise apply. Sulyma worked at Intel Corporation from 2010 to 2012 and participated in two Intel retirement plans. Payments into the two plans were then invested into two funds managed by the Intel Investment Policy Committee. Sulyma filed suit on behalf of a putative class in October 2015, alleging that the committee and plan administrators (Petitioners) breached their fiduciary duties by overinvesting in alternative assets. Petitioners claimed that the suit was untimely under 29 U.S.C. § 1113(2) because Sulyma filed suit more than three years after Petitioners had disclosed their investment decisions to him. The district court granted summary judgment for

Petitioners, but the Ninth Circuit reversed.

In a unanimous opinion written by Justice Alito, the Supreme Court held § 1113(2)'s "actual knowledge" requirement is met when the plaintiff in fact has become aware of the fiduciary breach. Although ERISA does not define the phrase "actual knowledge," the Court looked at the dictionary definition to determine that to have "actual knowledge" of a piece of information, a person "must in fact be aware of it." Additionally, the Court determined that Congress has repeatedly drawn a distinction between when an ERISA plaintiff actually knows and when he should actually know of certain facts in other time limitation provisions of ERISA and chose not to make that distinction in § 1113(2). The Court rejected Petitioner's arguments for a broader reading of § 1113(2) based on text, context, purpose, and statutory history. However, the Court noted that its opinion does not foreclose any of the "usual ways" to prove actual knowledge, including that plaintiffs who recall reading particular disclosures will be bound by oath to say so in their depositions or that actual knowledge can be proven through inference from circumstantial evidence.

The Supreme Court held that a plaintiff in an Employee Retirement Income Security Act of 1974 ("ERISA") breach of fiduciary duty action has "actual knowledge" under 29 U.S.C. § 1113(2) when the plaintiff has become aware of information contained in disclosures he receives.

***Retirement Plans Committee of IBM v. Jander*, __ S.Ct. __ (2020)**

In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Court held that to state a claim for breach of the fiduciary duty of prudence imposed by the Employee Retirement Income Security Act of 1974 (ERISA) on the basis of inside information, a plaintiff must allege "an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." The question presented in this case asked

whether *Dudenhoeffer*'s "'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time."

In a per curiam opinion, the Supreme Court held that the parties' certiorari briefing focused their arguments on matters that the Second Circuit did not address. As a result, the Court vacated the judgment and remanded for the Second Circuit to determine whether to consider the arguments asserted in the certiorari briefing.

The Supreme Court vacated the judgment and remanded because the parties' certiorari briefing presented arguments not addressed by the Second Circuit.

Maritime Law

***CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 140 S. Ct. 1081 (2020)**

In 2004, the M/T *Athos I*, a 748-foot oil tanker, collided with a nine-ton anchor abandoned on the bed of the Delaware River, causing 264,000 gallons of heavy crude oil to spill into the river. As required by federal statute, respondents Frescati Shipping Company—the *Athos I*'s owner—and the United States covered the costs of cleanup. They then sought to reclaim those costs from petitioners (collectively, CARCO), which had chartered the *Athos I* for the voyage that occasioned the oil spill. According to Frescati and the United States, CARCO had breached a contractual "safe-berth clause" obligating CARCO to select a "safe" berth that would allow the *Athos I* to come and go "always safely afloat." After a complicated series of proceedings, the Third Circuit found for Frescati and the United States, holding that CARCO was liable because the safe-berth clause embodied an express warranty of safety "made without regard to the amount of diligence" taken by

The Supreme Court held that a maritime contract's "safe-berth" clause established a warranty of safety, not simply a duty of diligence.

CARCO. The Court granted certiorari to resolve a circuit split over whether safe-berth clauses impose a warranty of safety or merely a duty of diligence.

The Supreme Court affirmed the Third Circuit's ruling in an opinion authored by Justice Sotomayor, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Kagan, Gorsuch, and Kavanaugh. The Court's analysis focused on the language of the safe-berth clause, which required CARCO to "designat[e] and procur[e]" a "safe place or wharf," "provided [that] the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Given the unqualified language of this clause, selecting a birth that does not satisfy those conditions constitutes a breach—and thus binds CARCO to a warranty of safety, even if it does not expressly invoke the term "warranty." The Court ultimately concluded that due diligence and fault-based concepts of tort liability have no place in the contract analysis required here because contract liability is strict liability

Justice Thomas dissented, joined by Justice Alito, to state his view that the categorical rule adopted by the Court finds no basis in the contract's plain text and to suggest that the Court should have remanded for a factfinding on whether industry custom and usage established a warranty of safety in this case.

Mootness

New York State Rifle & Pistol Association, Inc. v. City of New York, 140 S. Ct. 1525 (2020)

After the Supreme Court granted certiorari to review a Second Amendment challenge to New York City's rules for transporting firearms, the rules were amended to allow the relief that petitioners had requested in their complaint. The Supreme Court therefore held in a per curiam opinion that petitioners' claim challenging the old rule was moot. Although petitioners argued that the new rule also violated the Second Amendment, the Court adhered to its ordinary practice of vacating the mooted judgment and remanding for further proceedings in which the parties could amend their proceedings and develop

the record more fully, if necessary.

Justice Alito dissented, in an opinion joined by Justices Gorsuch and Thomas, to state his views that the case was not moot and his concerns about manipulation of the Court's docket. Justice Kavanaugh concurred in the mootness dismissal, but wrote separately to state that he shared Justice Alito's concerns that federal and state courts are not properly applying the Court's Second Amendment precedents and to suggest that the Court should address that issue soon.

Patents

Thryv, Inc. v. Click-to-Call Technologies, LP, 140 S. Ct. 1367 (2020)

The PTO must decide whether to institute inter partes review when it receives a request for inter partes review to reconsider the validity of a previously granted patent. Under § 315(b), the PTO cannot institute review if the request comes more than one year after a patent infringement suit against the requesting party. Under § 314(d), a determination of the PTO regarding whether to institute inter partes review is final and unappealable. Thryv, Inc. filed a petition for inter partes review. The PTO instituted review, which resulted in the cancellation of several patent claims owned by Click-to-Call Technologies, LP. Clickto-Call appealed, arguing that Thryv's petition was untimely under § 315(b). The Federal Circuit dismissed the appeal for lack of jurisdiction because it viewed § 314(d) as precluding judicial review of the PTO's application of § 315(b). After remand and a rehearing, the Federal Circuit determined that the PTO's application of § 315(b) was judicially reviewable.

The Supreme Court held that the Patent and Trademark Office's ("PTO") application of the time limit in 35 U.S.C. § 315(b) is a decision regarding whether to institute inter partes review and is therefore unappealable pursuant to 35 U.S.C. § 314(d).

In an opinion written by Justice Ginsburg, the Supreme Court vacated

and remanded for dismissal for lack of jurisdiction. The Court looked at the language of § 314(d), which indicates that a party generally cannot argue on appeal that the PTO should have refused to institute an inter partes review. Section 315(b)'s time limitation explicitly governs whether the PTO can institute inter partes review. Additionally, by providing for inter partes review, Congress designed a process to efficiently "weed out" bad patent claims. Allowing § 315(b) appeals solely on untimeliness grounds would undermine this legislative objective of prioritizing patentability over § 315(b)'s timeliness requirement. The Court rejected Click-to-Call's argument that § 314(d)'s bar on judicial review applies only to the PTO's initial determination under § 314(a) of whether the petitioner has a reasonable likelihood of prevailing. The Court had previously held that § 314(d)'s bar on judicial review applied to other statutes relating to the PTO's decisions, such as the PTO's application of § 312(a)(3). The language of § 314(d) is broad and encompasses the entire determination of whether to institute inter partes review. The Court also determined that even labeled as an appeal from the PTO's final written decision, ClicktoCall's appeal is still barred by § 314(d) because its contention remains that the agency should have refused to institute review.

Justice Gorsuch, joined in part by Justice Sotomayor, dissented, asserting that § 314(d) does not insulate the PTO's interpretation of § 315(b) from judicial review. Section 314(d) only insulates the PTO's decision "under this section," which means a determination discussed in § 314. Both precedent and the wellsettled presumption favoring judicial review of administrative actions do not support the Court's holding.

***Peter v. Nantkwest, Inc.*, 140 S.Ct. 365 (2019)**

The Court considered whether the term "expenses of the proceedings," in 35 U.S.C. § 145, includes the salaries of attorneys and paralegals employed by the United States Patent and Trademark Office (PTO). The Patent Act provides two methods to challenge an adverse decision by the PTO. The

first, under 35 U.S.C. § 141, is direct review by the Federal Circuit based on the administrative record before the PTO. The second, under 35 U.S.C. § 145, is a civil action against the PTO Director in federal court, which allows the applicant to present new evidence and authorizes the district court to act as the factfinder. Because section 145 proceedings lead to more extensive review, the statute requires the applicant to pay "[a]ll the expenses of the proceedings."

NantKwest filed a complaint against the Director under section 145 after the PTO denied its patent application. The district court granted summary judgment for the PTO, and the Federal Circuit affirmed. The PTO then moved to recover its expenses, including a pro rata share of the salaries of PTO attorneys and paralegals who worked on the NantKwest case. The district court denied the request to recover legal fees, and the en banc Federal Circuit affirmed.

The Supreme Court affirmed in a unanimous opinion by Justice Sotomayor, holding that "expenses of the proceedings" do not include the legal fees of PTO employees. The Court began its straightforward analysis by invoking the American Rule's presumption against fee shifting, specifically rejecting the PTO's argument that the presumption applies only to statutes that award fees to a prevailing party. The Court explained that the presumption against fee-shifting is particularly appropriate under section 145, which allows an unsuccessful government agency to recover expenses from a prevailing party.

The Court held that the PTO could not overcome the presumption against fee-shifting for three reasons. First, the text of section 145 is not sufficiently clear to indicate congressional intent to deviate from the American Rule. Although the word "expenses" could be read broadly enough to include attorneys' fees, the statutory term "expenses of the proceedings" recalls the concept of *expensae litis* or "expenses of the litigation," which would not have been understood to include fees. Second, Congress's repeated references to both "expenses" and "attorney's fees" in various fee-shifting statutes indicated that the term "expenses" does not include attorneys' fees unless

Congress expressly provides otherwise—as it has sometimes done. Third, the history of the Patent Act confirmed the plain reading of the text because there was no evidence that the PTO employed attorneys when the statute was enacted; the PTO had never before suggested that "expenses" under section 145 included attorneys' fees; and when Congress intended to authorize fee-shifting under the Patent Act, it had done so specifically.

Sixth Amendment

Ramos v. Louisiana, 140 S. Ct. 1390 (2020)

Evangelisto Ramos was convicted of a serious felony by a 10-2 jury vote, which is permitted under Louisiana law. He challenged the constitutionality of the law, arguing that the Sixth Amendment requires a unanimous jury verdict. The Louisiana Court of Appeals affirmed.

The Supreme Court reversed in an opinion by Justice Gorsuch. The Sixth Amendment guarantee of "trial by an impartial jury" includes guarantees regarding the content and requirements of a jury trial. Among those requirements is that a jury verdict convicting a criminal defendant must be unanimous. This longstanding practice formed a backdrop to the drafting and ratification of the Sixth Amendment, and the Court has regularly recognized that the Sixth Amendment requires a unanimous verdict. These requirements, originally applicable only to the federal government, were incorporated against the states by the Fourteenth Amendment. In *Apodaca v. Oregon*, however, the controlling opinion applied "dual-track" incorporation to simultaneously agree that the Sixth Amendment requires unanimous verdicts but hold that this requirement was not incorporated against the states. Assessing *stare decisis* standards, such as the reasoning of the

The Supreme Court held that the Sixth Amendment, incorporated against the states by the Fourteenth Amendment, requires that criminal defendants be convicted by unanimous jury verdicts.

original opinion and the reliance on the opinion, the Court determined to overrule *Apodaca*. Its reasoning is inconsistent with the Sixth Amendment and full incorporation under the Fourteenth Amendment, and the reliance interest expressed by Louisiana and Oregon does not warrant preserving the opinion.

Justice Gorsuch, joined by Justices Ginsburg and Breyer further reasoned that the holding in *Apodaca* did not qualify as precedent from the outset because it depended on the vote of a single justice whose dual-track incorporate rationale had already been rejected by the Court.

Justice Gorsuch, joined by Justices Ginsburg, Breyer, and Sotomayor also suggested that the reliance interests asserted by Louisiana and Oregon did not require affirming *Apodaca* because under settled Court precedent, any argument by convicted defendants seeking to leverage the holding in this case on collateral review would face strict standards that account for state reliance in prior law and that have never before been satisfied by a new rule of criminal procedure.

Justice Sotomayor issued an opinion concurring as to all but Part IV-A (suggesting that *Apodaca* lacked precedential force). Justice Sotomayor agreed with the Court's holding but wrote separately to emphasize three points: (1) the decision to overrule *Apodaca* was not only warranted but compelled, (2) the reasons for overruling *Apodaca* are stronger than other recent cases in which precedent has been overturned, and (3) the racially discriminatory origins of the state laws at issue is an important aspect of the Court's analysis.

Justice Kavanaugh issued an opinion concurring in part. Justice Kavanaugh agreed with the Court that *Apodoca* should be overruled. He wrote separately to explain his understanding of *stare decisis* principles and three broad considerations that should guide the decision to overrule prior precedent: (1) is the prior decision grievously wrong? (2) has the prior decision resulted in in significantly negative jurisprudential or real-world consequences? (3) would overruling the prior decision unduly upset reliance interests?

Justice Thomas issued an opinion concurring in the

judgment. Justice Thomas agreed that the Sixth Amendment requires unanimous jury verdicts but would hold that the requirement applies to the states through the Privileges or Immunities clause, rather than the Due Process clause, of the Fourteenth Amendment.

Justice Alito dissented in an opinion joined by the Chief Justice and by Justice Kagan as to all but Part III-D (reasoning that the reliance interest in this case outstrips those at issue in recent cases overruling other Court precedent). In the dissenters' view, *Apodaca* should not have been overturned. Its holding stood for fifty years without being undermined and has been the basis of enormous, justifiable reliance by Louisiana and Oregon—which have tried thousands of criminal cases based on its holding. The racist beginnings of the laws permitting conviction by less than a unanimous vote have no bearing on the analysis because both Oregon and Louisiana later reimplemented those laws without any hint of racism, and other jurisdictions have implemented similar laws without any basis in racism.

Sovereign Immunity

Allen v. Cooper, 140 S. Ct. 994 (2020)

This case arose from a dispute over whether the State of North Carolina impermissibly used videos and photos that had been copyrighted by the petitioner, a videographer. When the petitioner sued the state for copyright infringement, the state moved to dismiss on the ground of sovereign immunity. Petitioner claimed that Congress had abrogated the state's sovereign immunity through a statute declaring that states "shall not be immune, under the Eleventh Amendment [or] any other doctrine of sovereign immunity, from suit in Federal court" for copyright infringement. 17 U.S.C. § 511(a). The district court agreed and denied the motion

The Supreme Court found unconstitutional a federal statute that purported to strip the states of their sovereign immunity from copyright infringement suits.

to dismiss. The Fourth Circuit reversed, holding that under the Supreme Court's opinion in *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999)—which invalidated a similar statute related to patent infringement claims—Section 511(a) was constitutionally invalid.

The Supreme Court agreed in an opinion authored by Justice Kagan, joined in full by Chief Justice Roberts and Justices Alito, Sotomayor, Gorsuch, and Kavanaugh and in part by Justice Thomas. At bottom, the Court found that its holding in *Florida Prepaid* controlled: just as the law purporting to abrogate immunity for patent infringement claims lacked a valid constitutional basis, so too did the law for copyright claims. Although Congress has the authority to abrogate the states' immunity under the Eleventh Amendment, it can only do so where some constitutional provision allows it. In *Florida Prepaid*, the Court held that neither the "Intellectual Property Clause" in Article 1 § 8 nor the Fourteenth Amendment authorized Congress to strip the states of immunity from patent claims. The Court held that copyright claims are no different, although it allowed for the possibility that the Fourteenth Amendment could one day allow for abrogation of copyright (and patent) immunity if Congress could identify a pattern of intentional infringement by the states without an adequate remedy.

Justice Thomas concurred in part and in the judgment, writing to disagree with the Court's discussion regarding future legislation and to note an open question about whether copyrights are "property" under the Fourteenth Amendment.

Justice Breyer concurred in the judgment, joined by Justice Ginsburg, to note his belief that *Florida Prepaid* was wrongly decided, even while acknowledging that it controls.

State Elections

Thompson v. Hebdon, 140 S.Ct. 348 (2019)

After discussing the principles outlined in *Randall v. Sorrell*, 548 U.S. 230 (2006), the Supreme Court remanded to the Ninth

Circuit for renewed consideration of whether Alaska's $500 non-aggregate contribution limit violates the First Amendment.

Petitioners sued members of the Alaska Public Offices Commission, arguing that an Alaskan law limiting the amount an individual can contribute to a candidate for political office or to an election-oriented group other than a political party to $500 per year violated the First Amendment. The District Court upheld the law, and the Ninth Circuit affirmed.

In a per curiam opinion, the Supreme Court determined that the principles outlined in *Randall* should be considered in deciding whether Alaska's contribution limit was too low. The Court noted that Alaska's $500 contribution limit is substantially lower than contribution limits the Court previously upheld and is more restrictive than contribution limits in other states. Additionally, Alaska's contribution limit is not adjusted for inflation. The Court vacated the Ninth Circuit's judgment and remanded for consideration of whether Alaska's contribution limits are consistent with the First Amendment principles as outlined in *Randall*.

Justice Ginsburg noted that there are special justifications to consider when reviewing Alaska's law. For example, political parties in Alaska are subject to more lenient contribution limits than individual donors. Additionally, Alaska is particularly vulnerable to corruption in politics due to the power of the oil and gas industry.

Taxation

Rodriguez v. FDIC, 140 S. Ct. 713 (2020)

United Western Bank (the Bank) entered into a receivership, and the Federal Deposit Insurance Corporation (FDIC) served as receiver. United Western Bancorp, Inc., the Bank's parent company, later filed for bankruptcy. Simon Rodriguez served as the parent corporation's bankruptcy trustee. While the bankruptcy was pending, the Internal Revenue Service (IRS) issued a $4 million tax refund. The FDIC and Rodriguez each sought to claim the tax refund. The Tenth Circuit relied on the

federal common law rule known as the *Bob Richards* rule, which provides that a refund belongs to the group member responsible for the losses that led to it unless a tax allocation agreement unambiguously specifies a different result. The Tenth Circuit ruled for the FDIC as receiver for the Bank.

The Supreme Court held that the federal common law rule known as the *Bob Richards* rule regarding the allocation of a tax refund to an affiliated group is not a proper exercise of federal common lawmaking.

In a unanimous opinion written by Justice Gorsuch, the Supreme Court held that the *Bob Richards* rule is not a proper exercise of federal common lawmaking. The Court noted that there is no federal law regarding the distribution of a tax refund among affiliated group members. Some federal courts have relied on the *Bob Richards* rule to determine how a tax refund should be allocated, while other federal courts rely on state law. The Court clarified that a new area of federal common law should only be made when necessary to protect uniquely federal interests. The federal government has no interest in determining how a consolidated corporate tax refund is distributed among group members after it is paid to a designated agent. Corporations are created under state law, and state law is equipped to handle disputes involving corporate property rights, even in the context of a federal bankruptcy. As a result, there is no unique federal interest justifying the *Bob Richards* rule.

Trademarks

Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492 (2020)

Romag sued Fossil for trademark infringement arising out of the use of counterfeit handbag fasteners. After trial, a jury agreed with Romag and found that Fossil had acted "in callous disregard" of Romag's rights. At the same time, however, the jury rejected Romag's accusation that Fossil had acted willfully, as that term was defined by the district court. As relief for Fossil's trademark violations, Romag sought (among other

things) an order requiring Fossil to hand over the profits it had earned thanks to its trademark violation. The district court refused this request, pointing to Second Circuit precedent requiring a plaintiff seeking a profits award to prove that the defendant's violation was willful. Because other circuits apply a more flexible rule, the Court granted certiorari to resolve whether a finding of willfulness is required to support a profits award.

The Supreme Court reversed in an opinion authored by Justice Gorsuch, joined by Chief Justice Roberts and Justices Thomas, Ginsburg, Breyer, Alito, Kagan, and Kavanaugh. The Court focused on the relevant statutory text (15 U.S.C. § 1117(a)) and noted that, while a showing of willfulness is expressly stated as a precondition to a profits award under one section of the Lanham Act (section 1125(c)), Romag did not sue under that section. Romag sued under a section that says nothing about willfulness. Although that provision allows an award of profits "subject to the principles of equity," the Court held that this general reference does not amount to a categorical requirement of willfulness before allowing a profits remedy.

Justice Alito concurred, joined by Justices Breyer and Kagan, to state his view that willfulness is a highly important consideration in awarding profits, but not an absolute precondition.

Justice Sotomayor concurred in the judgment, writing separately to emphasize that an award of profits for innocent or good-faith trademark infringement would not be consistent with principles of equity.

The Supreme Court held that the Lanham Act does not categorically require a finding of willful trademark infringement before a plaintiff can be awarded the defendant's ill-gotten profits as damages.

Fifth Circuit Update

Natasha Breaux, Ryan Gardner, & Ryan Philip Pitts
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Jurisdiction and Procedure

***Escribano v. Travis Cty.*, 947 F.3d 265 (5th Cir. 2020)**

Six detectives of the Travis County Sheriff's Office sued Travis County alleging that they were entitled to overtime pay. Travis County asserted that the detectives were exempt as executive and highly compensated employees. At trial, the jury found that these exemptions did not apply, making Travis County liable for overtime pay. The district court entered judgment for the detectives, and, within 30 days of the judgment, Travis County sought judgment as a matter of law under Rule 50(b). The detectives moved for a new trial. The district court granted the motion for judgment as a matter of law and the detectives' motion for a new trial. Confusion followed, along with many more post-judgment motions, and the detectives ultimately sought to withdraw their motion for a new trial and to reinstate the verdict. But the district court refused, and the detectives appealed.

On appeal, the detectives argued that Travis County's Rule 50(b) motion was filed late and that, because Rule 50's deadline for seeking judgment as a matter of law is jurisdictional, the district court had no jurisdiction to rule on that motion. Relying on the reasoning of recent Supreme Court decisions, the Fifth Circuit joined at least five other circuits in holding that the time limits in Rule 50(b) are not jurisdictional. Unlike statutory deadlines, the deadlines that appear in court-made rules are treated as claim-processing requirements that do not restrict a court's authority.

Federal of Civil Procedure Rule 50(b) does not impose a jurisdictional deadline.

***Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019)**

Thomas Klocke was a student at the University of Texas Arlington who committed suicide after the University refused him permission to graduate after Nicholas Watson accused him of homophobic harassment. Thomas's father sued Watson and the University for defamation as the administrator of Thomas's estate. The University moved to dismiss under the Texas Citizens Participation Act ("TCPA"), which, on a certain showing, requires a court to dismiss the action and award attorneys' fees and costs. Klocke responded that the TCPA, as a procedural state statute, does not apply in federal court. The district court held that Klocke had waived the argument that the TCPA does not apply in federal court and granted the motion to dismiss.

On appeal, the Fifth Circuit held that Klocke had not waived his arguments and that the TCPA does not apply in federal court. Because the TCPA's burden-shifting framework imposes requirements beyond those in Federal Rules of Civil Procedure 12 and 56 and answers the same questions as those rules, the TCPA has no application in federal court. This reasoning was based on the Supreme Court's opinion in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), and a recent decision by the D.C. Circuit, *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015 (Kavanaugh, J.). *Klocke* was distinguished from a previous Fifth Circuit decision—*Henry v. Lake Charles American Press, L.L.C.*, 566 F.3d 164 (5th Cir. 2009)—because that decision concerned a Louisiana statute and came before *Shady Grove*.

The Texas Citizens Participation Act does not apply in federal court.

***Frank v. P N K (Lake Charles) L.L.C.*, 947 F.3d 331 (5th Cir. 2020)**

Family members of a deceased casino patron who suffered a fatal accident at a Louisiana casino brought wrongful-death action in Texas against PNK (Lake Charles) LLC ("PNK"), the company that owned the gaming license for the casino where

the accident occurred. PNK was domiciled in Louisiana and had no business operations in Texas other than advertising in Texas through a variety of media platforms, including mailers, the internet, billboards, television commercials, and radio ads, and subsidizing charter buses to shuttle patrons between Texas and Louisiana. PNK removed the case to federal court and then sought to either transfer venue to Louisiana or to dismiss for lack of personal jurisdiction. The district court granted the motion to transfer venue, which resulted in the claims being dismissed due to Louisiana's statute of limitations. The Plaintiffs appealed, asserting the district court erred in not exercising personal jurisdiction over PNK.

On appeal, the Fifth Circuit held that sending advertisements into a state was insufficient to establish general jurisdiction over PNK. Recent Supreme Court precedent required a foreign entity's activities in a state to be so continuous and systematic as to render it at home in the state. But PNK's contact with Texas began and ended with its advertising activities—all other operations occurred entirely in Louisiana. At most, PNK performed a substantial amount of business with Texans, but not in Texas. Thus, the Court held that general jurisdiction did not exist and affirmed the district court.

Targeted advertising cannot establish general jurisdiction over a foreign entity.

Arbitration

Quezada v. Bechtel OG & C Constr. Servs. Inc., 946 F.3d 837 (5th Cir. 2020)

Nicole Quezada worked for Bechtel OG&C Constructive Services on a construction project. Under her employment agreement, Quezada had agreed to arbitrate workplace disputes. Quezada brought an arbitration dispute against Bechtel alleging discrimination, failure to accommodate, and retaliation in violation of the Americans with Disabilities Act ("ADA"). The arbitrator found that Quezada had shown discrimination because Bechtel refused to allow her to work overtime, but

that Quezada could not show discriminatory or retaliatory termination. The arbitrator found Quezada entitled to $500 in nominal damages for the denial of overtime opportunities. Quezada sought and obtained reconsideration of the nominal damages award. The arbitrator awarded about $300,000 in back and front pay, compensatory damages, nominal damages, attorneys' fees and costs, and interest.

Bechtel sought vacatur or, alternatively, modification, of the arbitration award in the United States District Court for the Southern District of Texas. Quezada moved to confirm the award. The district court found that it had subject-matter jurisdiction and that Bechtel was not entitled to vacatur. Bechtel appealed.

The Fifth Circuit *sua sponte* examined the basis for subject-matter jurisdiction of the motion for vacatur or modification. In *Vaden v. Discover Bank*, 556 U.S. 49 (2009), the Supreme Court adopted a "look through" approach for determining federal jurisdiction over a petition to compel arbitration. Under that approach, a federal court looks through the petition to determine whether it is predicated on an action that arises under federal law. The circuits have split over whether the same look-through approach applies to motions to confirm, vacate, or modify an arbitration award. The Fifth Circuit adopted the majority approach—that of the First, Second, and Third Circuits—holding that the "look through" approach also applies to motions to confirm, vacate, or modify an arbitration award. This decision was based on *Vaden* and practical considerations.

The look-through approach of *Vaden v. Discover Bank*, 556 U.S. 49 (2009), applies to motions brought to confirm, vacate, or modify an arbitration award.

Federal Law

***Energy Intelligence Grp., Inc. v. Kayne Anderson Capital Advisors, L.P.*, 948 F.3d 261 (5th Cir. 2020)**

Energy Intelligence Group sued Kayne Anderson Capital

Advisors for copyright infringement and violations of the Digital Millennium Copyright Act ("DMCA"), alleging that Kayne had improperly shared access to an Energy Intelligence publication with his employees. At summary judgment, the district court permitted Kayne to move forward on a mitigation defense against statutory damages under the Copyright Act and DMCA. In a pretrial memorandum, Energy Intelligence argued that Kayne could not invoke mitigation as a complete defense to statutory damages under the two Acts. The district court overruled this argument, and the jury found that Energy Intelligence could have reasonably avoided—mitigated—most of the copyright and DMCA violations. Both parties appealed.

Mitigation is not a complete defense to statutory damages under the Copyright Act or the Digital Millennium Copyright Act.

The appeal presented an issue of first impression: whether failure to mitigate is a complete defense to liability for statutory damages under the Copyright Act and DMCA. After an in-depth analysis of both Acts, the Fifth Circuit reversed and remanded, holding that mitigation is a not complete defense to statutory damages under the Copyright Act or DMCA. A mitigation defense applies to post-injury consequential damages and Energy Intelligence did not seek such damages. Instead, Energy Intelligence sought statutory damages that served deterrent and potentially punitive purposes and arose with, not after, the injury. As a result, mitigation cannot be a complete defense to the Copyright Act's or DMCA's statutory damages.

Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc), *petition for cert. filed

Shareholders of Fannie Mae and Freddie Mac sued the Federal Housing Finance Agency ("FHFA"), its Director, the United States Treasury, and the Secretary of the Treasury—together, the "Agencies"—asserting violations of the Administrative Procedure Act ("APA") and Article II, §§ 1 and 3 of the United States Constitution. In 2008, the FHFA

appointed itself as Fannie Mae and Freddie Mac's conservator and made Preferred Stock Purchase Agreements with the Treasury to prevent them from defaulting. The Treasury and the FHFA later made amendments to these Agreements, which the Shareholders objected to. The Third Amendment replaced a quarterly 10% divided with variable dividends equal to Fannie Mae and Freddie Mac's entire net worth (except a capital reserve)—a decision that the Shareholders called a "net worth sweep." As to the APA claims, the Shareholders alleged that the FHFA exceeded its statutory conservator authority, the Treasury exceeded its securities-purchase authority, and the Treasury's adoption of the net worth sweep was arbitrary and capricious. The Shareholders alleged that the FHFA violated Article II, §§ 1 and 3 of the Constitution because, among other things, it is headed by a single Director removable only for cause.

The Agencies moved to dismiss all the claims. The Shareholders and the FHFA cross-moved for summary judgment on the constitutional claim. The district court dismissed the APA claims based on an anti-injunction provision preventing courts from taking actions to restrain the FHFA's exercise of powers or functions. The district court also granted summary judgment for FHFA on the constitutional claim. A Fifth Circuit panel affirmed the district court's decisions on the APA claims and reversed as to the constitutional claim. The Court granted rehearing *en banc*.

The claim that the Federal Housing Finance Agency ("FHFA") exceeded its statutory powers by amending Fannie Mae and Freddie Mac's financing agreements survives dismissal and the FHFA Director's for-cause removal protection is unconstitutional.

The Fifth Circuit, sitting *en banc*, held that the Third Amendment plausibly exceeded FHFA's statutory powers because the limited, enumerated conservator powers given to the FHSA did not encompass transferring substantially all the capital of Fannie Mae and Freddie Mac to the Treasury. The FHFA's design—an independent agency with a

single Director removable "for cause"—was held to violate separation of powers principles because granting removal protection and full agency leadership to a single Director stretched the independent-agency pattern beyond what the Constitution allows. As to remedies, the Shareholders were entitled only to a declaration that the FHFA's structure is unconstitutional.

Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *petition for cert. filed

This decision concerned the Affordable Care Act's ("ACA") individual mandate, which requires individuals to maintain health insurance or, if they do not do so, make a "shared responsibility payment" to the Internal Revenue Service. In a previous challenge, the Supreme Court upheld the individual mandate as a tax on an individual's decision not to purchase the insurance—a constitutional exercise of Congress's taxing power. In 2017, Congress set the shared responsibility payment at zero dollars. Afterward, two private citizens and eighteen states, including Texas, sued the United States, the Department of Health and Human Services, and other defendants, alleging that the individual mandate could no longer be characterized as a tax and was unconstitutional. The district court held that Texas and the other plaintiffs had standing because the individual mandate required them to purchase insurance, setting the shared responsibility payment to zero made the individual mandate unconstitutional, and the individual mandate could not be severed from any other part of the ACA. The United States and the other defendants appealed.

The Affordable Care Act's individual mandate is unconstitutional because it can no longer be construed as a tax, and no other constitutional provision justifies the exercise of congressional power.

On appeal, the Fifth Circuit affirmed the district court's rulings that the plaintiffs had standing and that the individual mandate was unconstitutional. Because Congress reduced the

shared responsibility payment to zero, the individual mandate could no longer be considered under Congress's taxing power. Relying on *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Court concluded that no other constitutional provision could have authorized Congress to enact the individual mandate—rendering it unconstitutional. The Court, however, remanded for additional analysis on severability because the district court had not explained with precision how particular ACA portions turned on the individual mandate.

***In re JPMorgan Chase & Company*, 916 F.3d 494 (5th Cir. 2019)**

Shannon Rivenbark sued JPMorgan Chase Bank N.A., alleging that Chase violated the Fair Labor Standards Act ("FLSA") by failing to compensate her and other employees at call centers for tasks completed "off-the-clock." After moving to conditionally certify a collective action consisting of around 42,000 current and former employees, Plaintiffs asked the district court to send notice of the action all putative collective members. Chase opposed, claiming that 35,000 of the putative class members had waived their right to proceed collectively pursuant to binding arbitration agreements. The district court conditionally certified Plaintiffs' collective action and ordered Chase to produce the contact information for all putative collective members within two weeks. Chase appealed and filed a mandamus petition.

A district court errors when it requires notice of a pending FLSA collective action to be sent to employees who are unable to join the action because of binding arbitration agreements.

On appeal, the Fifth Circuit denied mandamus review but issued a published opinion under its supervisory authority. Chase's harm was irremediable on ordinary appeal because the issue of whether the notice should issue would be moot after final judgment. Resolving the question at issue was appropriate because it had recurred and divided courts. On whether Chase

had a clear and indisputable right to a writ of mandamus, the Court held that the district court erred by requiring notice of a pending FLSA collective action to be sent to employees who were potentially unable to join the action because of binding arbitration agreements. The issue of whether valid arbitration agreements existed must be determined before notices were sent, and alerting someone who cannot ultimately participate in the collective action would only have the effect of stirring up litigation. However, the Court denied mandamus relief and held the district court's error was not clear and indisputable because it had followed the lead of other courts in the circuit. The Court nonetheless instructed the district court to revisit its decision.

***Doe v. Mckesson*, 945 F.3d 818 (5th Cir. 2019)**

During a public protest against police misconduct in which the protestors blocked a public highway, an unidentified person hit the Plaintiff, a police officer, with a heavy object, causing serious injury. The Plaintiff filed suit against "Black Lives Matter," and Deray Mckesson, the organizer of the protest. The district court dismissed the Plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6), holding the Plaintiff had failed to state a plausible claim against Mckesson. It also took judicial notice that Black Lives Matter was a "hashtag" and therefore an "expression" that lacked the capacity to be sued. The Plaintiff appealed.

On appeal, the Fifth Circuit reversed in part and affirmed in part. After holding that the Plaintiff had stated a claim for negligence under Louisiana law, the Court held the complaint should not be dismissed based on the First Amendment. The complaint's allegations that Mckesson had directed the demonstrators to engage in illegal and tortious conduct stated a claim because they plausibly alleged that Plaintiff's injuries were one of the

The First Amendment does not bar a negligence claim against a protest organizer who allegedly breached his duty of reasonable care while organizing and leading demonstration at which the plaintiff was injured by an unknown assailant.

consequences of the tortious activity directed by Mckesson. The Court further reasoned that Mckesson's conduct was not protected free speech because he ordered the demonstrators to violate a reasonable time, place, and manner restriction by blocking a public highway. Regarding the claims against Black Lives Matter, the district court erred in taking judicial notice of Black Lives Matter's capacity to be sued because the issue presented a mixed question of fact and law that was not immune from reasonable dispute. However, the Court went on to affirm the district court's dismissal of the claims against Black Lives Matter based on Louisiana law. The Court reversed in part, affirmed in part, and remanded the case for further proceedings.

***Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020)**

Brett Horvath was employed as a driver/pump operator by the City of Leander Fire Department. In 2016, the Department began requiring that all employees obtain TDAP vaccinations, but Horvath objected to the vaccination as a tenet of his religion. In response, the Department offered him the choice of two accommodations: (1) reassignment to the position of code enforcement officer with the same pay and benefits or (2) wear personal protection equipment, including a respirator, while on duty. Horvath rejected both accommodations and was terminated. Horvath filed suit against the City and the Department's Chief, alleging religious discrimination and retaliation in violation of Title VII, the Texas Commission on Human Rights Act ("TCHRA"), and 42 U.S.C. § 1983. The district court granted summary judgment in favor of the Defendants, and Horvath appealed.

The City of Leander did not violate a firefighter's religious freedom by discharging the firefighter after he refused to choose either of two accommodations to the municipality's vaccination requirement.

On appeal, the Fifth Circuit affirmed. Horvath's Title VII claims failed because the Defendants' offer for Horvath to be a code enforcer was a reasonable alternative with equivalent salary. The fact that Horvath preferred to remain in his current

position was insufficient for his claim to survive. Horvath's retaliation claims also failed because the City's proffered reason for Horvath's firing—defiance of a direct order—was a legitimate, non-discriminatory justification. Finally, Horvath's § 1983 claim failed because the City's respirator alternative would not burden Horvath's exercise of his religion. The Court affirmed the district court's judgment.

Texas Supreme Court Cases

Wes Dutton, Haynes and Boone, LLP
Jason N. Jordan, Haynes and Boone, LLP
Chris Knight, Haynes and Boone, LLP
Patrice Pujol, Forman Watkins & Krutz, LLP

Agriculture Law

***Pruski v. Garcia*, No. 18-0953, 63 Tex. Sup. Ct. J. 364, 594 S.W.3d 322 (Jan. 31, 2020)**

On the evening of December 5, 2015, Joshua Garcia was driving his pickup truck on State Highway 123 in Wilson County. He struck and killed a bull that had wandered onto the highway. Garcia was injured and his vehicle totaled. The bull, owned by Shary Pruski, had apparently escaped because of a broken gate latch to the animal's fenced pasture. Garcia sued Pruski, asserting negligence under the Agriculture Code for failing to keep the bull enclosed. The trial court granted summary judgment to Pruski on all claims. But the San Antonio Court of Appeals reversed in part, agreeing with Garcia that Pruski could be liable in tort for violation of statutory duties arising from two separate sections of Agriculture Code Chapter 143, specifically sections 143.102 and 143.074. Thus, the court of appeals affirmed summary judgment on all claims related to Pruski's alleged violation of section 143.102, but reversed in part, holding Garcia had raised a genuine fact issue on whether Pruski violated the stock-law duty under section 143.074.

When a driver on a state highway collides with an escaped bull in a county with a stock law, the standard of tort liability for the bull's owner comes from Agriculture Code section 143.102, which precludes liability unless the livestock owner knowingly permitted the animal to run at large.

The Texas Supreme Court reversed the court of appeals' judgment, holding that only section 143.102 applied to determine Pruski's potential liability because the accident occurred on a state highway. At issue was whether,

when a driver on a state highway collides with an escaped bull in a county with a stock law, the standard of tort liability for the bull's owner comes from section 143.102 or from section 143.074. Under section 143.102, owners of certain livestock, including cattle, "may not knowingly permit the animal to traverse or roam at large, unattended, on the right-of-way of a highway." Thus, the statute is violated only when the livestock owner *knowingly* permits the animal to run at large. In contrast, section 143.074 does not require the livestock owner's "knowing" mental state; instead, the owner can be liable if he did not act knowingly, so long as he "permit[ted]" the animal "to run at large." Moreover, under section 143.107, the Legislature decided that section 143.102's highway liability rules, including its "knowingly" mental state, "prevail[ ] to the extent of any conflict with another provision of this chapter," which includes the stock law statutes. Consequently, section 143.102 provides the only liability standard to which Pruski may be held for this accident. And because Garcia could not show that Pruski "knowingly permit[ted]" the bull to "traverse or roam at large ... on the right-of-way of a highway," he cannot impose civil liability on Pruski for the accident. Thus, the Supreme Court reversed in part the judgment of the court of appeals and reinstated summary judgment for Pruski on all claims.

Arbitration

***Robinson v. Home Owners Management Enterprises, Inc.*, 590 S.W.3d 518 (Tex. 2019).**

Nathan and Misti Robinson purchased a new home enrolled in a warranty program operated by Home Owners Management Enterprises, Inc. ("HOME"). When construction-related defects were discovered, the Robinsons sued HOME and other defendants, alleging the defects were not promptly or properly resolved. Over the Robinsons' opposition, the trial court abated the case and compelled arbitration based on an arbitration

clause in the warranty and its addendum. Neither the warranty nor the addendum mentioned the delegation of arbitrability questions. Nor did either contract reference class arbitration.

Less than a month before the scheduled arbitration, the Robinsons filed an amended statement of claims seeking to add class-action claims against HOME, alleging that HOME routinely demanded overbroad releases as a precondition to fulfilling its warranty obligations. HOME objected that the putative class claims were beyond the scope of the order referring the case to arbitration and were untimely under that order. Days before the arbitration, the arbitrator denied HOME's objections but bifurcated the class claims from the Robinsons' construction-defect claims. After the arbitration, but before the arbitrator issued a decision, HOME asked the trial court to clarify the scope of the issues referred to arbitration and, in the alternative, strike the Robinsons' class claims. While HOME's motion was pending in the trial court, the arbitrator ruled against HOME on the warranty claims. The Robinsons then urged the trial court to order that HOME must arbitrate their class claims.

A court must determine as a gateway matter whether an arbitration agreement permits class arbitration unless the parties clearly and unmistakably agreed otherwise, and silence on the matter does not suffice as clear and unmistakable agreement.

The trial court ruled in HOME's favor, concluding that whether the parties agreed to class arbitration was a question of arbitrability for the court and that the arbitration clause between the parties did not permit class arbitration. The court of appeals affirmed.

In a unanimous opinion written by Justice Guzman, the Court affirmed the court of appeals' judgment. The Court agreed with several federal courts that have held that determining whether parties agreed to arbitrate disputes as a class is a threshold question of arbitrability. Such threshold arbitrability questions are for a court to decide unless the parties "clearly and unmistakably" delegate arbitrability determinations to the

arbitrator. Here, the warranty and addendum were silent on the topic, so there was no clear and unmistakable delegation of arbitrability determinations. The Court explained that "magic words" are not necessary, but contractual silence cannot suffice as clear and unmistakable clarity. The Court further held that there was no affirmative contractual basis to show the parties agreed to class-wide arbitration because, again, the warranty and addendum were silent on the issue of class claims. Finally, the Court rejected the Robinsons' argument that HOME had acquiesced or consented to the arbitrator's authority to determine whether class claims were arbitrable. HOME's action in moving to compel arbitration of the Robinsons' individual claims was not inconsistent with HOME's opposition to class-wide arbitration.

Appellate Jurisdiction – Finality

***Interest of R.R.K.*, 590 S.W.3d 535 (Tex. 2019)**

Father moved to modify a court order establishing possession and support obligations for a child. After a bench trial, the court issued a one-page memorandum that contained bullet-point orders modifying some aspects of the possession and support obligations between Father and Mother. A final point in the memorandum contained a Mother Hubbard clause, stating that "[a]ny and all relief not expressly granted is hereby DENIED." Two days later, Mother and Father signed a Rule 11 agreement setting forth their agreement about possession for the upcoming holidays, and the Rule 11 agreement stated it was made "in anticipation of an Order being drafted." After the holidays, Father moved for entry of a final order, and Mother proposed her own final order in response. The trial court heard the parties' motions and then signed a 51-page "Order in Suit to Modify Parent-

A court should consult the record to determine an order's finality when it lacks unmistakable language of finality and is otherwise inconclusive as to its intent.

Child Relationship." Mother timely filed a notice of appeal from the 51-page order.

On appeal, the court of appeals *sua sponte* questioned whether it had jurisdiction and ultimately dismissed Mother's appeal, holding that the appeal was untimely because the trial court's initial one-page memorandum order constituted a final order.

Justice Bland delivered the Court's unanimous opinion reversing the court of appeals' judgment. The Court began by reviewing provisions in the Family Code that require certain information to be included in a "final order" in suits affecting the parent-child relationship. The Court then explained that layered on top of this statutory framework is the Court's finality jurisprudence, under which an order is final when it "disposes of all claims and all parties" in "clear and unequivocal language." A Mother Hubbard clause can indicate finality, but it is not conclusive on the issue. Clear and unequivocal language that shows an intent to dispose of the entire case is given effect, but if there is doubt about finality, the record should be consulted to resolve the issue. Here, the memorandum order did not remove "any doubt" about finality. The bullet points in the memorandum order left several possession and support issues unresolved and lacked many of the requirements for final orders under the Family Code. The Court noted that a failure to comply with every requirement under the Family Code is not fatal to finality, but when, as here, finality is contested, and the order lacks required statutory elements, a court should examine the record to determine finality. The record here showed that the 51-page order was the final order, not the earlier memorandum order.

Attorneys

In re Thetford, 574 S.W.3d 362 (Tex. 2019) (orig. proceeding)

Alfred Allen is an attorney in Graham, Texas who represented L.D. and Verna Thetford, an elderly couple who owned property in Graham. The Thetfords loaned $350,000

to their niece, Jamie Rogers, and her husband. Jamie, at various times, was also employed by Allen. In March 2012, Allen prepared the five-year note and the deed of trust for the loan, which enabled the Rogerses to buy property; Allen was also the trustee under the deed of trust. In July 2015, Verna, then 84, executed a will and power of attorney, also prepared by Allen. In the will, Verna left her estate to Jamie, and the power of attorney designated Jamie as Verna's attorney-in-fact and preferred guardian. In 2016, Verna's mental state began to deteriorate. Over the next several months to well into 2017, she became increasingly combative and confused, and was placed in a nursing home while being assisted by the Rogerses. In March 2017, the note to the Thetfords came due with a balloon payment of $285,000. Believing the Thetfords lacked the capacity to agree to extend the note, the Rogerses refinanced. But while the note remained due, Verna had another attorney prepare a revocation of her power of attorney, which she signed on March 27.

The Disciplinary Rules of Professional Conduct do not require that a lawyer be disqualified from representing one client who is applying to be appointed guardian for another current or former client, without that client's consent, as such representation is permitted under limited circumstances.

Two weeks later, on April 10, Jamie, represented by Allen, filed an application for temporary guardianship of Verna's person and a management trust for her estate. They attached a certificate of medical examination from Verna's personal physician, Dr. Pete Brown, as well as his office notes from a recent medical visit with Verna and his affidavit. These attachments detailed the decline in Verna's mental status and concluded that she "was, and is, incapacitated" as defined by Estates Code section 1002.017. After answering the suit, Verna moved to disqualify Allen as Jamie's attorney, asserting that he, "at all times material to the matters involved in this proceeding, has represented [Verna]" and that he had "obtained confidential information" when he represented Verna that he could use to her disadvantage in the guardianship proceeding. Distilled to

its essence, Jamie argued that Disciplinary Rule of Professional Conduct 1.02(g) places a duty on Allen to secure appointment of a guardian for Verna, while Verna argued that Rules 1.06(a), 1.06(b), and 1.09(a)(3) confirmed Allen's representation of Jamie without Verna's consent was a conflict of interest. Ultimately, the trial court denied Verna's motion to disqualify Allen. The Fort Worth Court of Appeals denied Verna's request for mandamus relief.

Determining the interplay between Rules 1.02(g), 1.06(a)-(b), and 1.09(a)(3), the Supreme Court denied Verna's petition for mandamus relief in a plurality opinion. Examining Rule 1.02(g), the Court's majority held that the rule's requirement that an attorney take "reasonable action" to protect a client expressly *allows*, but does not also *require*, the attorney to institute a guardianship proceeding. Reading Rule 1.02(g) together with conflict-of-interest Rules 1.06(b) and 1.09(a)(3), the Court further held that Allen's representations of Verna were not substantially related to the matters in the guardianship proceeding because Verna failed to show Allen's prior representations of her created a genuine risk that he would reveal her confidences to Jamie. Ultimately, these confidences related to her will and estate and were irrelevant to the guardianship matter, the purpose of which was to determine whether Verna was currently incapacitated.

As whether Allen's representation of Jamie in the guardianship proceeding was adverse to Verna, the Court, in a three-justice concurring opinion, held that for the guardianship proceeding to be adverse, Jamie's interests must be adverse to Verna's objectives or interests as Verna defined them before she became incapacitated. There was direct evidence of what those interests were: the power of attorney shows that before her dementia worsened, Verna wanted Jamie to serve as her guardian if the need ever arose. Moreover, nothing in the record indicated that Jamie has interests adverse to Verna's well-being. The Court also held that Allen's representation of Jamie in the guardianship proceeding was not adverse to Verna.

Justice Brown, joined by Justices Devine, Blacklock, and

Busby, proposed a simple, black-and-white rule that mirrors the model rule promulgated by the American Bar Association's ethics committee: "A lawyer with a disabled client should not attempt to represent a third-party petitioning for a guardianship over the lawyer's client." To these dissenting justices, this case presented an obvious conflict because Allen filed a guardianship application against a lender on a note for which he was the trustee, and he did so representing the note's defaulting debtor who was also his own employee. The Texas disciplinary rules impose limits on an attorney's ability to represent a third party in a guardianship proceeding against a current or former client. Even if Allen was no longer Verna's attorney, Rule 1.09 supports Allen's disqualification because Jamie's guardianship proceeding was adverse to Verna and the proceeding was substantially related to Allen's prior representation of Verna.

***In re Murrin Brothers 1885 Ltd.,* No. 18-0737, 63 Tex. Sup. Ct. J. 235, ___ S.W.3d ___ (Tex. Dec. 20, 2019).**

This case concerns a dispute over control of Billy Bob's Texas, the historic Fort Worth entertainment venue. The venue reorganized its ownership in 2011, bringing in additional owners and adopting a company agreement that included rules for management. One of these rules requires unanimous consent of the owners to "any matter within the scope of any major decision." Included in "major decision" is "settling, prosecuting, defending or initiating any lawsuit, administrative or similar actions concerning or affecting the business of BBT LLC and/or the BBT LLC Property." In 2011, Minick was unanimously elected President and Managing Member of BBT. But in 2017, nine out of BBT's twelve owners, dissatisfied with his performance, attempted to dismiss Minick by a majority vote. The opinion refers to this group as "the Hickman Group". Members of the "Murrin Group" (the remaining

Whether a company and the individual defendants in derivative litigation are "opposing parties" for purposes of Rule 1.06(a) requires consideration of the true extent of their adversity under the circumstances.

owners) responded by filing the underlying lawsuit in this case, individually and on behalf of BBT. They sought injunctive relief to prevent the Hickman Group from acting unilaterally on their behalf, the appointment of a receiver to break the gridlock, and a declaration that the Hickman group lacked authority to replace Minick without a majority vote. The Hickman Group hired the Kelly Hart & Hallman law firm (KHH) to represent BBT as well as the named defendants in the suit. KHH filed counterclaims on behalf of both the individuals and on behalf of BBT derivatively and also sought a receiver. On the eve of trial, the Murrin Group moved to disqualify KHH from representing both the company and the members of the Hickman Group, alleging that because BBT is the "plaintiff" in the Murrin Group's derivative claims, KHH's representation of both BBT and the Murrin Group has the firm representing both sides in the same case, which is prohibited under the disciplinary rules. The Murrin Group also filed a Rule 12 motion that required KHH to "show its authority" to represent BBT as that decision would have required a unanimous agreement by the owners, absent in this case. In response, the Hickman Group argued that the Certificate of Formation allowed this with only a simple majority. The trial court denied both motions. It did not explain its denial of the motion to disqualify but wrote that the letter of representation and Certificate of Formation qualified as "sufficient authority." The Murrin Group petitioned for a writ of mandamus in the court of appeals which was denied.

In a unanimous opinion by Justice Blacklock, the Supreme Court denied the mandamus petition, holding that trial court did not abuse its discretion in denying the motion to disqualify. The Murrin Group did not establish a clear entitlement to the "severe remedy" of disqualification of counsel. Even if a violation of the disciplinary rules is established, the party requesting disqualification must also show it will suffer prejudice if disqualification is not granted. The Court found that the Murrin Group did not make that showing. In response to the Murrin Group's argument that KKH could not represent both the plaintiff and defendant in the same case,

the Court found that the labels in a shareholder derivative action like this one were not as clear as in traditional cases and that "the proper inquiry is to look whether the substance of the challenged representations requires the lawyers to take conflicting positions or to take a position that risks harming one of his clients." Noting that courts around the country are divided on whether derivative litigation always presents such a risk, the court declined to make a categorical rule governing dual representation in derivative litigation. The question of which ownership group has authority to control BBT is one that could be solved by litigating the issue and the trial court did not abuse its discretion in denying the motion to disqualify.

Regarding the Rule 12 motion to show authority, the Court disagreed with the Murrin Group's argument that the trial court essentially decided the merits of its claim by denying the Rule 12 motion. The trial courts' ruling that KHH showed "sufficient authority" to represent BBT was not a merits decision on the ultimate issues in the case. Assuming, without deciding, that the Murrin Group is correct that the Company Agreement required unanimous consent of the owners before BBT could hire KHH, the Murrin Group must establish a lack an adequate remedy if mandamus relief is not granted, and the court found it did not.

Attorneys' Fees/Sanctions

***Nath v. Texas Children's Hospital*, 576 S.W.3d 707 (Tex. 2019).**

Texas Children's Hospital and Baylor College of Medicine (collectively, "Defendants") moved for attorneys' fees as a compensatory sanction, alleging that Rahul Nath's claims were frivolous. The trial court agreed Nath's claims were frivolous and imposed $1.4 million in attorneys' fees as a sanction. The Texas Supreme Court initially considered Nath's appeal of the sanction in 2014, holding that Nath's pleadings were sanctionable, but remanding for the trial court to reassess the award of attorneys' fees by considering "the degree to which [Defendants] caused their attorneys' fees." *Nath v. Tex.*

Children's Hosp., 446 S.W.3d 355, 372 (Tex. 2014).

On remand, Defendants' attorneys submitted affidavits stating that they did nothing to prolong the suit or unnecessarily increase their fees. The trial court found this evidence sufficient and reassessed the same sanction of $1.4 million in attorneys' fees. Nath appealed again, arguing the affidavits were insufficient to prove Defendants' "reasonable and necessary attorneys' fees." Defendants countered that attorneys' fees imposed as sanctions are not held to the same evidentiary burden as in other circumstances. The court of appeals upheld the sanctions award.

In a unanimous per curiam opinion, the Court held that "[b]efore a court may exercise its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness because without such proof a trial court cannot determine that the sanction is 'no more severe than necessary' to fairly compensate the prevailing party." Here, the affidavits Defendants' counsel submitted to the trial court merely referenced the fees without substantiating the reasonableness of the hours worked or the rates charged. The Court recently clarified the standards applicable when a prevailing party seeks to shift attorneys' fees to the losing party. *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469 (Tex. 2019). Because the standards clarified in *Rohrmoos* also apply to fee-shifting sanctions, the Court reversed the court of appeals' judgment and remanded the case to the trial court for further proceedings in light of *Rohrmoos*.

Before a court may shift attorneys' fees as a sanction, there must be some evidence of "reasonableness" of the fees.

Sanctions

In re Casey, 589 S.W.3d 850 (Tex. 2019)

This case involves a long-running dispute between Ann Coyle, an attorney licensed in Massachusetts, and her brother

and former sister-in-law, Chad Walker and Alisha Flood. Two prior lawsuits between the parties were settled by agreed judgment, but a dispute about satisfaction of the agreed judgment led to new claims. Represented by attorney Stephen Casey, Walker and Flood sued Coyle for abstracting a judgment fraudulently. Coyle, acting pro se, countersued and instituted a third-party action against Casey. Among other things, Coyle sought a declaration that Casey, Walker, and Flood are vexatious litigants as defined in Chapter 11 of the Texas Civil Practice and Remedies Code. Casey, on his own behalf and for his clients, moved to dismiss Coyle's claims as frivolous under Rule 91a and to designate Coyle as a vexatious litigant. In support of the vexatious-litigant designation, Casey presented evidence about certain pro se actions Coyle had commenced in the preceding seven-year period. Coyle did not respond to Casey's motion, but after a hearing at which Coyle appeared and argued, the trial court dismissed all of Coyle's claims as frivolous and designated her a vexatious litigant.

Coyle moved for reconsideration, arguing that the vexatious-litigant determination was wrong and seeking sanctions against Casey because he had not disclosed directly adverse controlling precedent and made groundless legal arguments. After a hearing, the trial court granted Coyle's motion, lifted the vexatious-litigant designation, and ordered Casey to reimburse Coyle $8,521.50 for attorney's fees incurred to prepare and argue the rehearing motion. Payment of the sanction was required within 10 days.

Casey promptly sought relief from the sanctions-payment deadline by moving the trial court to sever the sanctions order for immediate appeal, defer the payment deadline until rendition of an appealable judgment, or hold a hearing on his request for deferral in accordance with *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991).

When a litigant alleges in good faith that a monetary sanction would preclude access to the courts, a court must either defer payment until termination of the litigation or make written findings after a hearing as to why the sanction would not effectively preclude access to the courts.

Casey claimed that, if compelled to pay the sanction before appeal, both he and his clients would be deprived of access to the courts.

The trial court did not rule on Casey's motion, sever the sanctions order, or defer the sanctions-payment deadline. Casey then sought mandamus relief from the court of appeals, but his petition was summarily denied.

In a per curiam opinion, the Court held that deferral of the sanctions payment was required under *Braden*. Subject to good-faith pleading requirements, when a litigant, like Casey, contends that a monetary sanction would preclude access to the courts, *Braden* requires that a trial court must either allow for payment of the sanction at a time that coincides with or follows entry of a final order terminating the litigation, or make written findings after a prompt hearing as to why the sanctions would not effectively preclude access to the courts. Here, Casey's motion and supporting declaration were sufficient to invoke *Braden*'s deferral requirement, and the trial court did not hold a hearing or make findings to avoid deferral of the payment deadline. The Court therefore held that the trial court must modify its order to allow Casey an opportunity to appeal before the sanctions must be paid. The Court declined, however, to consider the propriety of the sanctions award by mandamus, because an adequate remedy by appeal was available.

Constitutional Law

Degan v. Bd. of Trustees of the Dallas Police & Fire Pension Sys., No. 19-0234, 63 Tex. Sup. Ct. J. 371, 594 S.W.3d 309 (Jan. 31, 2020)

The Dallas Police and Fire Pension System ("System") is a public pension fund that provides comprehensive retirement, death, and disability benefits for approximately 9,300 active and retired City of Dallas police officers, firefighters, and their qualified survivors. In addition to retirement pension options and disability benefits, System's pension plan offers a "Deferred

Retirement Option Plan" ("DROP"), which was started in 1993 to retain experienced police officers and firefighters after they attained eligibility to retire. With the DROP option, members who became eligible to retire could freeze their retirement benefits and continue working, receiving both a salary and an annuity payment from his or her retirement account. DROP accounts became very popular and initially collected an attractive interest rate that allowed members the option of a lump-sum withdrawal upon retirement. But when the lump-sum option threatened the liquidity and stability of the pension system, it was eliminated in 2017 when the Legislature amended Revised Civil Statute article 6243a-1.

LaDonna Degan and six other System retirees ("Retirees") challenged the amendment as unconstitutional. They argued that the DROP funds were accrued service retirement benefits and that the change to how these funds were withdrawn effectively reduced or impaired the accrued benefit in violation of the Texas Constitution, article XVI, section 66(d). This provision prohibits changes that "reduce or otherwise impair" certain accrued benefits "if the person (1) could have terminated employment or has terminated employment before the effective date of the change; and (2) would have been eligible for those benefits, without accumulating additional service under the retirement system, on any date on or after the effective date of the change had the change not occurred." The federal Fifth Circuit Court of Appeals certified two questions to the Supreme Court:

1. Whether the method of withdrawal of funds from the plan was a service retirement benefit protected under section 66.
2. If the answer to Question 1 is "yes," then whether the System's decision, made under the 2017 statute, to alter previous withdrawal elections and annuitize the DROP funds over a retiree's life expectancy violated section 66.

The Supreme Court answered no to both questions.

Although the Court agreed that DROP account funds

(including accrued interest) were a service retirement benefit to which the protection afforded by Section 66 could apply, the method of withdrawing funds from DROP was not itself a service retirement benefit. In answering "no" to the first question, the Court continued to the second question, acknowledging that whether the changes restricting their access to these funds was a prohibited reduction or impairment captured the constitutional question that the Court must resolve. Addressing the second question then, the Court first looked to the history of section 66 and noted that it was added to the Constitution to overrule the Court's decision in *City of Dallas v. Trammell*, 101 S.W.2d 1009, 1017 (Tex. 1937), in which the Court held that a "pensioner ha[d] no vested right" to future pension payments. Thus, section 66 protected the amount of monthly pension payments from reduction or impairment through subsequent changes to the system. The Retirees argued that the System's change violated section 66 by retroactively voiding previous elections and effectively denying them unfettered access to their accrued benefits, thus reducing or impairing their DROP accounts. The Court disagreed, holding that the change to how the DROP funds are distributed does not take away an accrued or granted annuity payment because the benefits in the Retirees' respective accounts have been reduced or impaired by the elimination of the lump-sum election or the flexibility it provided. Thus, the Court held that the 2017 amendment to Article 6243a-1 did not violate Article XVI, Section 66 of the Texas Constitution.

The 2017 changes to the Deferred Retirement Option Plans do not violate the Texas constitutional provision that prohibits the reduction or impairment of certain accrued retirement benefits.

Justice Boyd, joined by Justice Green, issued a dissenting opinion. Although the 2017 amendments did not "reduce" the amount of the monthly payments or prospectively lessen the amount of funds in the DROP accounts, they did "otherwise impair" them by eliminating the Retirees' right to withdraw all of their funds. The right to a lump-sum withdrawal was a

property right and "accrued" benefit the Retirees had as the exclusive owners of the funds in their DROP accounts. By retroactively depriving the Retirees of this right and forcing them to accept only lifetime annuity payments, the 2017 amendments "otherwise impaired" the accrued DROP benefits by diminishing their value to their exclusive owners.

Contracts

***Copano Energy LLC v. Bujnoch*, No. 18-0044, 63 Tex. Sup. Ct. J. 348, 593 S.W.3d 721 (Jan. 31, 2020)**

Stanley D. Bujnoch and others (collectively "Landowners") owned land in Lavaca and Dewitt Counties. In 2011, they granted easements to Copano Energy LLC ("Copano") for the construction, operation, and maintenance of a 24-inch pipeline, which was completed satisfactorily. In late 2012, Copano approached the Landowners to get an easement for second pipeline. Copano's landman, James Sanford ("Sanford"), contacted the Landowners' lawyer, Marcus Schwartz ("Schwartz"), to discuss the proposed second easement. What ensued was a series of emails and letters between Sanford, Schwartz, and other representatives of the Landowners and Copano over the next several months, although the parties never signed a written agreement memorializing the specific and pertinent terms of the easement. Ultimately, the second pipeline was never built. In February 2014, the Landowners sued Copano and others (collectively "Copano") for breach of contract and tortious interference with a contract. The Landowners alleged the existence of a contract to sell an easement to them for $70 per foot and to Transportation Equipment, Inc. (one of the Landowners with a separate interest) for $88 per

Forward-looking writings that contain potential contract terms can be used to supply the essential terms of a contract, but only if another writing confirms that the parties later agreed to the terms stated in the forward-looking writing.

foot. The trial court granted Copano's motion for summary judgment and rendered a take-nothing judgment on all claims. The Corpus Christi Court of Appeals affirmed summary judgment on the tortious interference claim but reversed summary judgment on the breach of contract claim.

The Texas Supreme Court reversed the court of appeals' judgment on the contract claim and rendered judgment that the Landowners take nothing on all their claims. Distilled to its essence, this case focused on whether the myriad communications between the parties amounted to a contract satisfying the statute of frauds. The Court held that they did not. The Landowners claimed their contract with Copano arose on January 30, 2013, when Sanford emailed Schwartz stating, "Pursuant to our conversation earlier, Copano agrees to pay your clients $70.00 per foot for the second 24-inch line it proposes to build," and Schwartz quickly responded, "In reliance on this representation we accept your offer ...." Although these emails show an offer, an acceptance, a price, and a pipe size, "they do not say what is being offered and accepted" and do not have the "essential elements of the agreement." To satisfy the statute of frauds, it is not enough that the writings state *potential* contract terms. Such forward-looking writings can conceivably be used to supply essential terms, but only if another writing confirms that the parties later agreed to the terms stated in the forward-looking writing. Here, no such later writing exists. The Court could not piece together, with certainty and clarity, the collection of writings showing the essential terms of an easement contract and the parties' agreement to be bound by those terms. As a result, the Landowners' proffered contract was not enforceable and the trial court's summary judgment for Copano on the breach of contract claim was proper. Thus, the Supreme Court reversed the judgment of the court of appeals and rendered a take-nothing judgment.

***Energy Transfer Partners L.P. v. Enterprise Prods. Partners L.P.*, No. 17-0862, 63 Tex. Sup. Ct. J. 340, 593 S.W.3d 732 (Jan. 31, 2020)**

In March 2011, Energy Transfer Partners L.P. ("ETP") and Enterprise Products Partners L.P. ('Enterprise") began negotiating a joint project to move crude oil from Cushing, Oklahoma to the Texas Gulf Coast. The project required a massive investment to build a new pipeline from Maypearl, Texas to Cushing, as well as converting an existing pipeline from Maypearl to Sweeny, Texas. While the parties explored the viability of the project, they intended that neither party would be bound to proceed until each company's board of directors had approved the execution of a formal contract. The parties' signed Confidentiality Agreement included the following provision at issue here:

> The Parties agree that unless and until a definitive agreement between the Parties with respect to the Potential Transaction has been executed and delivered, and then only to the extent of the specific terms of such definitive agreement, no Party hereto will be under any legal obligation of any kind whatsoever with respect to any transaction by virtue of this Agreement or any written or oral expression with respect to such a transaction by any Party or their respective Representatives, except, in the case of this Agreement, for the matters specifically agreed to herein....

The parties' subsequent Letter Agreement and Non-Binding Term Sheet contained a similar provision, and their Reimbursement Agreement contained language expressly stating that "the parties had not yet formed a partnership." By August 2011, ETP and Enterprise had not yet obtained sufficient shipping commitments to make the project viable. On August 12, Chesapeake Energy Corporation committed to ship 100,000

Parties may contract that, as between themselves, no partnership will exist unless certain conditions precedent are satisfied.

barrels daily, which gave ETP hope that other shippers would make commitments of their own. But days earlier, Enterprise had begun preparing its exit by resuming negotiations with Enbridge, with whom it had previous discussions about the project before Enterprise engaged with ETP. A few days later, Enterprise ended its relationship with ETP. Ultimately, Enbridge and Enterprise were able to secure additional commitments and, after investing billions to complete the needed work, achieved financial success with the new pipeline.

ETP sued. Its theory at trial was that despite the disclaimers in the parties' written agreements, they had formed a partnership to "market and pursue" a pipeline through their conduct, and Enterprise breached its statutory duty of loyalty by pursuing the project with Enbridge. After the jury found in ETP's favor, the trial court rendered judgment on the verdict for ETP for a total of $535,794,777.40 plus post-judgment interest. The Dallas Court of Appeals reversed and rendered judgment for Enterprise, holding that the Business Organizations Code allows parties to contract for conditions precedent to partnership formation and the conditions precedent in this case were not met.

In a case of first impression, the Supreme Court affirmed, but on an alternative basis. Section 152.051(b) of the Business Organizations Code provides that "an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name." Likewise, section 152.052(a) sets out the factors indicating that persons have created a partnership. Citing *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009), the Court noted that its holding did not resolve the issue of whether parties to an anticipated partnership could agree to *not* to be partners until conditions precedent were satisfied, thereby overriding the statutory default test, in which intent was a mere factor. On the one hand, ETP argued that the Business Organizations Code's totality-of-the-circumstances test controlled partnership formation to the exclusion of the common law and that the parties' intent with respect to the

creation of a partnership was just one factor to be weighed with the others in section 152.052(a). On the other hand, Enterprise argued for the primacy of freedom of contract and that if parties could not, by contract, protect themselves from the creation of an unwanted partnership, detrimental economic consequences to the State and constant litigation would ensue. Following its holding in *Ingram* that the Legislature did not "intend[ ] to spring surprise or accidental partnerships" on parties and noting that "perhaps no principle of law is as deeply engrained in Texas jurisprudence as freedom of contract," the Court held that parties can contract for conditions precedent to preclude the unintentional formation of a partnership under Chapter 152 and that, as a matter of law, ETP and Enterprise did so here. Nevertheless, the Court affirmed the court of appeals' judgment on the basis that ETP was required either to obtain a jury finding that Enterprise had waived the "no-partnership" provision or to prove it conclusively. Because ETP did neither, the Supreme Court affirmed.

***Pathfinder Oil & Gas Inc. v. Great Western Drilling Ltd.*, 574 S.W.3d 882 (Tex. 2019)**

Pathfinder Oil & Gas, Inc. ("Pathfinder") and Great Western Drilling Ltd. ("Great Western") were negotiating the terms of a participation agreement that would give Pathfinder a 25% working interest. Ultimately, Great Western withdrew the purchase offer. But within hours, Pathfinder signed the draft participation agreement and mailed it to Great Western with a required payment. Thereafter, Great Western sued for a declaration that the Letter Agreement was not an enforceable contract, and Pathfinder counterclaimed for breach of contract. The day before trial, the parties agreed to a stipulation that expressly (1) limited the issues to be submitted to the

By agreeing to limit the jury submissions to contract formation, breach, and specific affirmative defenses only, Great Western waived the right to insist on any other fact findings that might otherwise have been required to entitle Pathfinder to specific performance.

jury; (2) limited Pathfinder's remedy to specific performance and specified the conditions for obtaining that remedy; (3) waived Pathfinder's claim for money damages; and (4) required Pathfinder to nonsuit specific claims. In pertinent part, the stipulation agreement provided:

1. At the trial of this cause ..., the only issues that will be submitted to the Court and/or jury will be (a) whether the June 1, 2004 Letter Agreement ... is an enforceable agreement; (b) whether Great Western or Pathfinder breached the Letter Agreement; and (c) Great Western's affirmative defenses of estoppel, failure of consideration, statute of frauds, mutual mistake, anticipatory repudiation, unclean hands, material breach and revocation.

At the charge conference, the court denied Great Western's proposed jury question asking whether Pathfinder had, at all times, been "ready, willing, and able to perform the essence of its obligations"—an element of specific performance that is a fact issue when contested. In denying the request, the court explained that the parties' stipulations specified the only findings required and obviated the need for the requested finding. The jury found in Pathfinder's favor. The trial court rendered judgment for Pathfinder and, based on the relief outlined in the parties' stipulations, ordered Great Western to pay $3.05 million as net revenue on Pathfinder's working interest, plus pre-judgment interest of $ 729,252.90 and more than $ 200,000 in attorney's fees. The Eastland Court of Appeals reversed and rendered judgment for Great Western, reasoning that the parties' stipulations limited the remedy to specific performance but "did not obviate the necessity that Pathfinder prove its entitlement to it," as it failed to conclusively establish or obtain a jury finding that it was ready, willing, and able to perform.

The Supreme Court reversed, holding Great Western waived the right to insist on any other fact findings that might otherwise have been required to entitle Pathfinder to specific performance. Because stipulations are "contracts relating to litigation," the Court construed the parties' pretrial stipulations under the same rules as a contract to determine

whether they waived or eliminated Pathfinder's burden of proving its entitlement to specific performance. A party seeking the equitable remedy of specific performance for a breach of contract must plead and prove that (1) a valid contract exists; (2) the plaintiff performed or tendered performance as contractually required; (3) the defendant breached the contract by failing to perform or tender performance as contractually required; (4) the plaintiff sustained damages due to the breach; and (5) at all relevant times, the plaintiff was ready, willing, and able to perform under the contract. Here, however, the parties agreed that the jury would "only" determine three matters—existence of a valid contract, breach, and any affirmative defenses to recovery. According to the Supreme Court, "[t]he language in Paragraph 1 is plain and clear: the jury would only be charged with deciding the specified issues, nothing more." In so holding, the Court rejected Great Western's argument that Paragraph 3 of the stipulation—stating that "In the event that the Court or jury finds that … Pathfinder is entitled to recover for Great Western's breach …—required Pathfinder to prove it was "entitled" to specific performance, including that it was at all times "ready, willing, and able to perform." After comparing and harmonizing Paragraphs 1 and 3, the Court held that the only reasonable construction of the stipulation agreement was that Pathfinder was required to submit and prevail on only those issues Paragraph 1 reserved for the jury's determination. Thus, the Court reversed the court of appeals' judgment and remanded the case to that court for it to consider the unaddressed appellate issues.

Damages

***Atrium Med. Ctr LP v. Houston Red C LLC*, No. 18-0228, 63 Tex. Sup. Ct. J. 400, 595 S.W.3d 188 (Feb. 7, 2020)**

Atrium Medical Center LP ("Arium") entered a five-year contract with ImageFIRST Healthcare Laundry Specialists ("ImageFirst") for specialty laundry services. The parties

expected that the invoices would fluctuate based on weekly linen demand. After a few months, Atrium experienced financial distress and stopped paying ImageFirst's invoices, though ImageFirst continued to deliver linens for several more months. Atrium eventually canceled the contract and entered into an agreement with another vendor. Atrium's cancellation triggered the liquidated damages provision, which calculated these damages based on the remaining weeks of the contract term and required Atrium to pay a cancellation charge equal to 40 percent of the greater of (i) the initial "agreement value" and (ii) the current invoice amount, multiplied by the number of weeks remaining in the agreement's term. At the outset, the contract defined the "agreement value" to be $2,616.66 per week (the first week's rental price for the linens). The weekly invoice amount rose in the following months, based on Atrium's demand. ImageFirst's final weekly invoice charged $8,066.79. At the time Atrium canceled, approximately four years remained on the contract.

ImageFirst sued Atrium for breach of contract and sought to enforce the liquidated damages provision. In response, Atrium argued the provision was a penalty and thus unenforceable. The trial court enforced the provision, ruling that it was not a penalty because it reasonably estimated the harm that would result from a breach, and actual damages were difficult to predict when the contract was made. Citing these grounds, the Fourteenth Court of Appeals affirmed, and explained that the 40 percent cancellation charge was not a penalty because "the evidence of record demonstrated that 40% was a reasonable forecast" of the harm resulting from canceling the contract.

To determine whether a liquidated damages provision operates as a penalty, courts examine whether, at the time of the breach, an "unbridgeable discrepancy" exists between actual and liquidated damages.

The Texas Supreme Court affirmed. Citing *Phillips v. Phillips*, 820 S.W.2d 785 (Tex. 1991), the Court observed that courts will enforce liquidated damages provisions when (1) "the harm caused by the breach is

incapable or difficult of estimation," and (2) "the amount of liquidated damages called for is a reasonable forecast of just compensation." In applying these rules, courts examine the circumstances at the time the agreement is made. Nevertheless, a properly designed liquidated damages provision may still operate as a penalty due to unanticipated events arising during the life of a contract. Therefore, courts must also examine whether "the actual damages incurred were much less" than the liquidated damages imposed, measured at the time of the breach. Here, the provision permitted recovery of a contractual profit. The Court agreed that the record supported the trial court's findings that, at the time of contracting, (1) damages resulting from Atrium's breach were difficult to estimate and (2) the liquidated damages provision reasonably forecast just compensation.

In addition, the Court held that Atrium offered no evidence of an unbridgeable discrepancy between ImageFirst's actual expectancy damages and its liquidated damages under the contract. Instead, Atrium argued that ImageFirst's reliance damages were much less. But having rejected Atrium's argument that the contract limited ImageFirst's damages to a reliance measure, and noting that Atrium did not adduce evidence that the liquidated damages provision failed to approximate ImageFirst's damages for lost benefit of its bargain, the Court held the trial court had no basis to conclude the liquidated damages were out of step with actual damages. Therefore, because Atrium failed to prove an unbridgeable discrepancy or otherwise demonstrate that the provision operated as a penalty, the Supreme Court affirmed the judgment of the court of appeals.

***JCB Inc. v. Horsburgh & Scott Co.*, No. 18-1099, 62 Tex. Sup. Ct. J. 1199, 2019 WL 2406971 (June 7, 2019)**

This case involves two certified questions from the Fifth Circuit Court of Appeals addressing the damages and attorney's fees available under Chapter 54 of the Business and Commerce Code, also known as the Sales Representative Act

("Act"). JCB Inc. was a commissioned sales representative for Horsburgh & Scott Company ("Horsburgh"), a manufacturer of gears and gearboxes. Under the parties' written contract, JCB's commissions were due "on approximately the 10th of each month following the payment of a commissionable order by the customer to [Horsburgh]." Ultimately, Horsburgh owed approximately $280,000 in commissions, so JCB sued for treble damages and attorney's fees under section 54.004. When suit was filed, Horsburgh still owed commissions totaling $77,000 to $90,000, and eventually paid all remaining commissions plus approximately five percent interest. Horsburgh then moved for summary judgment, which the district court granted, finding that section 54.004 of the Act did not apply because all commissions had been paid.

To determine the date as of which the "unpaid commission due" should be calculated—whether it was the date the commissions were originally due under the contract, or (as the district court found) the time of trial or judgment—the Fifth Circuit certified the following questions to the Supreme Court:

1. What timing standard should courts use to determine the existence and amount of any "unpaid commissions due" under the treble damages provision of Business and Commerce Code section 54.004(1)?

2. May a plaintiff recover reasonable attorney's fees and costs under Business and Commerce Code section 54.004(2), if the plaintiff does not receive a treble damages award under section 54.004(1), and under what conditions?

Answering the first question, the Supreme Court held that the time for determining the existence and amount of "unpaid commission due" under section 54.001(1) is the time the jury or trial court determines the liability of the defendant, whether at trial or through another dispositive trial-court process such as a summary judgment. Chapter 54 gives sales representatives a valuable advantage few other litigants enjoy. The threat of treble damages down the road is a heavy stick for the sales representative to wield against the principal, even if the blow cannot be struck until judgment. But if treble-damages liability

irrevocably attaches the moment a breach occurs, the proverbial stick looks more like heavy artillery. Moreover, nothing in the statutory text indicates that this advantage must be applied in a way that is alien to how the law operates outside of chapter 54, such as with the general common-law principle that contract damages are not set in stone at the timeof breach but may be reduced or mitigated by the parties' later actions.

As to the second question, the Court held that a plaintiff may recover attorney's fees and costs under Business and Commerce Code section 54.004(2) even if the plaintiff does not receive treble damages, if the factfinder determines that the fees and costs were reasonably incurred under the circumstances. Moreover, reasonable costs, like reasonable attorney's fees, are available under section 54.004(2), and their availability does not depend on an award of treble damages under section 54.004(1). Under the plain language of section 54.004(2), JCB's entitlement to attorney's fees is triggered by Horsburgh's breach, not by JCB's success in litigation: "A principal who fails to comply with a provision of a contract ... relating to payment of a commission ... is liable to the sales representative ... for ... reasonable attorney's fees and costs." Because Horsburgh failed to comply with the commission contract, it "is liable to" JCB for "reasonable attorney's fees." As to the reasonableness of the sought-after fees, the attorney's fees spent pursuing the commissions (including treble damages) may be reasonable, assuming they satisfy other legal and factual standards applicable to reasonable fee awards. On the other hand, attorney's fees spent continuing to press for treble damages after the defendant paid all commissions due plus interest are likely not reasonable, because at that point the case should have been finished. Regardless, JCB is eligible for

Under the Sales Representative Act, the time for determining the existence and amount of "unpaid commission due" under section 54.001(1) is the time the jury or trial court determines the liability of the defendant, whether at trial or through another dispositive trial-court process such as a summary judgment.

an award of reasonable attorney's fees and costs by virtue of Horsburgh's breach and the plain language of section 54.004.

Deeds

***Trial v. Dragon*, No. 18-0203, 62 Tex. Sup. Ct. J. 1292, ____ S.W.3d ____ (Tex. 2019).**

Leo Trial and his six siblings each owned a 1/7 interest in 237 acres in Karnes County, Texas. Leo gifted to his wife, Ruth, "one-half (1/2) of all" his interest in the Karnes County property, giving Ruth a 1/14 interest in the property as her separate property, and leaving Leo with a 1/14 interest. Later, Leo and his siblings purported to convey the entire Karnes County property to the Dragons. The deed did not mention Ruth's 1/14 interest, Ruth was not a party to the sale, and there was no evidence the Dragons knew about Ruth's interest. The deed contained a general warranty clause stating that the sellers bound themselves and their heirs to warrant and defend the premises unto the Dragons against any person claiming title to the same. When Ruth passed away, her 1/14 interest passed to Leo's and Ruth's two sons through intestacy, giving each Trial son a 1/28 interest in the Karnes County property. When the Dragons eventually learned of the 1/14 interest that had been gifted to Ruth, they filed suit against the Trial sons, asserting claims for breach of warranty and estoppel by deed.

Damages for breach of a general warranty, not estoppel by deed, was the appropriate remedy for an adverse claim to title based on an interest that was not owed by the grantee at the time of execution of the deed.

The trial court considered competing summary judgment motions and ruled in favor of the Trials on almost every claim, including breach of warranty and estopped by deed. The Dragons appealed. The court of appeals reversed the trial court's judgment and rendered judgment for the Dragons based on estoppel by deed and the *Duhig* doctrine. *See Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940).

Justice Green authored the Court's unanimous opinion reversing the court of appeals' judgment and holding that neither estoppel by deed nor *Duhig* applied to divest the Trial sons of their cumulative 1/14 interest inherited from Ruth, which was a source of title independent from and predating the deed by their father and his siblings transferring the property to the Dragons. The Court explained that over time the estoppel-by-deed doctrine has developed to have a wide application that all parties to a deed are bound by the recitals therein, which operate as estoppel and bind "privies in blood, privies in estate, and privies in law." *Duhig* is a prominent application of estoppel by deed, but the Court explained that *Duhig*'s holding is "narrow" and confined to its facts. "*Duhig* stands for the proposition that if a grantor reserves an interest and breaches a general warranty at the very time of execution, then an immediate passing of title is triggered to the grantee for that property that was described in the reservation—in other words, if the grantor owns the exact interest to remedy the breach *at the time of execution* and equity otherwise demands it." Here, Leo did not own the interest required to remedy the breach when the deed to the Dragons was executed; Ruth owned that interest as her separate property. Thus, *Duhig* did not apply here. The Court went on to hold that the proper remedy for Leo's breach of the general warranty in the deed was monetary damages, and the Trial sons, as Leo's heirs, were bound by the warranty. Neither the trial court nor the court of appeals had considered this damages issue, so the Court remanded the case to the trial court to determine the appropriate damages.

Defamation

Scripps NP Operating LLC v. Carter, 573 S.W.3d 781 (Tex. 2019)

Terry Carter, the former president and CEO of the Corpus Christi Chamber of Commerce ("Chamber") sued Scripps NP Operating LLC d/b/a The Corpus Christi Caller-Times

("Newspaper") for defamation and other claims, asserting that it published false statements about him. From February to June 2008, the Newspaper published over 20 articles about Carter and financial issues at the Chamber. The Newspaper also published an editorial in March 2008, stating that its articles laid out reports of "highly questionable stewardship of the financial affairs of the chamber by Carter" and they described "duplicitous dealings by Carter in his relations with the membership and the executive committee." The editorial further stated that a letter by the Chamber's executive committee treasurer addressed "the questionable shifting of funds" that "allowed the chamber to show a profit, thus qualifying Carter for a bonus." After the Chamber put Carter of paid leave, he resigned. He later sued the Newspaper, asserting its statements that he engaged in financial and managerial irregularities to obtain an undeserved bonus caused him to lose his job.

In the trial court, the Newspaper filed a combined motion for traditional and no-evidence summary judgment based, among other things, on Carter's status as a public figure and the issue of malice. After the trial court denied the motion and the appellate court affirmed that Carter was not a public figure, the Newspaper filed a second summary judgment motion on remand. This motion argued, among other things, that the articles and editorial were (1) true, (2) not defamatory, (3) non-actionable opinion, and (4) published without negligence. The trial court again denied the motion and the Newspaper filed a second interlocutory appeal. The Corpus Christie Court of Appeals held the articles were defamatory and concluded that the Newspaper failed to establish that (1) the articles were published without negligence, (2) the editorial was non-actionable opinion, and (3) the gist of the articles was substantially true. The appellate court also rejected the Newspaper's claim that the articles were substantially true reports of allegations, observing that the statements went beyond mere "allegation reporting."

The Supreme Court affirmed the court of appeals' judgment in its entirety. As an initial matter, the Court rejected

Carter's argument that Civil Practice and Remedies Code section 51.014(a) limits a party to only one interlocutory appeal. The Court held that an appellate court has jurisdiction over a subsequent appeal if the second motion is a new and distinct motion and not a mere motion to reconsider previous grounds for summary judgment.

Turning to the merits, the Court held that the court of appeals correctly considered all the articles together to determine whether they were defamatory, thus rejecting the Newspaper's argument that each article should have been examined individually. The Court also noted that the appellate court could not have made a proper assessment of the alleged defamatory material without looking at the "surrounding circumstances" encapsulated in the series of articles.

The Supreme Court next rebuffed the Newspaper's claim that it was merely reporting third parties' allegations, holding instead that, "[t]he gist of the editorial was that the statements in the prior articles regarding Carter's shifting of funds for his own financial gain and intimidation of his critics were true, not that they were merely the accusations of others." As a result, the Newspaper was not entitled to summary judgment on the ground that its articles were substantially true as a matter of law. Moreover, the Court agreed with the court of appeals that a fact issue existed as to whether the Newspaper's incorrect reporting on Carter's entitlement to a bonus harmed him more than if the paper would have accurately reported as to this issue. In so holding, the Court left open the question of whether the common law recognizes a substantial truth defense for accurately reporting third-party allegations.

To ascertain whether an editorial statement is a protected opinion, the court must determine if the statement is verifiable as false and consider the entire context of the statement, which may disclose that it is merely an opinion masquerading as fact.

Finally, the Court rejected the Newspaper's argument that its editorial contained non-actionable opinion, not statements of fact. Although some statements in the editorial were opinions,

it said much more and was not simply opinion masquerading as fact. The editorial's subheadline read, "Funds were shifted that made a loss look like a profit, entitling CEO to a bonus." It represented that the prior news reports "describe duplicitous dealings by Carter in his relations with the membership and the executive committee" and laid out reports of "highly questionable stewardship of the financial affairs of the chamber by Carter," indicating that the statements in the editorial were supported by the prior reporting. The editorial also stated that, "[t]wo executive committee members ... were removed from the committee by Carter after they attempted to bring transparency and accountability to the finances," and that their removal was "nothing less than an attempt to intimidate critics of [Carter's] conduct." All of these statements are verifiable as false and are not protected opinion. Thus, the Supreme Court affirmed the court of appeals judgment and remanded the case to the trial court.

Oil & Gas

***Conoco Phillips Co. v. Ramirez*, No. 17-0822, 63 Tex. Sup. Ct. J. 299, 599 S.W.3d 296 (Jan. 24, 2020)**

In 1941, brother and sister Leon Juan and Felicidad Ramirez received a bequest from their father's estate comprising multiple tracts totaling 7,016 acres in Zapata County. They later partitioned the surface estate and severed the minerals, each taking 3,508 surface acres and an undivided half-interest in the minerals under the entire 7,016 acres. In 1966, Leon Juan died. His will made identical dispositions of his surface estate and mineral estate but in separate paragraphs: half of each to his wife, Leonor, and the rest to his three children (Leon Oscar Sr., Ileana, and Rodolfo) in equal shares. Leonor and the children later partitioned their interests in the surface estate. Their agreement stated that the partition did "not ... include oil, gas and other minerals which for the [time being] [were] to remain undivided." In 1978, Leonor executed her will. When she died

the following year, her will devised a life estate in "all of [her] right, title and interest in and to Ranch 'Las Piedras'" to her son Leon Oscar Sr. with the remainder to his living children in equal shares. The will also devised the residuary of Leonor's estate equally to her three children, Leon Oscar Sr., Ileana, and Rodolfo, who collectively believed that Leonor had devised her mineral interest in the entire 7,016 acres, including Las Piedras Ranch, to them in equal shares as part of her residuary estate. Indeed, over the years, Leonor's three children and their aunt Felicidad signed several oil and gas leases on various portions of the family land, including one in 1990 that was later transferred to ConocoPhillips. In 2006, Leon Oscar Sr. died. His death terminated his life estate, which passed, in accordance with Leonor's will, to his three children: Leon Oscar Jr., Rosalinda, and Minerva (who was incapacitated and represented through a guardian). He also left his property to Oscar Jr. and Rosalinda, whom his will named as co-executors.

After Leon Oscar Sr. died in 2006, his three children filed suit against their uncle Rodolfo, their aunt Ileana's estate, ConocoPhillips, and others, asserting that (1) their father's life estate under their grandmother's will included her interest in not only the surface of Las Piedras Ranch but also the minerals beneath it; and (2) the mineral interest their father, aunt, and uncle received under the will's residuary provision did not include those under the Ranch. Therefore, as remaindermen under the will, they claimed to own their father's life-estate interest in half of the surface of the Ranch and ¼ of the minerals, and as his heirs, Leon Oscar Jr. and Rosalinda claimed to own his fee interest in the other half of the surface. After a bench trial, the trial court signed a total judgment of almost $12 million against ConocoPhillips and in favor of Leon Oscar Jr. and Minerva (Rosalinda dismissed her claims). The San Antonio Court of Appeals affirmed.

A bequest of "all … right, title and interest in and to Ranch 'Las Piedras'" conveys only the surface estate in the property, but not the mineral interest.

The Texas Supreme Court reversed and rendered judgment for ConocoPhillips. At issue was whether Leonor's devise of "all ... right, title and interest in and to Ranch 'Las Piedras'" referred only to a surface estate by that name as understood by the testatrix and beneficiaries at the time the will was made or also included the mineral estate. Leonor's bequest capitalized "Ranch 'Las Piedras'" and placed the name in quotation marks, indicating that the term had a specific meaning to Leonor and her family, a meaning that was shown by the circumstances that existed when she executed her will. The agreements between Leonor and her children over the years involving the 7,016 acres and additional tracts acquired by one or more of them never partitioned or otherwise involved the mineral interests. In fact, until Leon Oscar Sr.'s death in 2006, his actions and those of Ileana and Rodolfo were consistent with their understanding that Leonor's will had given them a fee interest in the minerals under the entire 7,016 acres, including Las Piedras Ranch, and inconsistent with a contrary view. The evidence establishes that Leonor, who shared ownership of the Las Piedras Ranch surface with her son, gave him her interest in the surface for life, but gave her interest in the minerals in the 7,016-acre family estate equally to her three children, who already had equal interests. Thus, the Court reversed the court of appeals' judgment and rendered judgment for petitioners.

Property Law

***Teal Trading & Dev't LP v. Champee Springs Ranches Prop. Owners Ass'n*, No. 17-0736, 63 Tex. Sup. Ct. J. 329, 593 S.W.3d 324 (Jan. 31, 2020)**

Champee Springs Ranches ("Champee"), comprised of 9,246 acres in Kendall and Kerr counties, was created as a residential development in June 1998. Champee's owner, E.J. Cop ("Cop"), in conjunction with the plat, recorded a "Declaration of Covenants, Conditions, and Restrictions" for the property that included a one-foot easement encircling the

acreage and thereby restricted access to a main entrance. One month later, Cop sold 1,328 acres in Champee to a buyer, who later sold 660 of those acres in the northwest corner, which was platted as Privilege Creek Ranches ("Privilege Creek") and located in Kerr County. In June 1999, the Champee landowners replatted their acreage, subdividing their existing interior lots, and filed the replat in Kendall County only. Later, BTEX Ranch, LP ("BTEX"), the predecessor-in-title of Teal Trading and Development, LP ("Teal"), bought Privilege Creek and an adjoining 1,173 acres to the north. Although Privilege Creek was burdened by the restrictive easement, the adjoining acreage was not. As a result, the easement bisected Teal's contiguous parcels. Later, BTEX tried to develop both tracts as one subdivision and built a private construction road connecting both tracts in violation of the restrictive easement. If the construction road became a permanent road, Champee would no longer have a single entrance and the bisecting road would become a private throughway for new residential developments to the northwest. Seeking to enforce the easement, the Champee's Property Owners Association ("CPOA") intervened in a lawsuit filed against BTEX by Kendall County. The trial court severed Champee's claims into a separate lawsuit. Meanwhile, Teal acquired BTEX's land through foreclosure and intervened in the lawsuit.

Lack of mutuality does not equal lack of constitutional standing.

After the trial court's initial judgment granting Champee's summary judgment motion was reversed and remanded on appeal, the trial court again held that the easement was an enforceable covenant and not an unreasonable restraint against alienation or use. In the bench trial, the court also rejected Teal's affirmative defenses: waiver, estopped-by-deed, estoppel-by-record, and quasi-estoppel. The court signed a judgment declaring the easement valid, binding, and enforceable against Teal as a covenant running with the land. The San Antonio Court of Appeals affirmed.

Addressing five issues, the Texas Supreme Court affirmed. First, the Court held that Champee had standing to sue to enforce the easement. A plaintiff has standing to sue when the pleaded facts state a "concrete and particularized, actual or imminent, not hypothetical" injury. Teal argued that Champee's injury was illusory because the landowners initially subject to the easement were not "mutually burdened by the same restriction" in that Teal's property was about ten miles from the main entrance, but the average Champee resident was closer. Nevertheless, the Court held that a lack of mutuality does not deprive the court of jurisdiction to hear the dispute, and therefore did not affect Champee's standing. Because Champee alleged in its pleading that Teal violated a restrictive easement that burdened its and Teal's property, Champee pleaded an injury in fact and therefore had standing.

Next, the Court held that the evidence supported the trial court's rejection of Teal's affirmative defenses. Teal argued that Champee waived its right to enforce the restrictive easement, and that the doctrines of estoppel-by-deed or quasi-estoppel barred Champee from enforcing the easement. In support of these arguments, Teal relies on the 1999 replat that omitted the Cop easement and included a note stating that restrictive easements are "not allowed unless they are dedicated to the county." To succeed on this defense, Teal had to show that the Champee residents intended the replat to relinquish any enforcement right. The Court held that the omission and the note in the replat did not conclusively demonstrate "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right."

The Court also rejected Teal's estoppel-by-deed defense. Noting that estoppel-by-deed "does not bind mere strangers" to the deed, Teal was not entitled to invoke estoppel-by-deed against the document's signatories because it was a stranger to the replat. Even if Teal could invoke this doctrine against Champee, it would still fail because in the 1999 replat, Champee did not expressly disclaim its right to enforce the easement against Teal. For similar reasons, Teal's

quasi-estoppel argument also failed, as the evidence did not demonstrate that Champee took a position in the 1999 replat inconsistent with asserting its right to enforce the easement against Teal.

Finally, the Court declined Teal's invitation to void restrictive access easements on public-policy grounds because the permissibility of such easements, at least under the facts of this case, was an issue best left to the legislature and local governments. Although Teal makes reasonable arguments that restrictive easements can be problematic, the Court's authority under the common law to declare a valid contractual provision void is tempered by relevant expressions of public policy from the legislature. Under section 202.003(a) of the Property Code, a restrictive covenant not proscribed by statute should be "liberally construed to give effect to its purpose and intent." When restrictive covenants are confined to a lawful purpose and are clearly worded, they will be enforced. Thus, the Supreme Court affirmed the court of appeals judgment.

Venue

***In re Fox River Real Estate Holdings Inc.*, No. 18-0913, __ Tex. Sup. Ct. J. ___, 596 S.W.3d 759 (Jan. 31, 2020) (orig. proceeding)**

Metropolitan Water Company of Texas, L.L.C. ("MWGP") is the general partner of limited partnership Metropolitan Water Company, L.P. ("Met Water"). William Carlson owns MWGP and Met Water Vista Ridge, L.P. ("Vista Ridge"). A group of Met Water's limited partners (collectively "Fox River") sued Carlson and his entities as "a single-business enterprise," claiming Carlson misappropriated assets, breached the partnership agreement, and violated fiduciary duties. Relying on section 65.023(a) of the Civil Practice and Remedies Code, Fox River filed suit

In cases seeking mixed relief that includes injunctive relief, venue statute 65.023(a) does not apply if the injunctive relief is not the primary and principal relief requested.

in Washington County, where Carlson, MWGP, and Vista Ridge (collectively "Carlson") were domiciled. Citing a venue-selection clause in the partnership agreement, Carlson moved to transfer venue to Harris County. The trial court granted Carlson's motion without substantive comment and transferred venue. Without considering whether section 65.023(a) applied, the Fourteenth Court of Appeals denied Fox River's petition for mandamus relief that sought to return the case to Washington County.

The Texas Supreme Court denied mandamus relief, holding that section 65.023(a) was inapplicable to the case and, thus, section 15.020 governed venue. Section 15.020 requires enforcement of contractual venue provisions in certain circumstances that Fox River conceded were satisfied. However, subsection (d) of 15.020 states that the provision does not apply "if ... venue is established under a statute of this state other than this title [Title 2]." Fox River opposed a venue transfer, arguing that section 65.023(a) established Washington County as the proper venue. Section 65.023(a), which is in Title 3, requires injunction suits to be heard in the defendant's county of domicile. Fox River argued that section 65.023(a) controlled venue because the underlying lawsuit was primarily a suit for injunctive relief, as the request for injunctive relief was both genuine and necessary to ensure a complete remedy. But the Supreme Court disagreed. Although Fox River unquestionably pled for permanent injunctive relief, that was not the dominant purpose of the lawsuit because they primarily sought to remove Carlson as Met Water's general partner and recover monetary damages. The Court held that section 15.020 only prevails over venue provisions found in Title 2 of the Civil Practice and Remedies Code and did so here only because section 65.023(a), found in Title 3, was inapplicable. Because the trial court did not abuse its discretion in transferring the case to the parties' agreed venue, the Supreme Court denied mandamus relief.

Briefing Waiver

***St. John Missionary Baptist Church v. Flakes*, No. 18-0513, 63 Tex. Sup. Ct. J. 408, 595 S.W.3d 211 (Feb. 7, 2020)**

At a special church conference, a majority of members at St. John Missionary Baptist Church voted to terminate pastor Bertrain Bailey's contract. Bailey and chairman of the St. John's trustee board, Merle Flakes, were notified of the vote. But Flakes continued to pay Bailey, and Bailey refused to step down. Other members, loyal to Bailey, entered into a loan on St. John's behalf and began selling off the church's assets. St. John sued to prevent the sales.

In the trial court, Flakes filed a motion to dismiss, which raised two arguments: standing and the ecclesiastical-abstention doctrine. The trial court granted the motion without specifying why. St. John appealed, but its brief expressly raised only standing. The court of appeals, sitting en banc, affirmed in a divided decision. The majority held it was bound to affirm because St. John's failed to challenge all possible bases for the decision, and it was not allowed to sua sponte address ecclesiastical abstention, nor even request additional briefing on the issue.

The court of appeals had authority to order additional briefing on an ecclesiastical-abstention issue when that issue was fairly included in and inextricably intertwined with a briefed standing issue.

The Supreme Court reversed in a per curiam decision. The court of appeals had authority to order additional briefing under Appellate Rule 38.9. The Court hesitates to turn away claims on waiver grounds, and the rules provide that issues will be treated to cover every subsidiary question that is "fairly included." Here, the standing issue raised by St. John's "fairly included" the ecclesiastical-abstention issue because the two issues were inextricably intertwined. Flakes' standing argument was that the plaintiffs' membership—and thus their standing—was an ecclesiastical question unfit for judicial resolution. And it required wading into the church's bylaws. St. John's briefing was thus sufficient to put the court of appeals on notice of the

ecclesiastical-abstention issues in the case, and that court had authority to request further briefing on that issue.

Immunity

***Texas Department of Criminal Justice v. Rangel*, No. 18-0721, 63 Tex. Sup. Ct. J. 411, 595 S.W.3d 198 (Feb. 7, 2020)**

Late one night at a Texas Department of Criminal Justice jail in Humble, Texas, a group of about thirty inmates refused to "rack up"—or go to bed. Backup was called, and Lieutenant Cody Waller, the highest-ranking officer in the facility, along with three other Department employees responded. The inmates at first complied, but not for long. Soon the inmates divided into two groups and began yelling profanity and threatening each other. The officers ordered the inmates to return to their bunks, but they refused. Waller thus ordered another officer to retrieve a camera and, solely as a show of force, a 37mm tear-gas gun. Unbeknownst to Waller, he was issued a gun with a "skat shell"—a fire-producing shell meant for outdoor use only. The show of force did not work. The inmates grew unrulier, threatening imminent violence. A fracas seemed just around the corner. Waller ordered the inmates to rack up, but again to no avail.

Waller left the dormitory to seek authorization from the Duty Warden to use the tear-gas gun, as required by Department policy. After discussing the incident with the Duty Warden for 15-20 minutes, she authorized and instructed Waller to use the tear-gas gun and shells if the inmates refused to comply after two more orders. Two more orders were given, and the inmates did not comply. Waller fired his weapon. The skat shell hit an inmate, Cesar Rangel, in his chest and hand, causing burns and a fractured

An order to use a tear-gas gun constitutes "use" of tangible personal property to bring the Department's action within the Tort Claims Act's waiver of immunity, but the riot exception to that waiver applies under the circumstances of this case.

hand. After an internal use-of-force review, the Department disciplined Waller. Rangel sued the Department.

Rangel's petition alleged that the Department was liable for "dispensing the skat shell in response to an indoor situation," "keeping the skat shell in a defective, unlabeled condition," and "approving Lt. Waller's use of force." The Department filed a plea to the jurisdiction and motion for summary judgment, asserting that its sovereign immunity had not been waived. Rangel argued the Tort Claims Act's exceptions for intentional torts, riots, and emergencies did not apply. The trial court denied the Department's plea, and the court of appeals affirmed.

The Supreme Court, in an opinion by Justice Lehrmann, reversed. Initially, the Department "used" personal property under the Tort Claims Act, bringing it within the Act's waiver for personal injury caused by the use of tangible property. The Department did not simply make available the tear-gas gun and skat shell; by ordering their use by Waller, it put them into action or service and employed them for the given purpose of addressing the situation with the inmates. But the exception to that waiver for claims arising out of "riot" also applies. Both the common meaning of "riot" and its definition under the Penal Code show that the disturbance here qualifies. Standing alone, noncompliance and threats are not enough. But here there was more: the large group of inmates refused to return to their bunks after dozens of orders; they continuously threatened each other and made violent gestures; and they threatened imminent violence. That is a "riot" as a matter of law. Thus, the Department retained its immunity, and the Court dismissed Rangel's claims for lack of jurisdiction.

***Tarrant County v. Bonner*, 574 S.W.3d 893 (Tex. 2019)**

While incarcerated at the Tarrant County jail, inmate Roderick Bonner was receiving a diabetes treatment when his chair collapsed. Four days earlier, the same chair collapsed while being used by a detention officer, Robert Barham. Per his supervisor's instructions, Barham placed the broken chair in

the jail's multipurpose room to await disposal. Barham knew the room was occasionally used by nurses for inmates to receive medical treatments.

Bonner sued the County for his alleged injuries from the chair's collapse. He alleged the County was negligent in three ways: (1) failing to remove the broken chair from the jail within a reasonable time, (2) failing to warn him of the chair's unsafe condition, and (3) directing or allowing him to use the broken chair during his medical treatment. Bonner's claims invoked the legislative waiver of immunity under the Tort Claims Act, specifically Texas Civil Practice and Remedies Code section 101.021(2). In response, the County's denied Bonner's allegations and pled immunity under Code of Criminal Procedure article 42.20 and Government Code section 497.096. The County filed a summary-judgment motion arguing that, despite the waiver of immunity under the Tort Claims Act, it retained immunity from liability for ordinary negligence claims under these two statutes, which applied a higher standard of culpability—conscious indifference or reckless disregard—for claims arising from an act or omission connected with an inmate activity or program, like Bonner's diabetes treatment. The trial court granted the County's motion. The Fort Worth Court of Appeals reversed, concluding that (1) the "conscious indifference" standard did not apply to some of the inmate's negligence claims, and (2) the County's failure to dispose of the defective chair promptly or to warn of its defective condition were outside the statutes' scope because they were not failures "in connection with" the inmate's medical treatment.

The immunity provisions under Code of Criminal Procedure article 42.20 and Government Code section 497.096 apply to alleged governmental negligence in connection with certain inmate activities, including medical treatment.

The Supreme Court reversed, holding that the two statutes barred the County's liability. These two statutes immunize negligent acts and omissions that are reasonably related to the covered programs or activities, even when the relationship is

indirect. As a practical matter, this includes acts or omissions, which give rise to damages during covered programs and activities. Accordingly, because Bonner's damages claim rested on the County's alleged negligent acts and omissions that intersected with his medical treatment, they were "in connection with" each other, and the statutes applied.

Regarding the liability standard that the statutes impose to negate the County's immunity, the Court defined the terms used in these statutes: "conscious indifference for the safety of others" under article 42.20(a)(2) and "intentional, wilfully or wantonly negligent, or performed with conscious indifference or reckless disregard for the safety of others" under section 497.096. The Court held that this standard required Bonner to show the County's acts or omissions also involved an extreme degree of risk—in other words, that the defendant's mental state or conscious indifference and its awareness of the risk were interrelated. Applied to the Bonner's claim, he had no evidence of the frequency of medical use of the room, how likely the chair was to be used during those times, or other circumstances that might have made those using the chair particularly vulnerable to extreme injury. Indeed, a collapsing chair would present a lower risk of injury than most. Moreover, Bonner had no evidence that Officer Barham or his supervisor perceived anything other than a slight risk of harm from the defective chair. As a result, there was no evidence or fact issue regarding the County's conscious indifference and thus no basis to negate the County's statutory immunity. For these reasons, the Supreme Court reversed the court of appeals' judgment and rendered judgment that Bonner take nothing.

Justice Boyd issued a concurring opinion addressing the majority's definition of the heightened standard. He disagreed that that conscious indifference was "the same as" gross negligence, and that a person could not be consciously indifferent to a risk that was less than "extreme." In addition, Justice Boyd would not have addressed whether the Tort Claims Act waived immunity from a claim based on the County storing the chair in the multipurpose room because Bonner did not assert that claim.

***Garza v. Harrison*, 574 S.W.3d 389 (Tex. 2019)**

Rey Garza was a licensed peace officer for the City of Navasota Police Department. Although he worked in Grimes County, he lived in an apartment complex in Harris County. In addition to his job in Navasota, Garza also worked part-time as a "Courtesy Patrol Officer" for the complex. According to the complex's policies and procedures, courtesy officers were not classified as police officers and were used to deter and report crime, as opposed to actively engage in deterring crime. Garza was armed, off-duty, and in street clothes when he noticed Jonathen Santellana, whom Garza suspected of buying marijuana at the complex. Garza approached Santellana while he sat in a vehicle with a female passenger. While standing next to Santellana's car and another vehicle, Garza witnessed Santellana putting marijuana into a pill bottle. What happened next was contested, but according to Garza, after showing his badge and ID card to Santellana and ordering him out of the car, Santellana started backing out of the space, which pinned Garza between cars. Fearing he would be crushed or run over, Garza fired multiple times at Santellana, killing him.

Santellana's parents ("Plaintiffs") sued Garza and the apartment complex in state court for wrongful death and filed a section 1983 excessive-force complaint against Garza and the City of Navasota in federal court. In the state-court case, Plaintiffs alleged Garza was working as the complex's employee at the time of the shooting. Garza filed a motion to dismiss based on the election-of-remedies provision in Civil Practice and Remedies Code section 101.106(f) of the Tort Claims Act, which requires courts to grant a motion to dismiss a lawsuit against a governmental employee sued in an "official capacity" but allows the governmental unit to be substituted for the employee. The trial court denied Garza's motion, citing a fact issue as to whether he was acting as a peace officer or as the complex's employee at the time of the shooting. The Fourteenth Court of Appeals affirmed, holding that, as a matter of law, Garza could not have been doing his job as a peace officer because a peace officer operating extraterritorially

would merely be authorized—not obligated—to make an arrest under the extant circumstances.

The Supreme Court reversed, holding that by engrafting a "duty to act" limitation, the court of appeals misconstrued a peace officer's job "duties" for purposes of section 101.106(f) and applied a standard that is incompatible with an objective scope-of-employment analysis. Police officers are governmental agents that derive all their powers under the law through their employing governmental entity. In addition to the powers and duties generally described in article 2.13 of the Code of Criminal Procedure, articles 6.06 and 14.03(g)(2) of the Code confer additional authority and duties. Article 6.06 states that, "[w]henever, in the presence of a peace officer, or within his view, one person is about to commit an offense against the person or property of another, ... it is his duty to prevent it."

A licensed peace officer employed by a city's police department and acting under the warrantless-arrest provision in article 14.03(g)(2) of the Code of Criminal Procedure is within the general scope of the officer's employment for purposes of section 101.106(f) of the Tort Claims Act.

Similarly, article 14.03(g)(2) explicitly authorizes a police officer who is "outside of the officer's jurisdiction" to "arrest without a warrant a person who commits any offense within the officer's presence or view." Therefore, whether Garza was on- or off-duty as a peace officer did not determine whether his conduct fell within the scope of his employment. Moreover, once he observed the criminal activity, Garza's status as a peace officer was activated under article 14.03(g)(2) despite his being outside his jurisdiction. In attempting to arrest Santellana—whether accomplished in an improper manner as alleged—Garza was enforcing public laws. This is true even if the arrest also benefitted the apartment complex. Because an arrest was authorized only by virtue of Garza's capacity as a peace officer, he was acting in his official capacity as a matter of law. Therefore, the Supreme Court reversed the court of appeals' judgment and rendered judgment dismissing Garza.

Justice Boyd, joined by Justice Lehrmann, issued a concurring opinion to emphasize that the Court does not decide or address whether this action "could have been brought" against the City of Navasota, the third requirement under section 101.106(f). The Plaintiffs did not dispute that they could have brought this wrongful-death suit against Garza's employer, the City of Navasota, so the Court did not address that issue and confined its holding to Garza's conduct within the general scope of his employment as a police officer.

***University of Texas v. Garner*, No. 18-0740, 63 Tex. Sup. Ct. J. 41, ___ S.W.3d ___ (Tex. 2019).**

April Garner was traveling by bicycle on Alvin street toward the trail head at Eilers Park in Austin. No-trespassing signs are posted at both ends of Alvin, stating that the apartment complex it traverses is University property, but bicyclists often use Alvin as a shortcut to access Lady Bird Lake and the trails that surround it. As Garner was riding along Alvin, a University employee was backing out of a parking space in a University-owned vehicle. The employee did not see Garner and struck her with the vehicle, causing Garner to sustain a fractured wrist and cuts and bruises. Garner sued the University for negligence, contending that the Tort Claims Act waived the University's immunity. The University filed a plea to the jurisdiction, arguing that it owed only a duty not to injure Garner intentionally or through gross negligence because she was trespassing at the time of the accident. The University also argued that to the extent Garner was authorized to be on the property, the Recreational Use Statute nevertheless classified her as a trespasser. The trial court denied the University's plea to the jurisdiction and the court of appeals affirmed.

Recreational Use Statute applied and did not waive governmental immunity when there were no claims of gross negligence, malicious intent, or bad faith.

The Court reversed the court of appeals' judgment in a per curiam opinion and rendered judgment dismissing the claims against the University for

lack of jurisdiction. The Court explained that, as applied to governmental landowners, the Recreational Use Statute limits the scope of the Tort Claims Act's waiver of immunity by classifying recreational users as trespassers and requiring proof of gross negligence, malicious intent, or bad faith before immunity is waived. Here, Garner's only claim against the University sounded in ordinary negligence; she did not allege that the University or its employee acted with gross negligence, malicious intent, or bad faith. The court of appeals incorrectly held that the Recreational Use Statute did not apply here because the University did not "invite" recreational use of Alvin street. Under subsection (f) of the Recreational Use Statute, a governmental unit does not owe a degree of care greater than that owed to a trespasser "if a person enters premises owned, operated, or maintained by a governmental unity and engages in recreation on those premises." That occurred here: Garner entered the premises owned by the University and engaged in recreation on the premises (i.e., bicycling).

***Town of Shady Shores v. Swanson*, 590 S.W.3d 544 (Tex. 2019)**

Sarah Swanson sued the Town of Shady Shores, alleging that she was wrongfully terminated as retaliation for refusing to destroy certain recordings and reporting violations of the Open Meetings Act. The Town filed a plea to the jurisdiction, arguing it was entitled to governmental immunity. Swanson then amended her pleading to add new claims, including claims for a declaratory judgment that her termination violated the Open Meetings Act, the Texas Constitution's due course of law provision, and her free speech rights. The Town amended its plea to the jurisdiction as to Swanson's wrongful termination claims and filed traditional and no-evidence motions for summary judgment, arguing in both

Governmental immunity may be raised in a no-evidence summary judgment motion, and the Open Meetings Act waives governmental immunity for claims seeking mandamus and injunctive relief, but not declaratory relief.

motions that it was entitled to governmental immunity and that Swanson's Open Meetings Act and constitutional claims failed on the merits.

The trial court granted the Town's plea to the jurisdiction as to the wrongful termination claims but denied the Town's summary judgment motions. The Town appealed, arguing that Swanson had not established a waiver of governmental immunity as to her claims under the Open Meetings Act and Texas Constitution. The court of appeals affirmed in part and reversed in part. It held that the trial court correctly denied the Town's no-evidence summary judgment motion because a no-evidence motion is not a proper procedural vehicle to defeat jurisdiction. The court of appeals further held that the Open Meetings Act waived immunity as to Swanson's request for (1) a declaration that her termination was void, (2) injunctive relief to make meeting agendas and recordings available to the public, and (3) attorneys' fees.

In a unanimous opinion written by Justice Lehrmann, the Court reversed the court of appeals' judgment in part and remanded for further proceedings. The Court first held that a no-evidence motion for summary judgment may be used to defeat jurisdiction based on governmental immunity. Because jurisdiction may be challenged on evidentiary grounds and the plaintiff has the burden to establish jurisdiction, including a waiver of immunity from suit, the Court saw no reason to allow jurisdictional challenges via traditional motions for summary judgment but to foreclose such challenges via no-evidence motions. A plaintiff faced with a no-evidence summary judgment motion based on governmental immunity is required to present sufficient evidence on the merits of her claim to create a genuine issue of material fact.

The Court next held that the Open Meetings Act does not waive governmental immunity as to declaratory judgment claims. The Open Meetings Act generally provides that an action in violation of the Act is "voidable" and specifies the narrow mechanism to void the action—namely, a suit for mandamus or injunctive relief. Thus, the Open Meetings Act

clearly and unambiguously waives immunity from suits for injunctive and mandamus relief, but not a suit for declaratory judgment, which is not specified as a mechanism for relief under the Open Meetings Act. Because the Open Meetings Act did not waive immunity for Swanson's declaratory judgment claims, the Town was entitled to summary judgment on all declaratory judgment claims.

Lastly, the Court disagreed with the court of appeals' conclusion that Swanson had not pled claims directly under the Open Meetings Act seeking mandamus and injunctive relief, for which immunity is waived. Thus, the Court remanded the case to the court of appeals so that it could consider those issues in the first instance.

***University of Texas M.D. Anderson Cancer Center v. McKenzie*, No. 17-0730, 62 Tex. Sup. Ct. J. 1463, 578 S.W.3d 506 (Tex. June 28, 2019)**

Courtney McKenzie-Thue ("McKenzie") began treatment for a rare appendix cancer at the M.D. Anderson Cancer Center (the "Hospital") in 2011. That treatment included a two-part procedure known as hyperthermic intraperitoneal chemotherapy ("HIPEC"), which was a procedure developed by Wake Forest Medical School for the purpose of testing the effectiveness of two chemotherapy drugs—"oxaliplatin" and "mitomycin C". The first part of the HIPEC protocol required surgical removal of visible cancer from the patient's peritoneal cavity (the part of the abdomen containing the intestines, stomach, and liver). The second part of the protocol involved the use of a mixture of the chemotherapy drug oxaliplatin and a carrier agent, with the carrier agent initially used to spread oxaliplatin throughout the patient's peritoneal cavity and eventually used to remove oxaliplatin by flushing out the cavity. For McKenzie's HIPEC treatment, the Hospital used D5W—a sugar water solution—as the carrier agent.

As acknowledged by the Hospital, there was a known risk that D5W could cause a patient's blood sodium levels to drop, causing the patient's water levels to rise and in

turn causing the patient's cells to swell. To counteract this risk during McKenzie's treatment, the Hospital applied an IV drip containing insulin and saline during McKenzie's surgery. In McKenzie's case, these preventative measures were insufficient, and McKenzie experienced brain swelling following the procedure and died two days later. McKenzie's family sued the Hospital for negligence, alleging that the Hospital's use of D5W as the carrier agent was a "misuse of tangible personal property" sufficient to qualify for a waiver of the State of Texas's sovereign immunity. McKenzie's family retained a board-certified internal medicine specialist—Dr. David Miller—as an expert witness, and Dr. Miller testified in an expert report that the Hospital's use of D5W was the cause of McKenzie's death and that McKenzie would not have died if the hospital had not used D5W as a carrier agent.

In response to the negligence claim by McKenzie's family, the Hospital filed a plea to the jurisdiction asserting its immunity, arguing (1) that D5W was not administered by the Hospital, but rather by an independent contractor, and (2) that McKenzie's death was not foreseeable and therefore the plaintiffs could not show probable cause. The trial court denied the Hospital's plea to the jurisdiction, and the hospital filed an interlocutory appeal. The Hospital modified its arguments slightly on appeal, maintaining its assertion that D5W was not administered by the Hospital and that plaintiffs' lacked sufficient proof of proximate causation, but adding an alternative argument that the plaintiffs' claims were not for negligent use of property but was instead a claim of errant medical judgment masquerading as a claim for tangible property designed to trigger a waiver of immunity under the Texas Tort Claims Act ("TTCA"). The court of appeals affirmed, concluding that the record contained sufficient evidence that the use of D5W caused McKenzie's death.

On appeal to the Texas Supreme Court, the Hospital argues that (1) the plaintiffs failed to show that the Hospital "used" personal property in administering D5W, and (2) that McKenzie's death following the administration of D5W was unforeseeable.

Regarding the first argument, the Supreme Court reviewed the statutory language of the Tort Claims Act, explaining that—generally—immunity is waived when a government employee causes injury by furnishing property in a defective or inadequate condition, or uses non-defective property in an improper manner. The Hospital did not dispute that the Hospital "used" D5W, but instead focused its argument on whether the use was improper; specifically, the Hospital argued that there was a significant distinction between improper use of D5W and plaintiffs' arguments that it was improper to use D5W at all—with only the former qualifying for waiver of tort immunity. In other words, the Hospital argued that the *decision* to use D5W based on the medical judgment of Hospital employees was the root of plaintiffs' claim, rather than the *use* of the D5W, itself. The Supreme Court was unpersuaded by this argument and noted that, while the Court had not directly addressed the issue in the context of medication, it had indicated that the use of medication in improper circumstances would qualify as negligent "use" for purposes of TCCA waiver. On this point, the expert testimony supporting plaintiffs' claims that D5W should not have been used and that its use caused McKenzie's death was sufficient to waive the Hospital's immunity.

The Court distinguished precedent involving medical judgment by clarifying the difference between incidentally using tangible property in the course of pursuing a negligent course of action—in that case, mistakenly removing a non-cancerous testicle instead of a cancerous testicle—and plaintiffs' claim that McKenzie's death would not have occurred *but for the use* of D5W as a carrier agent. The Court was likewise unimpressed with the Hospital's policy-based arguments that allowing a waiver would "effectively eliminate the State's sovereign immunity in claims challenging medical judgment" and

The use of a specific carrier agent in a surgery at a University of Texas hospital which proximately caused a patient's death was a "use of tangible personal […] property" falling within a waiver of governmental immunity under the Texas Tort Claims Act.

invite a flood of new litigation; rather, the court reasoned that deeming the cause of McKenzie's injury to be something other than a "use" of D5W would render the statutory language in the TCCA waiver statute useless.

The Court then turned to the Hospital's alternative argument that—assuming D5W was a "use" of tangible personal property under the TCCA—the Hospital is still immune because the use of D5W was not a proximate cause of McKenzie's injury. The Court acknowledged recent precedent that TCCA waiver applied only where use of the property was a proximate cause of injury, and that the use was a proximate cause only if it was a cause-in-fact of the injury and was also a foreseeable cause of the injury. However, the Court clarified that its review of causation on a plea to the jurisdiction was limited to determining whether a fact questions exists regarding a causal relationship between the use of the property and the injury based on the evidence available at the time. The Hospital attacked foreseeability on two fronts: (1) though McKenzie's death from the use of D5W was a "possibility," it was not "predictable;" and (2) the precautions the hospital took to minimize the risk of using D5W—such as attempting to stabilize McKenzie's sodium levels by using insulin and saline IV drips during her surgery—made McKenzie's death unforeseeable. The Court rejected both arguments, noting that foreseeability merely required that the general danger to be foreseeable—not the exact sequence of events leading to the injury—and that the Hospital's precautions reducing the risk to McKenzie were not sufficient to eliminate the risk.

While the ultimate issue of whether the hospital was negligent in using D5W for the HIPEC protocol was beyond the scope the Court's review on a plea to the jurisdiction, sufficient evidence existed to show that the Hospital was aware of the risk that using D5W would cause McKenzie's blood sodium levels to drop. Thus, the Court concluded that the use of D5W was a proximate cause of McKenzie's death and that the "use" of D5W was a use of tangible property subject to the TCCA's waiver of immunity.

***Worsdale v. City of Killeen*, No. 18-0329, 62 Tex. Sup. Ct. J. 1246, 578 S.W.3d 57 (June 14, 2019)**

Scott Worsdale and Heike King were injured when the motorcycle Worsdale was driving collided with a large dirt mound spanning the width of the road. The Killeen Police Department conducted an accident investigation, in which it determined that road conditions and alcohol were contributing factors. The investigating officer spoke with officials from the City of Killeen. They acknowledged the obstruction but denied responsibility for it. Two days after the accident, though, the City removed the dirt pile at the police department's request and installed permanent road-closure signs and barricades. King died a month later; Worsdale succumbed to his injuries more than a year later.

Their relatives then sued the City under the Tort Claims Act, alleging the dirt mound was a special defect on the City's premises. The City filed a plea to the jurisdiction based on the relatives' failure to provide prompt notice under section 101.101 of the Act. Though the relative conceded formal notice was lacking, they argued the City had actual notice. The trial court denied the plea, but the court of appeals reversed and dismissed the case.

Evidence conclusively showed that city had actual notice of potential claims against it, thus excusing the plaintiffs' failure to provide formal notice under the Tort Claims Act.

In an opinion by Justice Guzman, the Supreme Court reversed and remanded. The undisputed evidence conclusively establishes the City had actual notice that it may be held responsible for the deaths of Worsdale and King. Because the city had actual notice, there is no need to overrule the Court's decision in *Cathey v. Booth*, 900 S.W.2d 339 (Tex. 1995). To hold, as the concurrence and relatives argue, that actual notice exists whenever a governmental unit has notice of any death, injury, or property damage would render the Tort Claims Act's formal-notice requirements meaningless. Instead, a lack of formal notice is excused only by actual, not constructive, notice. Here, almost

immediately after the accident, the City was actually aware of allegations that (1) the road condition and absence of warnings were contributing factors to the accident and (2) the City was responsible for maintaining the road. So, well within the Tort Claims Act's six-month deadline, the City actually knew of the possible claim against it.

Justice Boyd, joined by Justice Blacklock, concurred. They would have overruled *Cathey* as obviously wrong, inconsistent with the Tort Claims Act's text, and confusing in application.

Health Care Liability Claims

***Glenn v. Leal*, No. 18-0344, 63 Tex. Sup. Ct. J. 461, 596 S.W.3d 769 (Feb. 21, 2020)**

Dawn Leal was having a baby. Dr. Christopher Glenn was her obstetrician and gynecologist. Given Leal's medical history, Glenn recommended inducing labor. The Leals agreed and scheduled an elective induction. But complications arose. During delivery, Glenn discovered the baby's shoulder was lodged against Dawn's pubic bone and the umbilical cord was wrapped around its neck. To ensure the baby's survival, Glenn performed maneuvers to quickly deliver the baby. He did, but the baby suffered a permanent brachial plexus injury.

The Leals filed a health-care liability claim against Glenn and his medical group. Glenn argued that the Civil Practice & Remedies Code section 74.153 standard of willful and wanton negligence applied and, after the close of evidence at trial, moved for directed verdict on that basis. The trial court denied the motion and overruled Glenn's related objections to the jury charge and proposed questions. The jury returned a verdict that Glenn was negligent under an ordinary—not willful

In accordance with *D.A. v. Texas Health Presbyterian Hosp. of Denton*, 569 S.W.3d 126 (Tex. 2018), the Remedies Code's standard for negligence in rendition of emergency care applies when a patient receives emergency care in a hospital's obstetrical unit.

and wanton—standard and awarded the Leals $2.7 million. The trial court entered judgment, and the court of appeals affirmed, concluding that the standard of willful and wanton negligence applies only when emergency medical treatment is rendered first in a hospital's emergency department.

In a per curiam opinion, the Supreme Court reversed. A patient need not be treated in an emergency department before receiving emergency care in an obstetrical unit in order to trigger the section 74.153 standard of willful and wanton negligence. Here, that standard was a critical issue and was the very question that went to the jury to decide liability. Thus, the trial court's error in overruling Glenn's charge objections was harmful and warrants a new trial.

***Coming Attractions Bridal & Formal, Inc. v. Tex. Health Resources*, No. 18-0591, 63 Tex. Sup. Ct. J. 490, 595 S.W.3d 659 (Feb. 21, 2020)**

Amid the 2014 Ebola outbreak, a Texas Health Resources hospital in Dallas cared for an Ebola-infected patient. A nurse who attended the patient at the hospital later visited a Coming Attractions bridal shop in Ohio. When she returned to Dallas, she fell ill and was diagnosed with Ebola. Ohio health authorities learned that the nurse had visited the bridal shop. So they shut it down. After a thorough cleaning, the shop reopened. But the business did not recover, so its owner, Coming Attractions, closed it permanently. Coming Attractions sued Texas Health, alleging that its hospital failed to prevent transmission of the Ebola virus to the nurse through proper precautions and training, and that the hospital's negligence caused the shop to close due to health concerns and adverse publicity. Coming Attractions, however, did not provide an expert report to support its allegations under Civil Practice &

Bridal shop owner's claim against Texas hospital for loss of business stemming from hospital's failure to prevent an Ebola-infected nurse from visiting its shop was a health-care-liability claim under Chapter 74 of the Civil Practice & Remedies Code and thus required an expert report.

Remedies Code Chapter 74, which requires that a "claimant" alleging a "health care liability claim" against a health-care provider submit an expert report detailing the factual basis for, and a qualified opinion in support of, the claim.

For that reason, the hospital moved to dismiss. The trial court denied the motion, but the court of appeals reversed. It held that Coming Attractions is a "claimant" under the statute and that its claim against the hospital qualified as a "health care liability claim." Given that Coming Attractions had not filed an expert report, the court of appeals dismissed the lawsuit.

The Supreme Court, in an opinion by Justice Bland, affirmed. Initially, a "claimant" under Chapter 74 is defined as a "person." That includes a corporation like Coming Attractions. The statute does not limit persons to human beings, and generally a person includes a corporation. Next, Coming Attractions' claim is a health-care liability claim. Treating and preventing a communicable disease in a hospital setting is a duty related to the provision of health care. Coming Attractions alleges that Texas Health's failure to avoid transmission of such a disease caused its injury—the closure of its store. The connection between Coming Attractions' injury and services directly related to health care provides the requisite nexus so as to make Coming Attractions' claim a health-care liability claim. That Coming Attractions alleges economic damages, not physical injury, does not remove its claim from the statute's ambit. Claims alleging negligent provision of health care fall within the statute when the alleged damages stem from health-care-related claims, regardless of the type of injury alleged.

***In re Turner*, 591 S.W.3d 121 (Tex. Dec. 20, 2019).**

Comanche Turner sued Methodist Dallas Medical Center on behalf of her newborn child, alleging negligent care in the labor and delivery process proximately caused MT to suffer "profound and permanent brain damage." Turner moved for an extension to add additional parties to the suit and also attempted to schedule the deposition of Dr. Sandate. Dr. Sandate would not agree to be deposed absent Turner's

agreement not to file suit against him. Accordingly, Turner served Dr. Sandate with a subpoena and a subpoena deuces tecum compelling Dr. Sandate to appear for a deposition and produce specific documents. The doctor moved to quash his deposition, arguing that the deposition, disguised as nonparty discovery, was intended to investigate a potential health-care-liability claim against him and would violate the stay on presuit discovery the Medical Liability Act imposed. The trial court denied the doctor's motion, but the appeals court granted mandamus relief.

The Supreme Court conditionally granted mandamus relief, holding that the Medical Liability Act does not categorically prohibit deposing or obtaining documents from the doctor under these circumstances, but that certain limitations on discovery are appropriate. Drawing upon its reasoning in *In re Jorden*, 249 S.W.3d 416, the Court held that when discovery is sought from a health care provider on whom no expert report has been served and in the context of a potential claim against that provider, the nonparty exception does not apply even if the discovery is requested in a pending lawsuit in which the provider is not a defendant. But this case is different for two reasons. First, Turner has a pending health care claim against a different provider (the hospital) arising out of injuries allegedly caused by care she received during labor and delivery. Second, unlike the situation in *Jorden*, she has already served the expert report on the Hospital, crossing the threshold to weed out frivolous claims, at least as to that provider. Accordingly, discovery is no longer stayed, which would allow Turner to obtain discovery from the doctor if it qualifies as discovery from the hospital, which the court holds it does.

Medical Liability Act does not categorically prohibit deposing or obtaining documents from the attending obstetrician in a suit against the hospital.

However, while the court holds some discovery is permissible under these circumstances, certain limitations apply. Recognizing that some otherwise discoverable

information relevant to the claims against the hospital may also be relevant to potential claims against the doctor, the Supreme Court concluded that "Sandate may be deposed as a fact witness with respect to that cause of action, and his testimony about his recollection of the circumstances surrounding the employees' actions and omissions is decidedly relevant, including his own conduct as it relates to those actions. But Turner may not engage in a fishing expedition by requesting information from Sandate that sheds no light on what the hospital's employees did and why." The Supreme Court thus ordered that the court of appeals vacate its categorical prohibition against deposing and obtaining documents from Dr. Sandate.

Legal Malpractice; Tolling

***Gray v. Skelton*, No. 18-0386, 63 Tex. Sup. Ct. J. 464, 595 S.W.3d 633 (Feb. 21, 2020)**

Attorney Patricia Skelton drafted a will for Ysidro Canales, who died about a year after the will was executed. His family, though, could not find his will after he died. Skelton had a copy, but it was unfortunately water-damaged from a rainstorm that flooded her law office. So Skelton printed a clean copy from her computer and, believing she could not probate the will without signatures, cut and pasted the signatures from the water-damaged copy. Skelton filed the cut-and-paste version of the will with the probate court. Soon after, Skelton was indicted for forging Canales's will. She hired Guy Gray for her defense, which was unsuccessful. She was convicted in 2007 and hired new counsel for appeal. Her new lawyers

Under *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995), a plaintiff may show exoneration either by reversal on actual-innocence grounds or reversal on other grounds and a showing of innocence in her malpractice suit; tolling under *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991) applies to toll limitations of a legal-malpractice claim against a criminal-defense attorney during both direct appeal and post-conviction proceedings.

argued that Gray rendered ineffective assistance of counsel, but the court of appeals affirmed.

Meanwhile, some of Canales's relatives filed a will contest. There the jury found that the will was valid, Skelton did not intentionally defraud or harm another when she altered the will, and the will submitted was accurate. After these findings, Skelton filed a writ of habeas corpus, renewing her ineffective-assistance claim and claiming actual innocence. The district court denied the writ, but the court of appeals reversed on Skelton's ineffective-assistance claim.

About a year later, Skelton sued Gray for malpractice. Gray moved to dismiss, arguing that Skelton was not "exonerated" under *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995) and that the two-year statute of limitations barred her claim. The trial court agreed on *Peeler* and granted the motion. The court of appeals reversed, holding that *Peeler* did not apply because Skelton's conviction was reversed, and further that her suit was timely because limitations had been tolled until Skelton obtained habeas relief.

The Supreme Court, in an opinion by Justice Devine, affirmed. First, Skelton's claim is not barred by the *Peeler* doctrine, which provides that convicts may not sue their criminal-defense attorneys for malpractice unless they have been "exonerated." The decision rests on principles of proximate cause: It is the convicted criminal's illegal conduct, not the attorney's negligence, that proximately causes the conviction. Here, Skelton has not been exonerated in the sense that she has been found innocent. But *Peeler* does not require exoneration by a court. Innocence can be established in the underlying criminal proceeding when the conviction is vacated on actual innocence grounds, to be sure. But if a conviction is vacated on other grounds, formerly convicted individuals may prove their innocence in their malpractice suit against their criminal-defense attorneys. Skelton should have an opportunity to do so.

Second, Skelton's claim is not barred by the two-year statute of limitations. Tolling under *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991) should apply in this context. And for

purposes of *Peeler*, the limitations period should be tolled during both direct appeals and post-conviction proceedings, while it should run when neither a direct appeal nor post-conviction proceeding is pending. Here, Skelton's post-conviction proceedings included not only her habeas application process but also the period during which her case was pending for a new trial, awaiting prosecution. Thus, her legal-malpractice claim was filed within the two-year limitations period.

Justice Blacklock, joined by Justices Green and Bland, dissented. He would not extend *Hughes* to toll limitations during post-conviction habeas corpus proceedings, given that they are potentially innumerable and interminable. But, in any event, the Court misapplies its new tolling rule. The Court gets around its own rule by tolling limitations even after her conviction was vacated, while she awaited the state's next decision. At that point, though, there was no bar to her malpractice claim, and thus no reason for tolling.

***Erikson v. Renda*, No. 18-0486, 63 Tex. Sup. Ct. J. 216, 590 S.W.3d 557 (Dec. 20, 2019)**

Renda Marine, Inc. was found liable to the federal government in connection with a government dredging contract. Brian Erikson represented Marine in prosecuting and defending claims against the government. Not long after, Marine's accountant made plans to clean up the company's debt and contacted Erikson for advice. Erikson "blessed" the transfer of Marine's assets to various Renda-controlled creditors, including Oscar Renda, Marine's president and sole shareholder. After the transfers, Marine was unable to satisfy its liability to the government. Marine later sued Erikson, alleging malpractice in failing to appeal the liability determination against Marine. That suit settled for $2 million. Those funds were transferred to Renda

Late-filed suit against an attorney who purportedly blessed his ill-advised transactions was not saved by *Hughes* tolling because the allegedly bad legal advice was not integrally connected to the prosecution or defense of a claim.

Contracting to further discharge Marine's debt obligations, supposedly in reliance on Erikson's "blessing" of the earlier transfers.

Years later, Renda allegedly discovered that the asset transfers violated a federal priorities statute, which in turn made him personally liable to the federal government for the company's debt. The government learned, too, and instituted litigation against Renda for the transfers. The result was an $12.54 million judgment against Renda, in addition to an $11.8 million judgment against Marine in parallel litigation.

Renda sued Erikson for malpractice based on his blessing of the asset-transfer plan. The malpractice suit was filed nearly 11 years after the blessing, five months after Renda was served in the priorities statute suit, and seven months after appeals were exhausted in that suit. Erikson moved for summary judgment based on limitations. The trial court granted summary judgment for Erikson, but the court of appeals reversed and remanded, holding that there was a fact issue on whether tolling under *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154 (Tex. 1991), was available.

The Supreme Court, in an opinion by Justice Guzman, reversed and rendered. *Hughes* tolling is a bright-line rule. It does not apply every time legal malpractice results in litigation. Rather, for it to apply, malpractice must be committed in the prosecution or defense of a claim. The only claims that were prosecuted or defended here were those in subsidiary litigation and the asset transfers were not engaged to prosecute or defend those claims. The summary-judgment record shows that Erikson took no action to prosecute the debt claim for Renda or defend it on Marine's behalf. The asset transfers neither advanced nor refuted any claims in Marine's litigation against the government. Legal work only tangentially related to activities undertaken to prosecute or defend a claim, like the legal work here, does not meet the criteria for *Hughes* tolling.

Medical Practice Act

***Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796 (Tex. 2019)**

After a patient died, physician Ruben Aleman was required by state law to electronically sign the deceased's death certificate. But because Dr. Aleman was not registered with the Texas Electronic Death Registration ("TEDR") system, he hand-certified the paper certificate, after which he registered with the TEDR. Dr. Aleman then attempted to certify the death certificate electronically, but the TEDR system would not let him because the certificate was already "official." Almost two years later, the Texas Medical Board ("Board") filed a complaint with the State Office of Administrative Hearings ("SOAH") seeking disciplinary action against Dr. Aleman for his violation of state law, specifically Health and Safety Code sections 193.002(4) (requiring death certificates to be filed electronically) and 193.005(h) (requiring death certificates to be medically certified electronically). Ultimately, the administrative law judge ("ALJ") found in pertinent part that (1) Dr. Aleman violated section 193.005(h) by failing to complete the medical certification electronically and that his noncompliance "did not result from circumstances beyond his control"; (2) because the violation was related to Dr. Aleman's practice of medicine, he "by definition" violated the Medical Practice Act; and (3) Dr. Aleman was not entitled to attorney's fees. After the Board adopted the ALJ's findings, it sanctioned him $3,000 and ordered him to complete continuing medical education hours and pass the Board's Jurisprudence Examination, all within certain time limits. On Dr. Aleman's petition for judicial review, the trial court affirmed the order and the Austin Court of Appeals affirmed.

Agreeing with Dr. Aleman that the disciplinary action was not authorized, the Supreme Court reversed. As an initial matter, the Court held that the complaint against Dr. Aleman complied with the Medical Practice Act ("Act") and did not, as argued by Dr. Aleman, need to be "in the form of a written affidavit" or "made by a credible person under oath" as per

Occupational Code section 164.005(a) and (c). The Court next addressed whether the Board erred in taking disciplinary action against him for failing to complete the medical certification electronically. Although the Board correctly concluded that Dr. Aleman necessarily violated state law by certifying the death certificate manually, the Court held that this conduct was not "connected with" the practice of medicine and therefore was not subject to disciplinary action under the Act. The Act restricts the scope of the required connection by grouping the conduct described in section 164.053(a)(1) with a list of behavior that is sanctionable as "unprofessional or dishonorable conduct that is likely to deceive or defraud the public." Thus, the Court held that conduct violating state or federal law is subject to disciplinary action under the Act only if that conduct is connected with the practice of medicine in a manner that makes it likely to deceive or defraud the public. Dr. Aleman's conduct—medically certifying a death certificate using pen and paper rather than the approved electronic system—clearly does not qualify as an act that is connected with the practice of medicine in a manner likely to deceive or defraud the public. Finally, the Court held that Dr. Aleman was not entitled to recover attorney's fees, agreeing that the SOAH was not authorized to award attorney's fees because Chapter 10 of the Civil Practice and Remedies Code and Rule of Civil Procedure 13 do not apply to administrative proceedings. Thus, the Supreme Court affirmed the court of appeals' judgment in part, reversed it in part, and rendered judgment vacating the sanctions imposed against Dr. Aleman.

A physician's act of completing the medical certification for a death certificate manually rather than by using the approved electronic process does not constitute a "prohibited practice" under section 164.052 of the Medical Practice Act, and section 164.051 in turn does not authorize the Texas Medical Board to take disciplinary action against a physician for such conduct.

Justice Blacklock, joined by Justice Brown, issued a concurring opinion to address their different reasons for reaching the same conclusion as the

majority. Contrary to the Board's position, Occupational Code section 164.053(a)(1) is not triggered any time a physician "violates any state or federal law." Instead, it is triggered only when a physician "commits an act that violates any state or federal law." The only act Dr. Aleman committed was signing the death certificate with a pen. But Health and Safety Code section 193.005(h) does not prohibit that act and, in fact, says nothing about the legality of hand-signing a death certificate. Therefore, the Board was not prosecuting Dr. Aleman for what he did; it was prosecuting him for what he should have done.

Justice Boyd dissented, asserting that the plain and unambiguous language of section 164.051(a)(1) permitted the Board to discipline Dr. Aleman. He did not dispute that he certified the death certificate on paper rather than electronically. Section 193.005(h) required medical professionals to certify their patients' death certificates electronically instead of on paper. In reversing the Board's ruling, the majority upended this "slam-dink case" by divining some fictional "legislative intent" that runs contrary to the express language of the statute. Indeed, the Court's reasoning ignores—and effectively deletes—the statute's unambiguous language.

Oil & Gas

Piranha Partners v. Neuhoff, No. 18-0581, 63 Tex. Sup. Ct. J. 474, 596 S.W.3d 740 (Feb. 21, 2020)

In 1975, Neuhoff Oil & Gas bought a 2/3 interest in a mineral lease called the Puryear Lease, which covered all the minerals under a tract referred to as Section 28. Neuhoff later sold and assigned its 2/3 interest but reserved for itself a 3.75% overriding royalty interest on all production under the Puryear Lease. For the next 24 years, only one well was completed on Section 28: the Puryear B #1-28, which was located on the Section's northwest quarter. In 1999 Neuhoff Oil sold the interest at auction. Piranha Partners was the successful bidder. The parties executed an assignment. The next year, Neuhoff

Oil went out of business and assigned its remaining assets to members of the Neuhoff family. For a time thereafter, the operator paid the overriding royalty on the Puryear B #1-28 to Piranha. But it paid the overriding royalty on production on new wells in Section 28 to the Neuhoffs. Title opinions obtained in 2012, however, led the operator to pay Piranha the overriding royalty interest on all production under the Puryear Lease, not just from the Puryear B #1-28. The operator retroactively paid Piranha for past-due payments and demanded a refund from the Neuhoffs.

The Neuhoffs sued, claiming that Neuhoff Oil assigned Piranha its overriding royalty only in production from the Puryear B #1-28. On cross-motions for summary judgment, the trial court sided with Piranha, declaring that Neuhoff Oil sold the overriding royalty on all production under the Puryear Lease. But the court of appeals reversed. It disagreed with both the Neuhoffs and the trial court and held that Neuhoff Oil sold the overriding royalty in production from all of the northwest quarter of Section 28.

The surrounding provisions of oil-and-gas conveyance's property description unambiguously showed that party conveyed 2/3 interest in entire lease, not just in a single well or section of the lease.

In an opinion penned by Justice Boyd, the Supreme Court reversed. The granting clause says the interests are described in Exhibit A, but nothing in Exhibit A expressly states whether the well, the land, or the lease identifies the scope of the interest conveyed. Looking to the entirety of the assignment, however, the only reasonable construction is that Neuhoff Oil conveyed its overriding royalty interest in all production under the Puryear Lease. First, the two paragraphs immediately following the granting clause says that the interest conveyed shall include overriding royalty interests held by Neuhoff Oil as of the effective date of the conveyance. Second, another paragraph confirms that Neuhoff Oil meant to convey existing contracts to the extent they affect "the Leases," as opposed to just the well or the land. Finally, yet another part of the

granting clause contains details about the conveyance points to the leases described in Exhibit A and confirm that the interest assigned is payable from production under the Puryear Lease.

Justice Bland, joined by Justice Lehrmann, dissented. The two-page boilerplate assignment expressly limits the property description to Exhibit A, but Exhibit A is ambiguous. She would have held, therefore, that the property interest was ambiguous and remanded the case for a jury to determine its meaning.

Rule 91(a) Dismissal; Attorney Immunity

***Bethel v. Quilling, Selander, Lownds, Winslett & Moser P.C.*, 63 Tex. Sup. Ct. J. 497, 595 S.W.3d 651 (Feb. 21, 2020)**

Petitioner's husband died in a car accident while towing a trailer. Petitioner sued the trailer's manufacturer, arguing that faulty brakes caused her husband's accident. Quilling, Selander, Lownds, Winslett & Moser P.C, as well as attorney James Moody (collectively, "Quilling"), represented the manufacturer in the lawsuit. Petitioner alleged Quilling intentionally destroyed key evidence in the case by disassembling and testing the trailer's brakes before she had the opportunity to examine them and document their original condition.

Affirmative defenses, such as attorney immunity, may serve as the basis of a dismissal under Rule 91a.

Petitioner sued Quiling, and Quiling moved to dismiss, arguing the defense of attorney immunity under Rule 91a. The trial court granted Quiling's motion and dismissed the cases. Petitioner appealed, arguing (1) affirmative defenses, such as attorney immunity, cannot be the basis of a Rule 91(a) dismissal, and (2) attorney immunity did not protect Quilling's conduct. The court of appeals affirmed the decision.

The Supreme Court, in an opinion by Justice Devine, affirmed. The rule permits consideration of the substance of the Rule 91a motion and arguments at the hearing, in addition to the plaintiff's pleading. Rule 91a limits the scope of a court's

factual—but not legal—inquiry. A court may consider the plaintiff's pleadings if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court. In this case, the trial court did not need to look outside the plaintiff's pleadings to determine whether attorney immunity applied to the alleged facts.

As to the issue of attorney immunity, the Court applied the same reasoning it used in declining to recognize fraud as an exception to the attorney-immunity doctrine. Merely labeling an attorney's conduct "fraudulent" or "illegal" does not remove it from the scope of the attorney's legal representation of the client. Focusing its analysis on the type of conduct at issue rather than the alleged wrongfulness of the conduct, the Court concluded that the conduct in this case involved the provision of legal services and is thus protected by attorney immunity.

Expert Report Deadline

***Shinogle v. Whitlock*, 63 Tex. Sup. Ct. J. 503, 596 S.W.3d 772 (Feb. 21, 2020) (per curiam)**

When Benjamin Whitlock arrived at the Alpine Industries, Inc. shooting range, he took out his .22 caliber rifle and handed it to an employee for a safety inspection. While the employee was holding the rifle, it discharged, shooting Whitlock in the leg. Whitlock brought suit against both the employee and Alpine, alleging various negligence theories. The suit was governed by level-three discovery, and the parties submitted an agreed-upon scheduling order, which the court approved.

An agreed-upon scheduling order that does not specifically reference section 128.053 of the Texas Civil Practice & Remedies Code does not extend the deadline to serve an expert report under that statute.

More than 90 days after suit, the defendants filed a motion to dismiss. The motion contended that petitioner was required to designate and serve expert

reports on all parties in accordance with the 90-day deadline under section 128.053 of the Civil Practice & Remedies Code. The statute requires a claimant suing a sport shooting range to serve an expert report on each party within 90 days after the original petition was filed, unless the deadline is "extended by written agreement of the affected parties." Petitioner agreed that the statute governed the suit but argued that the scheduling order was the parties' written agreement to extend the 90-day deadline. The trial court agreed. It concluded that the scheduling order effectively extended the deadline but granted permissive interlocutory appeal on the issue of whether an explicit reference to the statute or its deadline is required to constitute an extension agreement. The court of appeals reversed, holding that a specific reference to the statute was required for an extension.

The Supreme Court, in a per curiam decision, affirmed the portion of the court of appeals' decision dismissing the suit against Alpine. The Court held that the scheduling order did not extend the deadline to serve the expert report. But, the Court reversed the judgment as to the employee, noting that he is entitled to a dismissal with prejudice under section 128.053(b)(2) as an implicated defendant whose conduct was required to be addressed in an expert report.

Contract Formation

***Chalker Energy Partners III LLC v. Le Norman Operating LLC*, 63 Tex. Sup. Ct. J. 525, 595 S.W.3d 668 (Feb. 28, 2020)**

A group of working interest owners (the "Sellers") decided to sell their interests in several oil and gas leases in the Texas Panhandle by accepting bids through an auction process. Prior to participating in the auction process, bidders were required to sign a confidentiality agreement in order to access the data room and place a bid. Among other things, the confidentiality agreement contained a "no-obligation clause," providing that no contract between the parties relating to the transaction

would exist "unless and until a definitive agreement has been executed and delivered."

One of the participating bidders was Le Norman. After the Sellers rejected Le Norman's initial bid, Le Norman's president emailed a new bid to the Sellers' representative, including the execution of a PSA as a term. The Sellers' representative emailed back that the group was "on board to deliver 67% subject to a mutually agreeable PSA." However, prior to signing a PSA, another group, Jones Energy, submitted a new bid. The Sellers decided to accept the new bid and executed a PSA with Jones Energy.

Le Norman sued for breach of the email agreement and the Sellers counterclaimed for a declaration that they did not breach any contract with Le Norman. Both parties moved for summary judgment. The trial court held that parties to the Le Norman bid did not intend to be bound to any agreement, the PSA was a condition precedent to contract formation, and there was no meeting of the minds.

The First Court of Appeals reversed, holding that whether the alleged contract was subject to the bidding procedures and whether LNO and Sellers intended to be bound by the terms in the emails were fact issues precluding summary judgment.

The Supreme Court, in an opinion by Chief Justice Hecht, reversed. The Court held that the negotiations were subject to the bidding procedures and confidentiality agreement, and the parties did not waive their right to negotiate without fear of being bound to a contract. Acknowledging that many of today's most sophisticated transactions are conducted, in part, through email, the Court noted that "parties often protect themselves through agreements stipulating the conditions upon which they may be bound." The Court continued to say

Emails exchanged between a buyer and seller did not create a contract for the sale of $230 million in oil and gas assets when the parties expressly agreed in a "no obligation" clause that "unless and until a definitive agreement has been executed and delivered" no contract between the parties relating to the transaction would exist.

that "Unquestionably, they are free to do so." By including the no-obligation clause in the confidentiality agreement, the parties "agreed that a definitive condition was a condition precedent to contract formation." The Court found the emails more akin to a preliminary agreement and that the parties' dealings showed that a PSA would be required for a definitive deal. Also, no agreement was "executed and delivered" as required by the no-obligation clause. The parties' conduct contained no indication of waiver of these requirements; to the contrary, their conduct reinforced that the need for the requirements to complete the sale.

Foreign-Trade Zones; Taxation

***PRSI Trading LLC v. Harris County*, 63 Tex. Sup. Ct. J. 533, 599 S.W.3d 303 (Feb. 28, 2020)**

Under the federal Foreign-Trade Zones Act of 1934 (the "Act"), goods imported into foreign-trade zones ("FTZs") located in the United States are not subject to tariffs or duties until they leave. In 2005, Pasadena Refining System Inc. ("PRSI") entered into an agreement with the Port of Houston to operate a subzone of an FTZ for the manufacturing, blending, and storage of petrochemicals and other related products at a refinery. U.S. Customs and Border Patrol ("Customs") approved the agreement, giving PRSI all the rights and benefits of an FTZ.

The next year, PRSI merged into its parent company, which merged into its parent company. The new entity was also known as Pasadena Refining System Inc. ("Pasadena"). When Pasadena applied to Customs to become the new operator of the subzone, Customs responded with a letter stating that the operator approval process, in part, depended on Harris County issuing a letter of non-objection. Harris County refused to issue the letter unless Pasadena waived its right to the tax exemption. Instead, Pasadena amended its argument to Customs, claiming that it was the same operator as the merged parent of the

previous operator and thus it did not need to follow these procedures.

From 2006-2009, Pasadena contin-ued operations in the FTZ and the Appraisal District continued to apply the exemption. In September 2009, Customs issued a letter stating that (1) the entity approved for the FTZ ceased to exist in 2006 as a result of the mergers; (2) Pasadena was a new entity that had to apply for approval and activation; and (3) the Port's concurrence was required. Pasadena sought administrative review of the letter, and, over the next five years, Customs issued 53 monthly letters giving Pasadena temporary authorization to operate and move goods through the FTZ with zone status.

In April 2013, Customs issued a second letter stating that Pasadena was a new entity that needed to apply for approval. The Port of Houston responded by requesting that Customs deactivate the zone. The Zone was deactivated in August 2013. Harris County petitioned the Appraisal Board for a determination that Pasadena's operations had never been tax exempt and that the County was owed taxes from 2011-2013. The Appraisal Board denied the request, and the County sought judicial review. The trial court granted summary judgment for Pasadena and the Appraisal District, which was reversed by the court of appeals, which rendered judgment for Harris County.

A merged entity was entitled to a tax exemption under the Foreign-Trade Zones Act of 1934 when U.S. Customs and Border Patrol treated the zone as active during the contested timeframe.

The Supreme Court, in an opinion by Chief Justice Hecht, reversed. The Court looked at one question—was the subzone activated during the tax years at issue? Examining Customs' actions during the contested time, the Court observed that Customs treated the FTZ as activated for several years and repeatedly issued extensions to operate it. These actions are not consistent with deactivation of the FTZ. Because the Port did not ask for the FTZ to be deactivated, and because Customs never suspended activation, the FTZ remained active for the years at issue.

Easements

***Southwestern Elec. Power Co. v. Lynch*, 63 Tex. Sup. Ct. J. 678, 595 S.W.3d 678 (Feb. 28, 2020)**

Use of a general easement without a fixed width does not render an easement ambiguous or require a court to supply the missing term.

Landowners filed a declaratory judgment against Southwest Electric Power Company, asking the trial court to declare that Southwest's prior use of certain transmission line easements limited the width of those easements to thirty feet. The trial court ruled in favor of the landowners, and the Texarkana Court of Appeals affirmed, concluding that because the original easements did not specify a width, the trial court was within its discretion to admit evidence of past use to determine how much of the landowner's land "was reasonably necessary" for the petitioner to utilize pursuant to the easements.

The Supreme Court, in an opinion by Justice Green, affirmed the Court of Appeals on jurisdictional grounds, but reversed as to the easement's scope. The Court concluded that the plain language of the easement is ascertainable and may be given legal effect. Respondents' properties were burdened by general easements with no defined width, and the lack of a fixed width does not render an easement ambiguous or require a court to supply the missing term.

Premises Liability / *Farae Naturae*

***Hillis v. McCall*, No. 18-1065, 63 Tex. Sup. Ct. J. 577, 602 S.W.3d 436 (Tex. March 13, 2020)**

Homer Hills ("Hillis") owns and operates a B&B in Fredericksburg, Texas. Henry McCall ("McCall") rented a neighboring cabin from Hillis, beginning in early 2014. Hillis allowed McCall to use the washer, dryer, and refrigerator in the nearby B&B, and would occasionally ask McCall to open

the nearby B&B for guests and maintenance workers, and to perform small tasks to prepare the B&B for the arrival of guests. On December 12, 2014, McCall entered the B&B upon Hillis's request to check whether the sink was leaking. While reaching under the sink, McCall was bitten by a brown recluse spider—a venomous spider indigenous to Texas. McCall had previously observed spiders in the B&B and neighboring cabin, and had notified Hillis about the presence of spiders, in general, on the premises. Hillis testified that he would pass McCall's notifications about the presence of spiders to a housekeeper tasked with preparing the B&B for guests and performing pest control on an as-needed basis. While neither McCall nor Hillis had personal knowledge of the presence of brown recluse spiders in the B&B or surrounding area, Hillis testified that he had read reports on the internet that the spiders inhabited Texas, that he was aware that they had bitten people—though not on his property—and that he "assumed they were around my property."

McCall sued Hillis for negligence on a premises liability theory, alleging that the presence of brown recluse spiders on Hillis's property was an unreasonably dangerous condition, that Hillis knew or should have known of the condition, that Hillis owed a duty to adequately warn invitees—including McCall—of the presence of recluse spiders or otherwise make the property safe, and that Hillis breached this duty to McCall. In response, Hillis filed a motion for summary judgment, arguing that the longstanding doctrine of *ferae naturae* (limiting landowner liability for harm caused by indigenous wild animals on the property) meant that Hillis was not liable for injuries caused by wild animals that Hillis did not introduce or harbor on the property. The trial court granted summary judgment for Hillis, but the court of appeals reversed, concluding

A maintenance worker at a bed and breakfast ("B&B") was bitten by a brown recluse spider while repairing a sink and sued the B&B operator for premises liability. The Supreme Court held that the operator was not liable, notwithstanding the operator's prior knowledge that brown recluses resided in Texas and had previously been observed in the B&B.

that "McCall was bitten by a spider in an artificial structure and Hillis knew or should have known of an unreasonable risk of harm posed by the spiders inside the B&B."

The Supreme Court reversed the court of appeals and rendered a take-nothing judgment for McCall. After reciting the general rule that landowners owe a duty of care to invitees to "make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not[,]" the Supreme Court noted that there are several exceptions to the general rule which limit the scope of a landowner's duty. *Ferae naturae* is one such exception; under this doctrine, a landowner does not owe a duty to protect invitees from wild animals on the property unless the landowner (1) "reduced indigenous wild animals to [his] possession or control," (2) "introduced nonindigenous wild animals into the area," or (3) "affirmatively 'attract[ed] the animals to the property.'" However, Texas courts have also recognized an exception to the *farae naturae* doctrine where a landowner is aware of the presence of wild animals "in artificial structures or places where they are not normally found[,]" and where the landowner knows, or should know, of an "unreasonable risk of harm" posed by the animals, and where the landowner "cannot expect patrons to realize the danger or guard against it." While the Supreme Court "generally agree[d]" with this exception to the *farae naturae* doctrine, it also noted that the requirement of an *unreasonable* harm "strikes an appropriate balance between protecting invitees and ensuring that the burden placed on landowners is not unduly onerous."

As applied to the facts of the present appeal, the Supreme Court held that Hillis owed no duty to McCall. The court reasoned that Hillis's knowledge of the "intermittent presence" of brown recluse spiders on and around his property did not amount to knowledge of an unreasonable risk of harm on the property or knowledge of the presence of brown recluse spiders within the B&B. Indeed, neither McCall nor Hillis had positively identified a brown recluse spider or other venomous spider on the premises prior to McCall's encounter, and their

prior observations of spiders, in general, were insufficient to impute knowledge of an unreasonable risk of harm to Hillis. As the Court noted, "it is simply common knowledge that some spiders are venomous and others harmless." In light of these facts, Hillis owed no duty to warn McCall about the presence of brown recluse spiders or take additional precautions to make the premises safe.

Mandamus Petition

***In re Mobile Mini Inc.*, No. 18-1200, 63 Tex. Sup. Ct. J. 583, 596 S.W.3d 781 (Tex. March 13, 2020) (per curiam)**

Mobile Mini, Inc. ("MMI") owned a trailer that was leased to Nolana Self Storage, LLC ("Nolana"), the owner of a construction site where the trailer was located. Luis Covarrubias ("Covarrubias") was a worker at the construction site who was injured when a gust of wind caused the trailer door to slam on his finger. At the time of Covarrubias's injury, the trailer was under the exclusive control of Nolana's contractor, Anar Construction Specialists, LLC ("Anar"). Covarrubias sued Anar and MMI 19 days before the statute of limitations expired on his personal injury claims, but did not sue Nolana. MMI timely filed an answer and served discovery responses, each of which was due after the limitations period expired. Covarrubias subsequently amended his complaint to add Nolana as a defendant, and MMI filed a motion to designate Nolana as a responsible third party the following day. No party opposed MMI's motion to designate Nolana as a responsible third party, but the trial court did not rule on the motion for nearly two years.

The trial court subsequently ruled that Covarrubias's tort claims against Nolana were time-barred and rendered summary judgment in Nolana's favor on MMI's cross-claim for contribution, dismissing claims against Nolana by both Covarrubias and MMI with prejudice. The trial court ultimately granted Nolana summary judgment on all claims, dismissing

Nolana from the proceedings, prior to the trial court's denial of MMI's motion to designate Nolana as a responsible third party. The court of appeals denied MMI's subsequent mandamus petition without comment. The Supreme Court reversed, holding that MMI is entitled to mandamus relief because the trial court abused its discretion in denying MMI's motion to designate Nolana as a responsible third party.

The main issue in this case is whether MMI's initial discovery responses disclosing Nolana as a potential responsible third party were "timely" under the Texas Civil Practice and Remedies Code, despite those responses being served after the statute of limitations expired on Covarrubias's underlying tort claims. Texas Civil Practice & Remedies Code Sections 33.002 and 33.004(a) provide that a tort defendant may seek leave to designate a person as a responsible third party by filing a motion on or before the 60th day before trial; in this case, MMI filed its motion 626 days prior to the first trial setting. However, because MMI's discovery response disclosing Nolana as a potential responsible third party was filed *after the statute of limitations expired*, Covarrubias argued on appeal that it was not timely filed under section 33.004(d). The Supreme Court distinguished a recent opinion in which it struck down a trial court's grant of leave to designate a third party by noting that the discovery responses in the present case were not due until after the limitations period expired. Observing that MMI and other defendants would be

The owner of a construction trailer filed petition for writ of mandamus to compel Hidalgo County Court at Law No. 7 to vacate an order denying the owner leave to designate the owner of the property on which the trailer resided as a responsible third party for a worker's injury; the worker was injured when a gust of wind caused the trailer door to close on the worker's hand. Despite a years-long delay between the owner's filing of the motion and the court's denial of leave, as well as a three-month delay between the trial court's denial of leave and the owner's filing of a mandamus petition, the Supreme Court granted the owner's petition and directed the trial court to vacate its order denying leave for the owner to designate a responsible third party.

prejudiced if they were penalized for timely serving discovery responses after the statute of limitations expired, the Supreme Court concluded that the legislature did not intend to deprive MMI of its statutory right to designate Nolana as a third party under section 33.004(d).

The Supreme Court dismissed additional arguments by Covarrubias that (1) Nolana could not be designated a responsible third party because it was already a named litigant when MMI filed its motion, and (2) Nolana could not be designated as a responsible third party because it had been dismissed from the suit. Regarding the first argument, the Court held that Nolana was not a party by the time the trial court considered MMI's motion to designate Nolana as a responsible third party—Nolana had already been dismissed at that point. Regarding the second argument, the Court noted that the statute of limitations is considered a procedural—rather than substantive—bar to bringing a claim, and therefore was not dismissed from the case on the merits of its defenses. Likewise, the Court reasoned that "responsibility" was not the same as "liability," and therefore Nolana could be designated a responsible third party even if it could not be held liable for Covarrubias's injuries. Finally, the Court concluded that MMI's mandamus petition should not be denied merely because MMI waited for three months after the trial court's ruling to file its mandamus petition.

Having rejected all of Covarrubias's arguments, the Court held that MMI was entitled to a writ of mandamus, and directed the trial court to vacate the order denying MMI's motion for leave to designate Nolana as a responsible third party.

Parental Rights

***In the Interest of L.G., a Child*, No. 19-0488, 63 Tex. Sup. Ct. J. 588, 596 S.W.3d 778 (Tex. March 13, 2020) (per curiam)**

The trial court terminated a father's parental rights under Texas Family Code section 161.001(b)(1), concluding that the father placed the child in conditions endangering the child's

physical or emotional well-being, failing to support the child, constructively abandoning the child, and failing to comply with a court order establishing actions necessary for the parent to secure the return of the child from the conservatorship of the Department of Family and Protective Services ("DFPS"). The trial court further found that the termination was in the child's best interest. On appeal, the father argued (1) that evidence was legally and factually insufficient to support termination, and (2) that the trial court violated the equal protection and due process clauses of the United States Constitution, as well as the Due Course of Law clause of the Texas Constitution, using the father's indigence as evidence supporting termination under several subsections of 161.001(b)(1). The court of appeals affirmed the trial court's termination of parental rights, holding that there was sufficient evidence to support termination under section 161.001(b)(1)(O)—failing to comply with a court order establishing conditions for the child to be returned to the parent from DFPS conservatorship—and further affirmed the trial court's finding that the termination was in the best interests of the child. The court of appeals also rejected the father's argument that the termination was unconstitutional.

The Supreme Court considers whether a trial court erred in terminating a father's parental rights because of his indigence, and whether the appellate court erred in providing insufficient analysis of the trial court's findings that clear and convincing evidence supported the termination of parental rights. The Supreme Court held that the trial court did not err in making its factual findings, but also held that the appellate court erred by relying on insufficiently detailed analysis of the trial court's findings.

On appeal to the Supreme Court, the father argued (1) that termination of the father's parental rights based on the statutory factors was unconstitutional because it failed to account for the father's indigence, (2) that the court of appeals erred in affirming the trial court's factual findings supporting termination of parental rights without making sufficiently detailed findings.

Regarding the first argument, the Supreme Court rejected the father's argument that the court of appeals failed to consider the father's indigence. Because the court of appeals relied on section 161.001(b)(1)(O)—the father's failure to comply with a court order—as justification for affirming the trial court's termination of parental rights, and because the father failed to comply with that order for a number of reasons unrelated to his indigence—including failure to attend mandatory counseling sessions, refusing to communicate at counseling sessions or communicate with counselors, and failure to complete online parenting coursework—the court of appeals did not violate his constitutional rights in affirming the trial court's findings.

Regarding the father's argument that the court of appeals' erred by providing insufficient analysis of legal and factual sufficiency of the evidence supporting termination of parental rights, the Supreme Court concluded that the court of appeals provided sufficient analysis of the trial court's factual findings supporting termination under section 161.001(b)(1)(O)—the father's failure to follow a court order—but failed to provide sufficient analysis of the court's findings on additional sections 161.001(b)(1)(D) and (E); this is significant because the additional factors could serve as the basis for terminating the father's parental rights for additional children, and therefore a detailed analysis was required of the court of appeals. In failing to detail its analysis of the trial court's findings under section 161.001(b)(1)(D) and (E), the court of appeals erred in affirming the trial court's order terminating the father's parental rights. Thus, the Supreme Court ordered the case to be remanded to the court of appeals for further proceedings.

***In the Interest of B.C.*, No. 19-0306 (Tex. Dec. 20, 2019), 63 Tex. Sup. Ct. J. 246, 592 S.W.3d 133 (per curiam)**

The Department of Family and Protective Services removed B.C. from her mother's home, alleging drugs were being sold in the home, ongoing domestic violence, and that the home lacked running electricity and water. The trial court

held a removal hearing and appointed the Department as B.C.'s temporary managing conservator. At the initial hearing, mother appeared without counsel. She was informed of her right to legal representation and her right to court-appointed counsel if she was indigent. She was also told she would need to fill out "some forms" before the court could determine whether she was indigent. However, mother was not admonished about these statutory rights at subsequent permanency hearings, despite appearing without representation at all of them. The trial court terminated mother's parental rights after an evidentiary hearing. Mother then filed an affidavit of indigence and a pro se notice of appeal. This resulted in the trial court holding a hearing where it was determined that mother was indigent and she was appointed counsel. The court of appeals held mother was entitled to appointed counsel because she had appeared in opposition to the suit and because "there was sufficient indication in the trial record that she was indigent such that the trial court should have conducted further inquiry into her status."

In a per curiam opinion, the Supreme Court affirmed the court of appeals' judgment, but on a different basis. The Court held that while filing an affidavit of indigence is a necessary prerequisite to a determination that a parent is indigent, mother's failure to file an affidavit in this case was not dispositive because the trial court failed to properly admonish her as required by section 263.0061 of the Texas Family Code. Therefore, the termination order was reversed and the case was remanded to the trial court for a new trial because mother was not properly admonished about her rights.

Failure to admonish unrepresented mother of right to court-appointed counsel in government-initiated termination hearing was reversible error.

***Interest of F.E.N.*, No. 18-0439, 62 Tex. Sup. Ct. J. 1492, 579 S.W.3d 74 (June 28, 2019) (per curiam)**

Fay's father works as a shrimper and has spent extended periods at sea. Her parents never married, and their relationship ended around the time of Fay's birth. Her father

visited while on shore, but did not know of her mother's drug abuse and neglect, on account of which the Department of Family and Protective Services was appointed Fay's managing conservator. Eventually mother's continued drug abuse caused the Department to place Fay in foster care. The Department initiated proceedings to terminate the parental rights of both parents; her father answered with a general denial. This case went to trial four years later, when Fay was nine. Before trial, Fay's mother voluntarily relinquished her parental rights.

Following a bench trial, the court ruled that Fay's father established his paternity but that his parental rights should nevertheless be terminated on several grounds. It also held that neither Fay's parents nor relatives should be appointed as her managing conservators. Fay's father appealed. The court of appeals reversed the termination of his parental rights and its naming of the Department as Fay's sole managing conservator. It did not render judgment on the conservatorship question, however, instead remanding that issue back to the trial court.

The Supreme Court, in a per curiam decision, denied the Department's petition for review. In so doing, it noted the difficulties that arise when conservatorship and termination are joined and litigated in a single proceeding. The Department's suit was primarily aimed at terminating Fay's father's parental rights; the record with respect to conservatorship was not adequately developed. A new trial for the conservatorship issues was therefore appropriate.

New trial for conservatorship issues was appropriate when trial court dealt with conservatorship and termination in the same proceeding.

Workers' Compensation

***Orozco v. El Paso County*, No. 17-0381, 63 Tex. Sup. Ct. J. 607, 602 S.W.3d 389 (Tex. March 20, 2020)**

Claimant died in a traffic accident while on his way home from an "Extra-Duty Assignment" at a university football

game. "Extra-Duty Assignment" is defined by the El Paso County Sheriff's Policy Manual as "secondary employment in which the actual or potential use of law enforcement powers is anticipated." An Extra-Duty Assignment must be approved by the sheriff's department, and employees must follow all applicable departmental policies and procedures while performing an Extra-Duty Assignment. Department vehicles may be used for Extra-Duty Assignments, so long as the employee obtains prior approval from a division commander. Because the football game was an approved Extra-Duty Assignment that might entail the use of law enforcement powers, Claimant wore his uniform, badge, and gun to the football game, and drove his assigned patrol car. Claimant died on the trip home in his patrol car after the game.

Following Claimant's death, his spouse, Orozco, filed a claim for workers' compensation benefits with the County of El Paso. The County denied the claim, reasoning that Claimant was not within the course and scope of his employment at the time of the accident. Orozco appealed to an administrative law judge, and the judge in that hearing concluded that Claimant's death was a compensable injury within the course and scope of his employment. A three-member Appeals Panel of the TDI-DWC reversed the administrative law judge's decision. Having exhausted her administrative remedies, Orozco pursued judicial review with the El Paso County Court at Law, which considered competing motions for summary judgment by Orozco and El Paso County, ultimately ruling in

A widow ("Orozco") filed a claim for workers' compensation death benefits after her husband, a deputy sheriff ("Claimant"), died in an automobile accident in a patrol car. The Appeals Panel of the Texas Department of Workers' Compensation ("TDI-DWC") reversed, concluding that Claimant was not acting in a law enforcement capacity at the time of the accident. The Supreme Court held that Claimant was acting in the scope of his employment at the time of the accident, and the coming-and-going rule did not exclude Claimant's travel home from an extra-duty assignment with a private employer from being within the scope of his employment at the time of the car accident.

favor of Orozco. The County appealed, and the court of appeals reversed the trial court in holding that Claimant's trip home after his Extra-Duty Employment was not in the course and scope of his employment as a deputy sheriff. Orozco appealed this decision to the Supreme Court.

The primary issue on appeal to the Supreme Court was whether Claimant was operating in the course and scope of his employment within the meaning of the Workers' Compensation Act. Orozco argued on summary judgment that Claimant's operation of the patrol car was in service of the County, and further argued that Claimant was performing law-enforcement duties during his travel home from the Extra-Duty Assignment at the football game. The County, in turn, argued that Claimant was "off duty" at the time of the accident, that Claimant was not being paid by El Paso County at the time of the accident, and that Claimant was not engaged in a law enforcement activity at the time of his death; rather the County argues that Claimant was merely returning home from an Extra-Duty Assignment, and that such travel was outside the course and scope of his employment as a deputy sheriff.

As an initial matter, the Supreme Court noted the unique status of peace officers among government employees; because peace officers may be required to "spring into action at a moment's notice, even while off duty[,]" it can be difficult to determine whether conduct at any given time is a law-enforcement activity in the course and scope of a peace officer's employment. The key issue in this case is, specifically, whether Claimant's use of his patrol car for travel home after completing an Extra-Duty Assignment fell within the course and scope of his employment as a deputy sheriff with El Paso County.

The decisive evidence on this issue was the testimony of Chief Deputy Messick—the second-highest-ranking officer in Claimant's department—that departmental policies and procedures authorized Claimant to take his patrol car home at work's end, but that also prohibited personal use of the patrol car, instead mandating that the vehicle be used for enforcement of laws, responding to emergencies, and supporting departmental

functions. Claimant's use of the patrol car for his Extra-Duty Assignment had properly been approved by his department. Chief Deputy Messick further testified that Claimant was a patrol officer whose duties included patrolling the county, enforcing traffic laws, answering calls, and maintaining a law-enforcement presence in public. Furthermore, the department's policy manual defined death in the line-of duty as "the death of an active duty sworn officer by felonious or accidental means during the course of performing a law enforcement function while on- or off-duty." After reviewing the parties' summary judgment evidence, the Supreme Court held that Claimant's drive home in his patrol car from a department-approved Extra-Duty Assignment was a law-enforcement activity; Claimant was a patrol officer and his travel home in a marked patrol car was in the course and scope of his employment as a deputy sheriff.

Having concluded that Claimant's travel was within the course and scope of his employment as a deputy sheriff by the County, the Supreme Court still needed to determine whether two statutory exclusions applied to bar Orozco's recovery of workers' compensation benefits.

First, the Workers' Compensation Act generally excludes "transportation to and from the place of employment." This exclusion is known as the "coming-and-going rule," and is, itself, subject to several exceptions. The logic of this rule is that travel on public roads is a risk assumed by the general public and is ordinarily not incidental to employment. However, exceptions to this rule apply where an employer pays for employee transportation or exercises control over employee travel. The Supreme Court concluded that those exceptions apply here because the County provided Claimant with a patrol car and controlled his use of the car with policies and procedures, including rules for Claimant's use of the car while off duty.

Second, employee travel "for both personal and business reasons" is typically excluded from the Workers' Compensation Act. This is often referred to as the "dual-purpose rule" and applies where both personal and professional purposes are necessary and sufficient causes for travel. The Supreme Court

noted that the dual-purpose rule developed at common law, and was intended to distinguish situations where an employee is traveling between work and a place *other than the employee's home*. The Supreme Court has held that the coming-and-going rule and the dual-purpose rule are mutually exclusive. Because the Court already determined that Claimant was traveling home from an Extra-Duty Assignment, and likewise held that the assignment was within the course and scope of Claimant's employment as a deputy sheriff, his travel home after the assignment was travel between work and home; thus, the coming-and-going rule applied to the exclusion of the dual-purpose rule.

Because Claimant's Extra-Duty Assignment was authorized by his department, because claimant's travel home was a law-enforcement activity within the course and scope of his employment by El Paso County, and because the coming-and-going rule applied as an exception to the general rule excluding "transportation to and from the place of employment" from eligibility for benefits under the Workers' Compensation Act, the judgment of the court of appeals is reversed and judgment is rendered in Orozco's favor.

Eight-Corners Rule (Insurance)

***Richards v. State Farm Lloyds*, No. 19-0802, 63 Tex. Sup. Ct. J. 614, 597 S.W.3d 492 (Tex. March 20, 2020)**

This case involved a coverage dispute between Janet and Melvin Richards ("Policyholders") and their insurer, State Farm Lloyds ("State Farm"), for coverage of personal injury claims against Policyholders arising from an ATV accident in which Policyholders' 10-year-old grandchild was killed while under Policyholders' supervision. Policyholders were sued by their grandchild's mother in a separate action for negligent failure to supervise and instruct the grandchild regarding his use of the ATV. Following Policyholders' tender of the complaint against them to State Farm under a homeowner's

insurance policy, State Farm sought a declaratory judgment that it had no duty to defend Policyholders because: (1) a motor-vehicle exclusion for injuries occurring "while off an insured location" applied because the ATV accident occurred on a public trail outside of Policyholders' property; and (2) an "insured exclusion" applied because Policyholders were joint managing conservators for their grandchild, and so the grandchild's injuries were excluded from the policy's coverage for bodily injury. As evidence in support of its arguments on summary judgment, State Farm relied on a vehicle crash report and a court order from a "suit affecting the parent-child relationship."

The primary issue on appeal to the Fifth Circuit Court of Appeals was whether the Eight-Corners Rule precluded State Farm from relying on extrinsic evidence to prove that policy exclusions applied, and State Farm had no duty to defend Policyholders in the related personal injury litigation. The Eight-Corners Rule generally stands for the proposition that an insurer's duty to defend should be assessed solely on the "four corners" of the applicable insurance policy and the "four corners" of the petition in the underlying litigation. Under the Rule, an insurer's duty to defend is typically triggered regardless of whether the allegations in the petition are true, so long as the allegations fall within the insurer's coverage obligations under the policy. State Farm advocated for a narrower interpretation of the Eight-Corners Rule by arguing that the Rule applied only to insurance policies expressly requiring an insurer to defend "all actions against its insured no matter if the allegations of the suit are groundless, false or fraudulent." This policy-based limitation to the Eight-Corners Rule—known as the "policy-

On a question certified from the Fifth Circuit Court of Appeals, the Supreme Court reaffirmed the breadth of the Eight-Corners Rule for determining when an insured's duty to defend is triggered. As a general rule, the Court held that Texas courts should refer solely to the language in the policy and the allegations in the petition to assess whether the duty to defend is triggered.

language exception"—had been applied by federal courts in Texas—notably, in *B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F. Supp. 2d 634, 645 (N.D. Tex. 2006)—but was an as-yet unsettled question of law among Texas state courts. In order to resolve this open issue under Texas law, the Fifth Circuit certified the following question to the Texas Supreme Court: "Is the policy-language exception to the eight-corners rule articulated in *B. Hall Contracting Inc. v. Evanston Ins. Co.*, 447 F. Supp. 2d 634 (N.D. Tex. 2006), a permissible exception under Texas law?"

In response to the Fifth Circuit's certified question, the Supreme Court held that Texas law did not recognize the policy-language exception as a permissible exception to the Eight-Corners Rule. Instead, the Supreme Court held that the Eight-Corners Rule applied regardless of whether the policy at issue contained a groundless-claims clause like the one discussed in *B. Hall Contracting*. The Supreme Court reasoned that its holding was consistent with the intended purpose of the Eight-Corners Rule, which was to construe the duty to defend more broadly than the duty to indemnify. In this sense, the Eight-Corners Rule was designed to trigger the duty to defend early in the underlying litigation; as soon as a lawsuit was filed against the insured, the insurer's duty to defend could be determined solely by reference to the language in the applicable policy and the allegations in the petition. In other words, the Eight-Corners Rule allowed coverage disputes to be resolved without resorting to time-consuming and costly discovery and fact-finding regarding the merits of the claims against the insured in the underlying litigation. While the Supreme Court noted that insureds and insurers were free to structure their policies so as to "contract around" the Eight-Corners Rule, the mere absence of a groundless-claims clause in the State Farm homeowner's insurance policy was not sufficient to limit application of the Eight-Corners Rule in this case.

Insurance

***Barbara Technologies Corporation v. State Farm Lloyds*, No. 17-0640, 62 Tex. Sup. Ct. J. 1424, 589 S.W.3d 806 (Tex. June 28, 2019)**

Barbara Technologies ("Barbara Tech") owned a commercial property in San Antonio and insured the property with State Farm Lloyds ("State Farm"). On March 31, 2013, a wind and hail storm caused damage to the property. On October 16, 2013, Barbara Tech submitted a claim for coverage of the costs of repairing its property to State Farm. Following an inspection of Barbara Tech's property, State Farm issued a denial of Barbara Tech's insurance claim on November 4, 2013. In its denial of coverage, State Farm concluded that Barbara Tech's property sustained only $3,153.57 in damages and was therefore below the $5,000 deductible required by the insurance policy. Upon Barbara Tech's request, State Farm conducted a second inspection but reached the same conclusion. On July 13, 2014, Barbara Tech sued State Farm for violating the Texas Prompt Payment of Claims Act ("TPPCA"). Following State Farm's invocation of an appraisal provision in the policy, independent appraisers concluded that Barbara Tech's property had sustained damages in the amount of $195,345.63. Within one week of receiving the independent appraisal, State Farm paid Barbara Tech $178,845.25, which represented the appraisal value after Barbara Tech's deductible and depreciation were subtracted.

An appraisal process mandated by an insurance policy is a contractual remedy—not an adjudication of liability or an award of damages—and as such, the appraisal process does not insulate an insurer from liability under the TPPCA.

Following State Farm's payment, Barbara Tech filed a motion for summary judgment on its TPPCA claim, arguing that it was entitled to damages because State Farm had failed to pay its insurance claim within the 60-day time limit prescribed by the statute. State Farm filed a cross-motion for summary

judgment, arguing that it paid the appraisal award in a timely fashion and was therefore not liable for violating the TPPCA.

The trial court denied Barbara Tech's motion for summary judgment and instead granted summary judgment for State Farm. Barbara Tech appealed, arguing that the 60-day timeline for payment of claims mandated by the TPPCA runs from the date that Barbara Tech gave State Farm notice of its loss—not 60 days from the date State Farm received the independent appraisal—and that State Farm was strictly liable for failing to pay Barbara Tech within that window. The court of appeals affirmed the trial court's judgment, reasoning that State Farm timely paid the appraisal award when it remitted payment to Barbara Tech within one week of receiving the independent appraisal.

The Supreme Court reversed the court of appeals and trial court, holding that State Farm's invocation of the policy-based appraisal process did not extend the 60-day deadline for payment required by the TPPCA, and that State Farm's payment of the appraisal amount did not exempt State Farm from liability under the TPPCA. However, the Supreme Court also held that State Farm's payment of the independent appraisal award was not an acknowledgment of its liability under the policy; rather, the appraisal process was a contractual remedy and State Farm's election to pay the appraisal award was not proof of its liability to Barbara Tech as a matter of law. Because State Farm is liable for TPPCA damages only if (1) State Farm accepts liability or is adjudicated liable under the insurance policy, and (2) State Farm violates a TPPCA deadline or requirement, neither party carried its burden of proof on their respective motions for summary judgment.

Because the TPPCA requires the insurer to be liable on the policy in order to be liable for violations of the TPPCA, the Supreme Court concluded that Barbara Tech would need to prove that State Farm owed it benefits under the insurance policy before Barbara Tech could succeed on its claim that State Farm delayed payment of those benefits for more than 60 days following Barbara Tech's initial notice of loss. Likewise,

State Farm's payment of the appraisal award within 60 days of receiving notice of the award did not exempt State Farm from liability for failing to pay Barbara Tech's insurance claim within 60 days of State Farm's receipt of the notice of loss. Thus, the Supreme Court remanded the case to the trial court to resolve factual issues regarding State Farm's liability on the insurance policy, itself, as a necessary predicate for determining whether State Farm violated the TPPCA.

***Ortiz v. State Farm Lloyds*, No. 17-1048, 62 Tex. Sup. Ct. J. 1484, 589 S.W.3d 127 (Tex. June 28, 2019)**

Oscar Ortiz ("Ortiz") submitted a policy claim for wind and hail damage to his property under his homeowner's insurance policy with State Farm Lloyds ("State Farm"). State Farm dispatched an adjuster to inspect Ortiz's home, and the adjuster concluded that the damage amounted to $732.53—which was below Ortiz's $1,000 deductible. Key to the State Farm adjuster's conclusion was a finding that additional damage observed at the property was not caused by hail and was not covered under the policy. Ortiz responded by forwarding State Farm a second opinion from a public adjuster that valued Ortiz's loss at $23,525.99. State Farm conducted a further inspection—this time increasing its initial estimate of damage to $973.94—but again concluded that the damage caused by hail did not exceed the $1,000 deductible.

Following State Farm's second inspection, Ortiz sued State Farm for breach of contract, TPPCA violations, and bad-faith insurance practices under statutory and common law claims. State Farm responded by filing a motion to compel an appraisal based on a provision of the homeowner's insurance policy, and the trial court granted its motion. The resulting appraisal award concluded that the replacement cost of the damaged property was $9,447.52, but that the actual cash value of the damage was $5,243.93. State Farm paid the award to Ortiz within seven days, and then moved for summary judgment on all of Ortiz's claims. The trial court initially denied State Farm's motion but later granted it on reconsideration, rendering

judgment for State Farm on all claims. Ortiz appealed and the court of appeals affirmed the trial court's judgment; the court of appeals concluded that State Farm's timely payment of the appraisal award precluded Ortiz's claims for breach of contract—as the appraisal process was a remedy designated in the policy—and further held that State Farm's delays in investigating and paying Ortiz's insurance claim was not sufficiently "extreme" to cause injury independent of Ortiz's contract claim. Despite affirming the trial court's grant of summary judgment on all claims, the court of appeals did not clearly address Ortiz's claim under the Texas Prompt Payment of Claims Act ("TPPCA").

The Supreme Court of Texas affirmed the trial court and court of appeals with regard to summary judgment on Ortiz's contract and bad-faith claims, but reversed the grant of summary judgment on Ortiz's TPPCA claim in light of the *Barbara Technologies* opinion published on the same date. The Court agreed with the court of appeals that State Farm did not breach the terms of the insurance policy by invoking the appraisal clause of the contract and paying the appraisal award within one week. Additionally, because Ortiz's breach of contract claim failed, so too did his statutory claim for bad-faith insurance practices under Chapter 541 of the Texas Insurance Code, which required claimants to prevail on underlying claims and recover damages in order to be entitled to recover attorneys' fees. However, as in *Barbara Technologies*, the Court held that State Farm's payment of the appraisal award did not preclude Ortiz from proceeding with his TPPCA claim; because the appraisal process was a contractual remedy, State Farm's payment of the

An appraisal process mandated by an insurance policy is a contractual remedy—not an adjudication of liability or an award of damages—and as such, the appraisal process does not insulate an insurer from liability usnder the TPPCA. However, payment of the appraisal award does preclude an insured's claims for breach of contract and bad-faith insurance practices related to payment of claims under the policy.

appraisal award neither acknowledged State Farm's liability under the policy nor exempted State Farm from the TPPCA's provisions.

Trade Usage; Justifiable Reliance

***Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*, No. 17-0332, 62 Tex. Sup. Ct. J. 1385, 590 S.W.3d 471 (June 28, 2019)**

Barrow-Shaver is an oil-and-gas exploration company that was prospecting four counties in north-central Texas to put together a drilling prospect. Carrizo, a publicly traded oil-and-gas company, had an interest as a lessee in the 22,000-acre Parkey lease, which was set to expire on April 23, 2011 if no producing well was established per the lease. Carrizo entered into a farmout agreement with Barrow-Shaver, in which Barrow-Shaver would earn a partial assignment of Carrizo's interest in the Parkey lease in exchange for its services in drilling a producing well. To memorialize their agreement, the parties executed a letter agreement, which included a consent-to-assign provision stating that Barrow-Shaver's rights under the agreement may not be assigned without Carrizo's express written consent. During negotiations, though, Carrizo's representative assured Barrow-Shaver that Carrizo would provide consent to assign if Barrow-Shaver chose to assign its rights in the future. After drilling an unsuccessful well, Barrow-Shaver sought to assign its rights—and had a buyer for them. But Carrizo refused consent. The deal fell through.

Evidence of trade usage was not relevant to determine scope of farmout agreement's consent-to-assign provision, which gave company unqualified right to withhold consent to assignment; given that right, driller could not justifiably rely on oral statements that company would not withhold such consent.

Barrow-Shaver sued Carizzo breach of contract, fraud, and tortious interference with a contract. The case was tried to a jury. The trial court

instructed the jury to consider industry usage to determine the standards by which Carrizo could withhold consent. The jury then awarded Barrow-Shaver $27 million in damages, plus interest and fees. But the court of appeals reversed. It held that the contract was not ambiguous given that the negotiations Carizzo struck a restriction that consent could not be unreasonably withheld. It also held that Barrow-Shaver's fraud claim failed because justifiable reliance was negated as a matter of law.

The Supreme Court, in an opinion by Justice Green, affirmed. The consent-to-assign provision is not qualified by a reasonableness standard. The contract contains no consent requirements other than that it be express and in writing. The Court will not imply any others, and thus industry custom should not be considered to import an obligation that does not exist in the contract. Nor is there an implied duty of good faith and fair dealing here, in the context of a farmout agreement between sophisticated parties. The Court will not impose a duty on Carrizo for which the parties did not contract. The contract allowed Carrizo to refuse consent for any reason, and therefore Carrizo could not breach the parties' agreement by withholding consent.

As for fraud, Barrow-Shaver's claim is barred as a matter of law because it could not reasonably rely on Carrizo's oral representations contrary to the consent-to-assign provision. Barrow-Shaver was sophisticated. It should have realized that Carrizo could change its mind—especially given the contract terms. Further, Carrizo's vague and general statements indicating it would give consent were representations of future intentions that were inherently unverifiable. Barrow-Shaver should have known better than to accept them blindly.

Justice Guzman, joined by the Chief Justice and Justice Busby, concurred and dissented. She concurred in the judgment on the fraud claim, but dissented on the contract claim. She would not have repudiated trade usage and custom as an aid to interpretation, and would reverse and render judgment for Barrow-Shaver on its breach-of-contract claim.

Justice Boyd dissented. He would have held that the trial court erred by excluding evidence of the parties' negotiations. He would remand for a new trial on both claims.

TUFTA Good Faith

***Janvey v. GMAG, L.L.C.*, No. 19-0452, 63 Tex. Sup. Ct. J. 250, 592 S.W.3d 125 (Dec. 20, 2019)**

Stanford International Bank, Ltd. ran a complex Ponzi scheme for almost two decades that attracted over $7 billion in investments. It sold fraudulent certificates of deposit and issued "returns" to old investors with money from new investors. Stanford deceived over 18,000 investors before the SEC uncovered its scheme in 2009. Magness was one of the largest investors. When he withdrew his investments in 2008, he had netted a $8.5 million return.

The district court appointed a receiver, Ralph Janvey, to recover the Stanford's assets and distribute them equitably. So Janvey sought return of Magness's net payout. It sued him to recover these funds, alleging that his withdrawal constituted a fraudulent transfer under TUFTA and that he was unjustly enriched. The district court granted Janvey's motion for partial summary judgment for the net amount Magness received over his investment; Magness paid the receiver $8.5 million. But the district court left to the jury whether Janvey was entitled to claw back Magness's original $79 million investment. That turned on whether Magness satisfied TUFTA's good-faith defense. The jury found that Magness had inquiry notice of the Ponzi scheme, but that an investigation would have been futile. Thus, the district court held that Magness satisfied his good-faith defense. Janvey appealed, contending that the jury's finding on inquiry notice

A transferee on inquiry notice of fraudulent intent must show at a minimum that it diligently investigated any suspicions of fraudulent intent in order to show good faith under the Texas Uniform Fraudulent Transfer Act (TUFTA).

defeated Magness's good-faith defense as a matter of law. The Fifth Circuit agreed. But then, on rehearing, certified the issue to the Supreme Court.

The Supreme Court, in an opinion by Justice Busby, held that TUFTA's good-faith defense against fraudulent-transfer claw-backs is not available to a transferee who had inquiry notice of the fraudulent behavior and did not conduct a diligent inquiry—even though they would have not been able to discover that fraudulent activity through a diligent inquiry. If the transferee fails to show good faith and avoid willful ignorance by conducting a diligent investigation, it cannot be characterized as acting with honesty in fact. The investigation may turn up additional information, or it may not, but the result does not negate the suspicions that a transferee on inquiry notice has at the time of the transfer. An investigation is an opportunity for a transferee to show its good faith, and requiring proof of an investigation negates any incentive transferees may have to remain willfully ignorant of fraud.

Implied Waiver

***LaLonde v. Gosnell*, No. 16-0966, 62 Tex. Sup. Ct. J. 1226, 593 S.W.3d 212 , (Tex. June 14, 2019).**

The Gosnells hired engineers to evaluate and stabilize their home's foundation. According to the Gosnells, the engineers' work exacerbated their foundation problems and significantly damaged their home. Two years later, the Gosnells sued the engineers, but they did not contemporaneously file a certificate of merit as required by section 150.002 of the Texas Civil Practice and Remedies Code.

Twenty months later, the engineers filed their answer and the parties agreed to a scheduling order. Soon after, the parties participated in mediation which was not successful. So, the parties began litigating the case. Just weeks before trial, the engineers filed a motion to dismiss because the Gosnells had not included a certificate of merit when they filed their original petition forty months earlier. The trial court ultimately granted

the petition and dismissed the suit without prejudice. The court of appeals reversed, holding that the engineers impliedly waived the certificate of merit requirement. Considering the totality of the circumstances, the court of appeals held that "the Engineers' engagement in the judicial process indicated their intention to litigate and amounted to waiver." On appeal, the engineers argued that implied waiver of a statutory right (1) is not determined under a totality-of-the-circumstances test, (2) should not be reviewed de novo because it involves a question of intent, (3) always begins with a presumption against waiver, (4) requires a showing of prejudice.

The Supreme Court, in an opinion by Justice Guzman, affirmed. Section 150.002's certificate of merit requirement is mandatory but not jurisdictional, so it can be waived even without a statutory dismissal deadline. Waiver by conduct is a question of law. The test for waiver by conduct is whether the parties' conduct clearly demonstrates an intent to relinquish, abandon, or waive the right at issue. In determining this intent, courts must consider a totality of the circumstances. Factors considered by the court in this case include (1) discovery participation; (2) stage of litigation and elapsed time; and (3) seeking affirmative relief and alternate dispute resolution. The Supreme Court notes that no one factor is necessarily dispositive, and that a case-by-case analysis is required. When analyzing the facts in this case, the court specifically noted that the filing defect was "open and obvious" and that it existed from "day one." The engineers participated in full discovery, including multiple extensions of deadlines, and waited until just before trial to assert this right. They sought affirmative relief and unsuccessfully attempted to mediate. Waiting 1,219 days after the Gosnells filed the initial petition, "every day of which the Gosnells' procedural mistake was

Civil Practice and Remedies Code section 150.002's certificate of merit requirement is mandatory but not jurisdictional and it may be waived even without a statutory dismissal deadline. The totality of the circumstances test is the proper test in determining whether the requirement has been waived.

apparent," is, according to the Supreme Court, a "significant delay" constituting waiver in this case.

Justice Boyd, joined by Justices Hecht and Blacklock, filed a dissenting opinion arguing that the majority misconstrues the right at issue. According to the dissent, the issue is whether the engineers waived their dismissal right, not whether they are estopped from asserting it. At best, the facts may support estoppel, but the facts do not support waiver. Chapter 150 does not impose a deadline by which the defendant must require a dismissal motion under this chapter, so a defendant does not waive the right to move for dismissal by waiting to file the motion.

Texas Citizens Participation Act

***Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, No. 18-0656, 63 Tex. Sup. Ct. J. 227, 591 S.W.3d 127 (Tex. Dec. 20, 2019)**

Lona Hills Ranch, LLC ("Ranch"), and Creative Oil & Gas, LLC ("Lessee"), entered into an oil and gas lease under which COG was the lessee and Creative Oil & Gas Operating, LLC ("Operator"), was the operator of the sole well on the lease. Ranch sued Operator for trespass, alleging that the lease previously terminated due to a cessation of production, and the Lessee intervened. Ranch ultimately dropped its claims against Operator and amended its petition to assert claims against Lessee. While Ranch and Operator brought a variety of counterclaims, the essence of the dispute involved two allegations by Lessee and Operator: (1) Ranch falsely told third-party purchasers that the lease expired and payments on purchases of production should stop; (2) the litigation, itself, breached Section 11 of the lease, which required Ranch to provide Lessee with a notice of breach

Private communications regarding the alleged expiration of a single oil and gas lease did not involve a "matter of public concern" as required for invocation of the Texas Citizens Participation Act ("TCPA").

and opportunity to cure prior to filing suit. Ranch responded by filing a Texas Citizens Participation Act ("TCPA") motion to dismiss Lessee's counterclaims, arguing that its statements to third parties were an exercise of free speech and that its filing of the lawsuit was an exercise of its right to petition.

Ranch's TCPA motion was denied by operation of law in the trial court and Ranch appealed. The court of appeals concluded that Ranch's statements to third parties was an exercise of speech falling under the TCPA, but the court of appeals did not address whether Ranch's statements to third parties involved a "matter of public concern." Regarding Lessee's argument that the litigation breached the terms of the lease, the court of appeals agreed with Lessee that Ranch had contractually agreed to limit its right to petition by signing a lease containing a notice and cure provision. However, the court of appeals held that Operator lacked standing to pursue this claim, because it was not a party to the lease agreement. Thus, the court of appeals dismissed Lessee's and Operator's claims related to Ranch's statements to third parties but would have allowed Lessee's claim for breach of the lease to proceed while dismissing Operator's claim for breach of the lease because Operator was not a party to that contract.

As summarized by the Texas Supreme Court, a court's resolution of a TCPA claim involves a three-step process: (1) first, the trial court must dismiss the legal action if the movant shows by a preponderance of evidence that the action is "based on, relates to, or is in response to the party's exercise of … the right of free speech [or] the right of petition[;]" (2) next, the court may not dismiss the legal action if the non-movant shows—by clear and specific evidence—a "prima facie case for each essential element of the claim[;]" and (3) last, the movant can still prevail on a TCPA motion to dismiss by showing—by a preponderance of evidence—that a valid defense applies to the non-movant's claim. Crucially, the TCPA defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern" and further defines a matter of public concern to include issues related to "environmental, economic, or community well-being," "the government," or "a

good, product, or service in the marketplace."

Regarding Ranch's comments to third parties about the lease expiring, the Supreme Court noted that the court of appeals deemed the comments to relate to Ranch's exercise of free speech, and further concluded that the Lessee and Operator each failed to establish a prima facie case for each element of their counterclaims. The Supreme Court disagreed with the court of appeals' analysis, instead holding that Ranch's communications with third parties did not involve matters of public concern under the TCPA. Parsing the terms in the subsidiary definitions of "matter of public concern," the Court concluded that Lessee's and Operator's counterclaims concerned private business communications by Ranch to third party purchasers of production from a single well, which allegedly harmed Lessee and Operator by causing purchasers to withhold payment; nothing in the record indicates that the communications by Ranch were relevant to a broader marketplace or otherwise involved matters of public concern. While the Court was careful to note that private communications can sometimes be covered by the TCPA, the TCPA does not apply to every communication related to business, and a dispute between a handful of private parties regarding the meaning of a single contract does not implicate a matter of public concern.

Regarding Ranch's right to petition, the Court affirmed the court of appeals' judgment that the Operator's counterclaim for breach of contract was covered by the TCPA because it related to Ranch's filing of the instant lawsuit. The Court likewise affirmed the court of appeals' dismissal of Operator's counterclaim because Operator was not a party to the lease and could not recover damages for its breach. Furthermore, the Court concluded that Operator failed to present clear and convincing evidence that it was a third-party beneficiary to the lease. Thus, Operator's counterclaim for breach was properly dismissed. The Court did not address Lessee's counterclaim for breach of the lease because Ranch did not challenge that adverse ruling on appeal to the Supreme Court.

In sum, Ranch's communications with third parties

regarding the expiration of its oil and gas lease with Lessee did not relate to a matter of public concern and were therefore not covered by the TCPA. In addition, Operator could not counterclaim against Ranch for breach of Ranch's lease with Lessee because Operator was neither a party to that lease nor a third-party beneficiary. The Court therefore affirmed the portion of the court of appeals' judgment dismissing Operator's breach of contract counterclaim but reversed the court of appeals' dismissal of Lessee's and Operator's counterclaims related to Ranch's communications with third parties.

***In re Geomet Recycling LLC*, No. 18-0443, 62 Tex. Sup. Ct. J. 1268, 578 S.W.3d 82 (Tex. June 7, 2019)**

This appeal involves two groups of parties, including individuals and entities associated with a scrap metal recycling business, Geomet Recycling, LLC ("Geomet"), and EMR (USA Holdings) Inc.—which is also a scrap metal recycling business—and it affiliated entities ("EMR"). Multiple EMR employees left EMR to start Geomet—a competing company—in mid-2017. EMR sued Geomet several months later for trade secret misappropriation, breach of fiduciary duty and similar claims. The trial court issued a temporary restraining order directing Geomet not to use EMR's trade secrets and other confidential information. Geomet filed a motion to dismiss under Texas Civil Practice and Remedies Code § 27.003 (TCPA), and the trial court limited discovery to issues relevant to the TCPA motion. EMR responded by moving for contempt and alleged that EMR was violating the temporary restraining order. The trial court denied Geomet's TCPA motion to dismiss and Geomet filed an interlocutory appeal pursuant to § 51.014(a)(12) of the Texas Civil Practice and Remedies Code. Concurrent with that interlocutory appeal, Texas Civil Practice and Remedies Code § 51.014(b) triggered a stay of "all other proceedings in the trial court pending resolution of that appeal." Despite this, EMR filed a motion in the court of appeals to lift the stay so the trial court could hear EMR's request for a temporary injunction and its motion for contempt. EMR argued that, although § 51.014(b) prohibited the

trial court from conducting additional proceedings, it did not stay the court of appeals from lifting the stay for the limited purpose of permitting EMR's contempt motion to proceed.

The court of appeals agreed with EMR and ordered the stay lifted "for the limited purpose of allowing the trial court to conduct a hearing on appellees' request for temporary injunction and motion for contempt." Geomet then filed a mandamus petition to the Texas Supreme Court challenging the court of appeals' order lifting the stay.

The Texas Supreme Court held that the court of appeals was not authorized to lift the stay and that mandamus relief was warranted. The Court noted that § 51.014 did not authorize a court of appeals to lift the stay—in full or in part—and likewise added that the legislature did not intend for courts to add "equitable or practical exceptions" to that section. Not only does the statute stay "*all* other proceedings in the trial court" but it also provides that the stay shall last until "resolution of th[e] appeal[.]" Because nothing in Section 51.014 authorized the court of appeals to partially lift the stay, that authority must derive from another source. EMR pointed to Texas Rules of Appellate Procedure 29.3 and 29.4 as alternate bases for the appellate court's authority to lift a portion of the stay.

Texas Rule of Appellate Procedure 29.3 provides courts of appeals with authority to "make any temporary orders necessary to preserve the parties' rights" during interlocutory appeals. However, the Supreme Court reasoned that Rule 29.3 was a procedural rule, and that procedural rules cannot conflict with statutes like § 51.014, even where the court of appeals believes that doing so is necessary to preserve parties' rights. Thus, this rule could not supply the basis for the court of appeals' modification of the stay order.

A court of appeals lacked authority to lift a stay of proceedings triggered under Texas Civil Practice and Remedies Code § 51.014(b) by a party's interlocutory appeal; while the court of appeals possessed authority to issue temporary orders where necessary to preserve the litigants' rights, it could not alter the stay to permit limited proceedings in the trial court while the interlocutory appeal was pending.

Texas Rule of Appellate Procedure 29.4 provides that "while an appeal from an interlocutory order is pending only the appellate court in which the appeal is pending may enforce the order." The Supreme Court concluded that this rule was likewise inapplicable to the case at hand because EMR was not seeking to enforce an order on appeal, but to enforce a separate temporary restraining order that was not pending appeal. Even if EMR did seek to enforce the order on appeal, the rule would still not permit the court of appeals to contravene § 51.014.

As a final recourse, EMR argued that the court of appeals had inherent constitutional authority to stay the trial court order if doing so was necessary to prevent irreparable harm to EMR. EMR went further in arguing that a legislative attempt to prevent courts from acting to prevent irreparable harm to litigants improperly invades the exclusive judicial authority of the courts. While the Supreme Court agreed with the principle that legislative authority to curtail courts' criminal contempt power is not limitless, and that the contempt power is essential to judicial independence and inherent authority, the court concluded that EMR was not without recourse in preserving its rights during an interlocutory appeal. While EMR could not ask the court of appeals to issue an order contrary to the stay mandated by the legislature, Rule 29.3 did authorize the court of appeals to issue temporary orders to preserve the litigants' rights. Rather than seek a temporary order focused solely on an irreparable harm faced by EMR, EMR instead sought to use Rule 29.3 as a mechanism to lift a stay mandated by § 51.014—thereby seeking to use a procedural rule to impermissibly curtail the function of a statute.

In sum, the Supreme Court concluded that the court of appeals erred in authorizing the trial court to conduct further proceedings in the trial court, violating the plain language of § 51.014. Because there is no remedy for an erroneous order by the court of appeals lifting the stay, it was appropriate for the Supreme Court to conditionally grant Geomet's mandamus petition—with the writ to issue only if the court of appeals did not promptly vacate its order violating the stay.

Texas Courts of Appeals Update

Andrew B. Bender, The Bender Law Firm PLLC

Insurance • Appraisal • Summary Judgment

***Lambert v. State Farm Lloyds*, No. 02-17-00374-CV, 2019 WL 5792812 (Tex. App.—Fort Worth Nov. 7, 2019, pet. filed)**

The Second Court of Appeals held that an insurer's full and timely payment of an appraisal award bars an insured's common law and statutory bad-faith claims for policy benefits as a matter of law, but does not preclude a claim under the Texas Prompt Payment of Claims Act because payment of an appraisal award is neither an acknowledgment nor a determination of liability under the Act.

In May 2015, the Lamberts submitted a claim for damages under their homeowner's-insurance policy after their home was damaged by a wind and hail storm that tore through Parker County Texas. Texas State Farm Lloyds sent its adjuster, Tevin Senne, to inspect the property. Three weeks later, State Farm sent the Lamberts a letter telling them that the value of the covered loss was $4,935.97. Because it was less than the policy's $5,862.00 deductible, State Farm denied the claim.

The Lamberts asked State Farm to inspect their home again, and State Farm obliged. This time State Farm determined that the value of the covered loss was nearly $10,000. After withholding the applicable deductible and depreciation, State Farm issued the Lamberts a check for roughly $1,700. Dissatisfied with this result, the Lamberts sued State Farm and its adjuster in January 2016, asserting claims for breach of contract, unfair settlement practices under the Texas Insurance Code, violations of the Texas Prompt Payment of Claims Act, breach of the duty of good faith and fair dealing, violations of the Deceptive Trade Practices Act, and fraud.

State Farm responded by invoking the policy's appraisal clause. The Lamberts and State Farm selected appraisers, who jointly appointed an umpire. The appraisal panel set

the amount of loss to the Lamberts' home at $99,112.72 on a replacement-cost basis and $70,965.54 on an actual-cash-value basis. In August 2016, State Farm deducted depreciation and past payments before paying the Lamberts $63,404.63.

One month later, State Farm moved for summary judgment on all of the Lamberts' claims, arguing that because it had paid the amount of loss as determined by appraisal and because the Lamberts had not alleged an independent injury separate from their rights under the policy, State Farm was entitled to a take-nothing judgment in its favor. The Lamberts also moved for partial summary judgment on their claim under the Texas Prompt Payment of Claims Act, arguing they were entitled to statutory interest and attorney's fees as a matter of law because State Farm failed to follow the Act's prompt-payment deadlines. The trial court granted State Farm's motion and denied the Lamberts' motion.

The Lamberts raised two arguments on appeal. First, they argued that payment of the appraisal award, on its own, does not dispose of their common law and statutory bad-faith claims as a matter of law. In addressing this issue, the Second Court of Appeals began its analysis by recognizing that an insured need not prove the insurer breached the contract to pursue extra-contractual claims. Nonetheless, the court relied on the recent Texas Supreme Court decision in *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019), to conclude that State Farm's full payment of the appraisal award, which amounted to payment of all policy benefits to which the Lamberts could be entitled, precluded the Lamberts from seeking actual damages in the form of policy benefits as a matter of law. And because the Lamberts did not seek damages independent of the benefits already paid under the policy, the court of appeals affirmed the portion of the trial court's judgment for State Farm on the Lamberts' common law and statutory bad-faith claims.

Second, the Lamberts argued that the trial court erred by granting State Farm's summary-judgment motion and denying their motion on State Farm's liability for statutory interest and attorney's fees under the Texas Prompt Payment of Claims

Act. After laying out the statutory framework established by the Act, the Second Court of Appeals turned to another recent Texas Supreme Court decision, *Barbara Technologies Corporation v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019), for guidance:

> The facts in *Barbara Tech* were much like the ones we face here: State Farm twice denied its insured's claim for storm-related damages because, State Farm asserted, the damages did not exceed Barbara Tech's deductible. Barbara Tech sued, prompting State Farm to invoke the policy's appraisal provision. Barbara Tech accepted the resulting appraisal-award payment but still claimed that statutory damages were appropriate because State Farm had failed to comply with the TPPCA's 60-day time limit for payment. Although both the trial and appellate courts found that a payment of an appraisal award barred a TPPCA claim as a matter of law, the Texas Supreme Court disagreed.

As the court of appeals noted, the Court in *Barbara Tech* interpreted the statute and concluded that payment of an appraisal award has no bearing on the first element an insured must prove to recover damages under the Texas Prompt Payment of Claims Act—that the insurer was liable for the claim under the policy. According to the court of appeals, the holding in *Barbara Tech* applied to the facts in this case and thus controlled the disposition of the Lamberts' second issue. Because payment of the appraisal amount neither established nor foreclosed liability under the policy as a matter of law, the Second Court of Appeals reversed the portion of the trial court's order granting summary judgment for State Farm on the Lamberts' TPPCA claim and remanded the case to the trial court. On January 27, 2020, the Lamberts filed a petition for review with the Supreme Court of Texas.

Personal Jurisdiction • Minimum Contacts • Alter Ego

***Fisher v. Eagle Rock Custom Homes, Inc.*, No. 14-18-00483-CV, 2020 WL 205975 (Tex. App.—Houston [14th Dist.] Jan. 14, 2020, no pet.)**

The Fourteenth Court of Appeals held that a trial court lacks personal jurisdiction over a non-resident defendant in his or her individual capacity, where the plaintiff alleges that the individual engaged in tortious conduct and conducted business in Texas on behalf of entities connected to the individual, without pleading or proving that the defendant committed the allegedly tortious conduct in Texas.

Mack Davis and Eagle Rock Custom Homes Inc. ("Eagle Rock") filed a lawsuit in Harris County, Texas against Jeff Fisher in his individual capacity. To support personal jurisdiction, Eagle Rock and Davis alleged that Fisher is a Texas resident who conducted business in Texas. They further alleged that Eagle Rock, which is a home-building company, had been doing business with Blevesco, purportedly a Fisher-related entity, when Fisher approached Eagle Rock with a proposal for creating a joint venture to develop property. According to Eagle Rock and Davis, Fisher made false representations regarding the property and construction loans, that Fisher failed to transfer properties to Eagle Rock as promised, and that entities Fisher controlled had taken funds that did not belong to them. This conduct, they said, forced Eagle Rock out of business and caused Davis significant debt. Based on these allegations, Eagle Rock and Davis asserted claims against Fisher for fraudulent inducement, common law fraud, constructive fraud, and negligent misrepresentation.

Before answering, Fisher filed a special appearance in which he contested personal jurisdiction over him in his individual capacity. Fisher attached an affidavit in which he averred that he is a full-time resident of Hong Kong, where he has lived continuously since 1997. He acknowledged that he visited his parents a couple of times a year in Texas and that he maintained

a Texas driver's license so that he could drive on those visits. Fisher further stated that although he was formerly a manager or investor in companies that did business in Texas, he personally does not own any property, have any bank accounts, or conduct any business in the state.

In response, Eagle Rock and Davis submitted an affidavit signed by Davis. In the affidavit, Davis averred that he was first introduced to Fisher at Blevesco's offices in Harris County, after which Blevesco and Eagle Rock entered into joint venture agreements for the construction of new homes. According to Davis, after several successful projects, Fisher approached Eagle Rock with a proposal for entities owned and controlled by Fisher to provide both the lots and financing for future projects. Eagle Rock then began the projects with various Fisher entities. Davis further asserted that during their business dealings he had numerous in-person meetings with Fisher at the Blevesco office and at a local restaurant. Davis said that Fisher was always his contact through the years of doing business with the Fisher entities. In a reply, Fisher insisted that his attendance at any meetings with Davis was only in his capacity as a representative of a company. Following a hearing at which no testimony was taken and no exhibits were admitted, the trial court signed an order denying Fisher's special appearance. Fisher filed an interlocutory appeal.

The Fourteenth Court of Appeals held that Fisher was not subject to personal jurisdiction in his individual capacity. In addressing the arguments raised by Eagle Rock and Davis, the court of appeals observed that their allegation—that Fisher is an alter ego of entities under his control—falls within an exception to the general rule that the party contesting jurisdiction bears the burden to negate the jurisdictional allegations against it. The court concluded that Eagle Rock and Davis presented no proof to pierce the corporate veil between Fisher and any related entities that do business in Texas. The court further recognized that although Eagle Rock and Davis alleged that Fisher engaged in tortious conduct and that they met Fisher in Texas on several occasions, they never alleged

that he committed any tortious conduct in Texas. The court of appeals concluded that jurisdiction cannot extend to Fisher in his individual capacity based on contacts with Texas on behalf of corporations connected to him. As a result, the Fourteenth Court of Appeals reversed the trial court's order denying Fisher's special appearance and rendered judgment dismissing the case for want of personal jurisdiction.

Texas Court of Criminal Appeals Update

John R. Messinger, Assistant State Prosecuting Attorney
Austin, Texas

Collateral Estoppel

***Ex parte Adams*, 586 S.W.3d 1 (Tex. Crim. App. 2019)**

Adams was present when two men, Justin and Luke, began fighting. According to the State's evidence, Justin's brother, Joe, told Adams to stay out of it. When Joe decided to pull his brother off Luke, Adams stabbed Joe and then stabbed Justin. Adams was charged in two separate causes with aggravated assault, one against each brother. Justin's case was tried first. Adams testified and claimed that Joe hit him when he tried to stop Justin from beating an unconscious Luke. Fearing both brothers, he drew his pocket-knife and stabbed Joe. Justin then tackled him, and he stabbed Justin. Adams said he was trying to protect Luke and himself, and the jury was charged on deadly force in defense of a third person. Adams was acquitted.

When the State proceeded on Joe's case, Adams filed a pretrial writ alleging it was barred by collateral estoppel. He argued that his justification of defense of a third person (Luke) had been decided against the State in the first trial on the same evidence. The trial court denied the writ, Adams appealed, and the court of appeals agreed with him. The Court of Criminal Appeals granted the State's petition for review and reversed.

Reviewing the law on collateral estoppel, including the Supreme Court's recent opinion in *Currier v. Virginia*, 138 S. Ct. 2144 (2018), the Court reiterated that the question is whether the first jury "necessarily" decided the factual issue: would it have been irrational for the first jury to acquit without deciding the fact or issue essential for conviction in the second trial? The analysis depends on properly

For collateral estoppel to apply, the issue decided in the first trial must necessarily be the issue required for conviction in the second trial.

framing the issue determined in the first trial. Although the Court agreed with the court of appeals that Adams's acquittal was based on defense of a third person and that defense of a third person must be rejected for conviction in the second trial, it decided the court of appeals "applied the brush too broadly." The first jury was asked to determine the reasonableness of Adams's use of deadly force to prevent Justin's further use of force against Luke. It was not asked to decide, and therefore could not have necessarily decided, that Adams's use of deadly force against Joe was justified.

The opinion was unanimous but Presiding Judge Keller, in an opinion joined by Judges Hervey, Yeary, and Slaughter, concurred to emphasize that it was "not enough, by itself," that the two cases had different victims. After all, *Ashe v. Swenson*, 397 U.S. 436 (1970), the seminal case on collateral estoppel, applied the doctrine to successive trials for different victims of a single poker-game robbery. The difference between *Ashe* and Adams's case was the defense alleged: Ashe's acquittal in the first robbery was necessarily based on his claim that he was not one of the robbers. Ashe's acquittal precluded further trials because his defense to the robbery of the other poker players was identical. Adams could not say the same.

***Simpson v. State*, PD-0578-18, 591 S.W.3d 571 (Tex. Crim. App. Jan. 15, 2020)**

In *Ex parte Tarver*, 725 S.W.2d 195 (Tex. Crim. App. 1986), the Court held that a finding of "not true" at a probation revocation hearing could estop the State from convicting a defendant for the same allegation. In *State v. Waters*, 560 S.W.3d 651 (Tex. Crim. App. 2018), the Court overruled *Tarver* on two bases: 1) double-jeopardy rights, from which collateral estoppel flows, are not implicated by revocation hearings, and 2) no state common-law version of collateral estoppel should apply, either. This case addressed

The State cannot use a plea or finding of true at a revocation hearing to prevent a defendant from raising a defense at the trial on the same allegation.

whether the State can invoke the doctrine offensively to prevent a defensive claim at trial that appears inconsistent with a prior pleading at a revocation.

Simpson was on deferred-adjudication probation when she hit her roommate in the head with an ashtray. The State moved to revoke her probation upon this offense and three other allegations. Simpson pleaded "true" to all four, which the judge found to be true. The State then tried her for aggravated assault against her roommate. At trial, Simpson admitted the assault but claimed self-defense. When she requested the instruction, however, the State argued that she could not raise the defense after she pled true to the same conduct at the revocation proceeding without claiming self-defense and the allegation was found to be true. The trial court denied the instruction on self-defense and she was convicted.

The court of appeals reversed, holding that her failure to raise self-defense at the revocation hearing did not bar relitigation of the claim at trial. Because the revocation could have been based on any of the four allegations found true, the court held, it was not necessarily based on any one of them. As the denial of a self-defense instruction is rarely harmless, a new trial was ordered.

The State petitioned. It did not argue that the evidence did not raise self-defense or that Simpson was not harmed. Instead, it said pleading "true" at the revocation hearing without raising the defense precluded its applicability at trial.

The Court rejected that argument. As a threshold matter, offensive collateral estoppel is not supported by the Double Jeopardy Clause because it protects persons, not the State. Applying *Waters*'s analysis for common-law collateral estoppel, the Court found the same (and more) reasons to reject it in this case. They fell into three main groups. First, it agreed with the court of appeals that the assault allegation was not essential to the revocation. Second, it observed that the disparate purposes and qualities of the two proceedings that make defensive use unattractive apply with more force because the State's use might also infringe on the right to a jury trial. Regardless at which

proceeding a defendant has greater incentive to present her best evidence, acknowledging the State can likely prove an allegation by a preponderance of the evidence is neither a concession that it can prove guilt beyond a reasonable doubt nor a waiver of the right to a jury trial on related issues. Third, application of the doctrine could cause revocation or administrative hearings to preempt the trial for fear of inconsistent rulings. That risk should not override a defendant's right to (or the public's interest in) a jury determination of her defense after a full trial. Further, there would be no savings of judicial resources in forcing a defendant to fight every revocation allegation that might lead to a trial; revocation hearings would take more time and an adverse ruling wouldn't prevent that defendant from obtaining a better ruling from a jury on a higher burden.

Presiding Judge Keller concurred to clarify that it is not the defendant's plea of true at the revocation hearing (without raising self-defense) that matters but the trial court's finding on the allegation.

Judge Slaughter also concurred. She opined that a plea of "true" in a revocation proceeding is a judicial admission that can be used as evidence against a defendant at trial even if it has no preclusive effect.

Record Problems

***Int'l Fid. Ins. Co. v. State*, 586 S.W.3d 9 (Tex. Crim. App. 2019)**

Rule of Appellate Procedure 34.6(f) entitles an appellant to a new trial if, *inter alia*, the reporter's record is "lost or destroyed" and cannot be replaced. In this case, the Court held the rule does not extend to records that were supposed to be made but never were.

International was the surety on a bail bond that was forfeited. It filed a motion for new trial, received a hearing, and requested a court reporter. A reporter was present and appeared to transcribe the proceedings. International lost. The parties exchanged contact information with her in anticipation

of appeal. International filed a notice of appeal and requested the reporter's record. No record was filed. At a hearing on abatement, the reporter said she was present at the hearing but had no typed or recorded file for that date. She maintained that, in her experience, she had never recorded a hearing and been unable to be find it later. The trial court found the record was "neither lost nor destroyed" because it was never made and denied International a new trial. The court of appeals agreed.

International petitioned because being denied a new trial when appeal is made impossible through no fault of its own is unfair. Reviewing the trial court's decision for abuse of discretion, the Court was forced to affirm. By its plain language, Rule 34.6(f) "does not contemplate a situation in which a record was never created." Rather, the rule places a burden on the appellant to prove the record existed but was subsequently lost or destroyed. Despite being an "evident . . .flaw," Rule 34.6(f) offered no relief once the trial court found the record was never made.

Presiding Judge Keller and Judge Hervey concurred in the result.

Judge Walker, joined by Judge Yeary, dissented because the rule contemplates not only losing the formal, final version of the reporter's record but also "notes" and "recordings." Accepting the trial court's conclusion that a final version was never produced, Judge Walker found it "wholly unreasonable" for the trial court to deny that a record of some kind was made and then lost or destroyed.

An appellant is not entitled under Rule 34.6(f) to a new trial for a "lost or destroyed" reporter's record when the court reporter, to everyone's surprise, never made one.

Evidence and Preservation

***Dixon v. State*, PD-0048-19, 595 S.W.3d 216, (Tex. Crim. App. Jan. 15, 2020)**

Dixon was convicted of murder for hiring David Shepard to

kill Joseph Sonnier, who was dating Dixon's ex-girlfriend. The court of appeals reversed his conviction on two grounds. First, it held the admission of cell-site location information (CSLI) was reversible error. The trial court admitted four pages of Dixon's phone records that would have been lawfully obtained before *Carpenter v. United States*, 138 S. Ct. 2206 (2018), said a warrant was required. The CSLI contained therein showed that Dixon was in Lubbock on the same day as Shepard four months before the murder, forcing Dixon to concede at trial that he lied to police about it. The court of appeals held that this information, which was used as part of a map exhibit, "formed a main pillar supporting the State's argument . . . that appellant could not be believed." Second, it held that Dixon was deprived of a public trial at three points in the proceeding: when a sketch artist was excluded during jury selection, when the courtroom was cleared for a hearing, and when some people were excluded during closing arguments.

A unanimous Court reversed on both and affirmed Dixon's conviction. It found any error in the admission of Dixon's CSLI harmless because it was relevant mainly for redundant impeachment or to prove matters of little consequence. Because this was a murder-for-hire prosecution, Dixon's presence in Lubbock on the day of the murder would not have been particularly important, let alone his presence four months earlier. Moreover, although that evidence incrementally improved the argument that he met with Shepard that day, fifty-one pages of Shepard's phone records already showed the two had an established connection and Dixon's defense at trial was that he hired Shepard to follow Sonnier for private investigative purposes. To the extent any or all of Dixon's trial admissions were prompted by the admission of his CSLI, the Court intimated in a footnote that the use of illegally obtained CSLI to impeach false testimony might not be improper. Regardless, it held that any error was harmless beyond a reasonable doubt

Improperly admitted CSLI had no effect on the verdict; two of three "public trial" claims were forfeited, and the third was not error.

because his whereabouts four months prior and any related lies were "not a significant pillar of the State's case."

The Court disposed of the first two "public trial" claims on lack of preservation. It is the defendant's burden to show he objected at the earliest opportunity but Dixon did not complain about the sketch artist's exclusion until the following day. Because Dixon did not explain when he became aware of that fact, he failed to show the next day was the earliest opportunity to object. Dixon did object when the trial court cleared the room of spectators for a hearing but, in all the crosstalk between the judge and parties, never obtained a ruling or refusal to rule. The final claim, the exclusion during closing arguments, was preserved by motion for new trial because Dixon was unaware until after trial that some spectators were told they could not enter until someone left to prevent standing. After the hearing, the trial court entered findings explaining that the trial was held in the largest available courtroom, the room was filled to capacity, and regulation of entrants was "done for safety reasons, to maintain courtroom decorum, and to minimize juror distraction." Because the trial court reasonably accommodated public attendance, the Court found no error. Had the trial court not been so diligent, Dixon might have received a new trial because a room full of "public" is not sufficient to avoid a "public trial" violation.

Judge Hervey, joined by Judges Keasler and Newell, concurred to clarify that the constitutional harm standard was applicable to Dixon's CSLI issue because he raised a Fourth Amendment claim. Had he raised it under the Texas corollary, Article I, Section 9, the standard would have been for non-constitutional harm because Texas has no constitutional exclusionary remedy; suppression is sought under the statutory remedy provided by Tex. Code Crim. Proc. art. 38.23(a).

***Burg v. State*, PD-0527-18, 592 S.W.3d 444 (Tex. Crim. App. Jan. 29, 2020)**

After Burg was convicted of driving while intoxicated with a BAC of .15 or more, the judge placed him on community

supervision and ordered his license suspended for one year. The judge had no authority to do that in this case, but no one complained until appeal. There, the State and court of appeals treated Burg's complaint like it was about a condition of probation and held it was barred. *See Speth v. State*, 6 S.W.3d 530, 534 (Tex. Crim. App. 1999) ("[C]onditions not objected to are affirmatively accepted as terms of the [supervision] contract."). After Burg petitioned, the parties agreed that the suspension was not a condition of probation. The operative question became whether the suspension was part of Burg's sentence.

In *Mizell v. State*, 119 S.W.3d 804 (Tex. Crim. App. 2003), the Court held that an illegal sentence—one that is outside the range of punishment—can be noticed and corrected at any time by any court having jurisdiction over the case. Burg claimed that suspension is part of the sentence because the penal code says that it and other civil penalties "may be included in the sentence." *See* TEX. PENAL CODE § 12.01(c). The Court rejected this argument on multiple bases. First, the Code of Criminal Procedure's definition of "sentence" and expansive list of items to be included in the judgment, as a sentence must be, does not include suspensions. *See* TEX. CODE CRIM. PROC. arts. 42.01, 42.02. Second, the Court's "illegal sentence" cases deciding what does and does not make a sentence illegal do not support making license suspension part of the sentence. Third, suspensions do not meet the test for treating a civil penalty as punishment, *i.e.*, when it is "historically regarded as punishment or [as] promot[ing] the traditional aims of punishment such as retribution and deterrence." "The bottom line," the Court concluded, "is that a license suspension is not considered punishment because it is not incarceration, probation, a fine, or an enhancement, regardless of whether it is included in the so-called sentence."

An unauthorized license suspension is not an "illegal sentence" that may be complained about for the first time on appeal.

Although this opinion is helpful to further flesh out the "illegal sentence"

body of law, the more interesting aspect of the opinion was the treatment of *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993), the "watershed" case that established a categorical approach to preservation. The majority noted the seminal case and its three categories of rights—absolute non-waivable rights, waivable-only rights, and forfeitable rights—but observed that "not all rights and requirements fit neatly into one of *Marin*'s three categories." That was the case here. The Court observed that, in its purest form, Burg was effectively invoking the "right" to be free from the suspension of a privilege, which does not exist. Rather than wrestle with identification and categorization, the Court simply determined whether the facts fit the existing exception to preservation claimed by Burg.

Judge Keasler, joined by Presiding Judge Keller and Judge Yeary, took issue with the majority's claim that the right at issue did not neatly fit one of *Marin*'s categories despite placing it in the third category "for all practical purposes." Given the majority's conclusion, he argued, refusing "to couch its conclusion in *Marin*'s lexicon" "needlessly confuses" the Court's jurisprudence and "threatens the analytical stability that *Marin* has fostered."

The dispute, it seems, is over where *Marin*'s value lies. If its value lies in its explicit shift from seemingly *ad hoc* "fundamental error" exceptions to a serious, thoughtful preference for preservation, *Marin* is as vital as the concurrence says and should not be tinkered with. If its value lies in its categorical framework, their conclusion is less assured. As the majority points out, the analysis often stops at whether the right at issue is forfeitable and sometimes *Marin* is not mentioned at all. [Ironically, the latter was the case with *Mizell*.] Moreover, the existence of three defined categories has done nothing to ease the process of determining forfeitability. For example, *Proenza v. State*, 541 S.W.3d 786 (Tex. Crim. App. 2017), and *Grado v. State*, 445 S.W.3d 736 (Tex. Crim. App. 2014), both recognized non-forfeitable rights related to the conduct of judges but only after lengthy analysis and over the dissents of as many as three judges. Comparison to previous categorizations helps but that's

just the common law at work; the result is the same without *Marin* labels.

Statutory Construction

***Curry v. State*, PD-0577-18, __ S.W.3d __ (Tex. Crim. App. 2019), *reh'g denied* (Dec. 18, 2019)**

Before September 1, 2013, Section 550.021 of the Transportation Code imposed certain duties to stop and render aid, if necessary, on the operator of a vehicle who knew he was "involved in an accident resulting in injury or death." Importantly, the knowledge requirement is not in the statutory language; it is the result of the application of Tex. Penal Code § 6.02(b), which requires a culpable mental state unless the statute plainly dispenses with one. *Huffman v. State*, 267 S.W.3d 902 (Tex. Crim. App. 2008). Following amendment, those duties also attach when the operator is involved in an accident that "is reasonably likely to result in injury . . . or death." This case decided what the State must now prove.

Curry kept driving after he struck a cyclist; the cyclist later died as a result. A citizen's tip led police to Curry and his truck, which had damage consistent with striking something on the front passenger side. The State's reconstruction expert said the cyclist would have been visible and that the driver was aware of the collision because the debris path showed the driver swerved. Curry testified that it was dark and he did not see anything; he thought his headlight bursting was the result of a rock or perhaps a bottle thrown at him, and he was afraid of the possible thrower. He claimed he went back shortly thereafter and saw neither the cyclist nor his bike. However, he called an attorney before he heard about the hit-and-run on the news. Curry was denied an instruction on mistake of fact, Tex. Penal Code § 8.02(a), and convicted.

"Failure to stop and render aid" requires knowledge of both the accident and the resulting injury or reasonable likelihood that injury would result.

The court of appeals affirmed. It held the evidence was sufficient to prove Curry knew he was involved in an accident. However, it held the State no longer had to prove Curry knew another person was involved or hurt because it deemed the 2013 amendment a response to *Huffman* intended to create a duty to stop even without knowledge of injury. The court reasoned that it made no sense for the Legislature to add a duty to determine if anyone was involved or injured (TEX. TRANSP. CODE § 550.021(a)(3)) if knowledge of that fact is still required. That court rejected Curry's entitlement to a mistake instruction on the same basis; mistake inures only if there is a mental state to negate.

Both issues required construing the amendments. The Court concluded that the amendment did not remove the knowledge requirement as to injury. Instead, it added a theory of liability in which the operator need not know that injury resulted so long as he knows injury was reasonably likely. Either way, the injury or likelihood thereof are circumstances surrounding the conduct that must have a mental state attached for the same reasons explained in *Huffman*.

Applying this interpretation, the Court affirmed on sufficiency but reversed on mistake. The Court quickly held that a rational jury could conclude that Curry knew he was involved in an accident that did or was reasonably likely to injure someone. As for mistake, the Court held that Curry raised the issue of the reasonableness of his belief that no one was injured or was reasonably likely to have been. The Court remanded for a harm analysis.

Judge Keel dissented. In her view, the amendments—specifically the new duty to determine another's involvement in the accident—force the conclusion that the knowledge requirement should extend only to involvement in an accident. The Legislature wants operators to stop and see if someone needs help. The majority's interpretation nullifies that duty because it enables an operator to flee any accident he knows he's involved in so long as it turns out no one was hurt and it is later decided that injury was not likely to have resulted.

Judge Yeary concurred. He pointed out that, legislative intent notwithstanding, the failure to dispense with a culpable mental state meant the Court was bound to read one in (again). *See* TEX. PENAL CODE § 6.02(b). Further, reapplying a knowledge requirement to both the accident and the reasonably likely result does not conflict with the duty to verify whether someone was involved and/or hurt.

Because the majority's discussion of mistake was brief, it is unclear how the defense would be argued at trial and what a harm analysis would look like. An operator is entitled to a mistake instruction only because the State is already required to prove knowledge. If the jury believes the operator unreasonably but sincerely thought he was not involved in an accident, it will acquit him without additional instruction. A mistake instruction, which requires that his belief be reasonable, makes his defense harder. *See Okonkwo v. State*, 398 S.W.3d 689, 696-97 (Tex. Crim. App. 2013) (holding it was reasonable to forgo "mistake" because it could either confuse or lessen the State's burden). The analysis for knowledge of injury or death mirrors that for accident, but the instruction on "reasonably likely" is more complicated. What is the jury deciding when it says an operator was (or was not) reasonably mistaken about whether injury or death was reasonably likely to result? Is this a negligence-like foreseeability analysis? Is the jury considering the adequacy of his understanding of physics and/or anatomy, or of his awareness of a presumably objective standard? Either way, an operator is no worse off without an instruction on reasonable mistake.

JURY CHARGES

Jordan v. State, PD-0899-18, 593 S.W.3d 340 (Tex. Crim. App. Feb. 5, 2020)

Jordan and his friend, Cody Bryan, arrived at a restaurant at which Summer Varley, Jordan's ex-girlfriend, worked. Varley was there with Jordan Royal, Austin Crumpton, and two other

men. After Royal and one of the others approached and spoke aggressively to Jordan and Bryan, the latter two waited for them and their group to leave, cancelled their orders, and left the restaurant. The group was still outside when they exited, however, and their hollering prompted Jordan and Bryan to walk speedily to Bryan's car. Royal caught up to them and knocked Bryan unconscious with one punch. Jordan tried to run to the car but was hooked and spun around by Royal, who got on top of him. Varley was trying to pull Royal off when Jordan drew a pistol and fired repeatedly, hitting Royal and Varley. After everyone fled, Jordan returned to the restaurant, put his pistol down on the counter, and waited for police.

Jordan was tried for aggravated assault against Royal and deadly conduct by discharging a firearm at Varley and Crumpton. Jordan testified that he believed he was getting mobbed and, based on what happened to Bryan, he was justified in pulling his pistol from his pocket and firing even though he could not see to aim. Varley testified for Jordan in his defense. The jury was instructed on self-defense on both charges based on Royal's use of unlawful deadly force. The jury hung on aggravated assault but convicted Jordan of deadly conduct.

Jordan raised numerous complaints about the self-defense instruction, including the trial court's failure to apply "multiple assailants" language so that it applied to the conduct of Royal "or others with him." The court of appeals overruled these complaints by holding Jordan was not entitled to any instruction on self-defense to deadly conduct because there was no evidence that the alleged victims—Varley and Crumpton—used deadly force against Jordan.

The Court reversed. It held that Jordan was entitled to a self-defense instruction that included "multiple assailants" language because the evidence, in the light most favorable to his request, showed he harbored a reasonable apprehension of apparent danger from

A defendant who testifies that he was attacked by multiple assailants is entitled to a self-defense instruction that includes "multiple assailants language."

multiple assailants—in the Court's words, "a mob." The Court rejected multiple related arguments along the way. It said Jordan satisfied the confession-and-avoidance requirement for self-defense because the prosecution said at trial that he did. [Jordan admitted to knowingly firing his gun and acknowledged it was towards others.] It also rejected the argument that the victim must be an (apparent) assailant in her own right under the plain language of Section 9.31, noting that it "encompasses 'others' because 'another' is defined by the Penal Code, and Penal Code definitions apply to grammatical variations of the defined terms," and "self-defense is based on reasonableness."

The Court found the error harmful (even though the court of appeals did not address harm) because it was briefed by the parties and harmfulness was "clear." Limiting self-defense to the reasonableness of response to Royal's conduct caused obvious harm because "a need to shoot at Royal alone would never justify also shooting at Varley and Crumpton," and "shooting at Varley and Crumpton would never be necessary to defend against Royal alone." It rejected the argument that Jordan got what he wanted because he essentially claimed it was Royal's conduct that justified his own.

Judge Keasler dissented on Jordan's entitlement to any self-defense instruction. Jordan plainly and consistently explained that he did not knowingly fire at Crumpton or Varley because he could not see anything other than Royal, who was on top of him. Moreover, the snippet of Jordan's testimony cited by the majority (and relied upon by the prosecution at trial) shows only that he knowingly fired his gun and that he acknowledged it was towards others—not that he knowingly fired at them, as required by the deadly conduct statute. "That is not multiple-assailants self-defense," said Judge Keasler. "It is the time-honored defense of 'You didn't prove your case.'"

Judge Yeary, joined by Presiding Judge Keller, dissented to the Court's consideration and resolution of harm. Because "Royal was by far the main aggressor in the melee," and because a "multiple assailants" instruction would have been predicated on Crumpton and Varley acting in concert with

him, it is unclear what difference including "and others" to the self-defense instruction would have made. "In any event, the question of harm seems, at least, debatable—not, as the Court would have it, so self-evident as to obviate our usual practice to remand the cause for that analysis."

Because of the Court's resolution of entitlement on factual grounds, it is unclear what significance, if any, should be placed on its discussion of the legal issues. For example, the Court recently put into doubt whether confession-and-avoidance requires an admission to all the elements. *See Gamino v. State*, 537 S.W.3d 507, 512 (Tex. Crim. App. 2017) ("Admitting to the conduct does not necessarily mean admitting to every element of the offense."). The majority's abstract recitation of the law did not clarify this, saying only that a defendant "must admit to his otherwise illegal conduct" and "cannot both invoke self-defense and flatly deny the charged conduct." Even its response to the claim that Jordan did not admit all the elements is unclear; did the Court agree with the State's trial position on Jordan's admission, or did the State pay a price for inconsistent positions?

The standard for entitlement to a "multiple assailants" instruction is similarly unclear. In the abstract, the majority said that "multiple assailants" "may be raised even as to those who are not themselves aggressors as long as they seem to be in any way encouraging, aiding, or advising the aggressor." *See Dickey v. State*, 22 S.W.3d 490, 493 (Tex. Crim. App. 1999) (Keller, J., concurring) ("The rule concerning multiple assailants is essentially an application of the law of parties to the defendant's assailants."). In application, however, it said what matters is "whether [Jordan] had a reasonable apprehension of actual or apparent danger from a group of assailants that included Crumpton and Varley." The cases it cited have victims who were perceived physical threats. Even its rationale for "clear" harm—no one can justifiably shoot A based on the conduct of B—seems to suggest a rejection of the "party" theory of the "multiple assailants" instruction. Again, the majority's "mob" view of the facts made addressing any of these legal issues unnecessary.